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

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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

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South Korea from 1989 to 1993, is chairman of the Korea Society.

... gyan, China's leading expert on Ko... here in the world.

Journal

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. □

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

changed its tune.

It says Mr. Carville and company be trusted to do the right thing, but it's best to remain skeptical.

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.

both employer and individual mandates 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.

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MEMORANDUM

Date: May 20, 1994
To: Senator Dole
From: Alec Vachon AV
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.

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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:

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"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."

South Korea from 1989 to 1993, is chairman of the Korea Society.

gyan, China's leading expert on Ko- threat we face anywhere in the world.

Journal

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. □

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

...ings. Now the White House has changed its tune.

It says Mr. Carville and company ...gain. Mr. Carville and the rest should be trusted to do the right thing, but it's best to verify that they are.

...both employer and individual mandates ...kapul. 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.

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.

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

Federal News Service
<MAY> 13, 1994, FRIDAY

SECTION: IN THE NEWS

HEADLINE: PRESIDENT CLINTON'S ANNOUNCEMENT OF HIS CHOICE FOR SUPREME COURT NOMINEE
WHITE HOUSE ROSE GARDEN
WASHINGTON, DC

BODY:
PRESIDENT <CLINTON:> (Applause.) Thank you very much.

Good afternoon. Today, I am proud to nominate Judge Stephen <Breyer> to serve on the United States Supreme Court. I believe a president can best serve our country by nominating a candidate for the Supreme Court whose experience manifests the quality in the justice that matter most -- excellence.

Excellence in knowledge, Excellence in judgment. Excellence in devotion to the Constitution, to the country, and to the real people. It is a duty best exercised wisely, and not in haste.

I have reflected on this decision now for the last several weeks, about 37 days.

I have been well-served by the White House Counsel, Lloyd Cutler, and the other members of our legal staff who have worked very hard, by our Chief of Staff, Mr. McLarty, who's kept the process going in an orderly way, and by others who worked on it. We have worked hard to achieve the pursuit of excellence. In that pursuit, I came again to Judge <Breyer,> who serves today -- as most of you know -- as the Chief Judge for the United States Court of Appeals for the First Circuit, and I will nominate him to be the Supreme Court's 108th Justice.

Without dispute, he is one of the outstanding jurists of our age. He has a clear grasp of the law, a boundless respect for the constitutional and legal rights of the American people, a searching and restless intellect, and a remarkable ability to explain complex subjects in understandable terms. He has proven that he can build an effective consensus and get people of diverse views to work together for justice sake. He's a phi beta kappa graduate of Stanford, a graduate of Oxford University, a magna cum laude graduate of the Harvard Law School. He server the late Justice Goldberg as a law clerk, spent two years in the Antitrust Division of the Justice Department, and served as chief counsel of the Senate Committee on the Judiciary where he had the opportunity to work with senators of both parties.

Judge <Breyer> has had a private law practice, has written dozens of scholarly articles, published in distinguished law reviews and legal text, and he's been a member of the Federal Sentencing Commission. Fore more that a decade he served with true distinction on the U.S. Court of Appeals in the First Circuit. His writings, in areas ranging from the interpretation of legislation and analysis of the sentencing guidelines to the underpinnings of regulation and the interplay of economics and the law, reveal a keen and vital mind. His record displays a thirst for justice. His career personifies both public service and patriotism.

As you know, I had a wealth of talent to choose from in making this nomination, in addition to Judge <Breyer,> whom I considered very seriously for this position the last time I had a Supreme Court appointment. I'd like take just a moment to comment on two of the gentlemen who made this decision a

difficult one for me. Secretary Babbitt was attorney general and governor of his stats and, during that time, a colleague of mine. He was a candidate for the presidency in a race which everyone acknowledged raised the serious and substantive issues of the day. He has been a very effective secretary of the Interior for me -- one of the most sensitive, complex, and difficult posts in this administration.

He would bring to the Court the responsibility and discipline of service in public life. He would bring a feel for law at the state level. And most important, perhaps, for life at the grassroots. Although I know he would be a good addition, indeed, a superb addition to the Court, frankly, I came to the same conclusion I have every time I've thought about him -- I couldn't bear to lose him from the Cabinet, from his service in Interior, from his service as an advisor to me, and a vital and leading member of our domestic policy team.

Judge Richard <Arnold,> the chief judge of the Eighth Circuit, has been a friend of mine for a long time. I have the greatest respect for intellect, for his role as a jurist, and for his extraordinary character. I think a measure of the devotion and the admiration in which he is held is evidenced by the fact that somewhere around 100 judges -- one-eighth of the entire federal bench 00 wrote me endorsing his candidacy for the Supreme Court.

But, as has been widely reported in the press, Judge <Arnold has cancer,> and is now undergoing a course of treatment. I have every confidence that that treatment will be successful. And if I am fortunate enough to have other opportunities to make appointments to the Court, I know I will be able to consider Judge <Arnold> at the top of the list.

Five decades ago, Judge Learned Hand defined the spirit of liberty as "the spirit which seeks to understand the minds of other men and women, the spirit which weighs their interests along side its own bias, the spirit which lies hidden in the aspirations of us all."

When our citizens hear about Judge <Breyer's> nomination and learn about his background and beliefs, I believe they will join me in saying, "Here is someone touched by that spirit of liberty, who believes in the Constitution and the Bill of Rights, who is graced with the intellectual capacity and the good judgment a Supreme Court Justice ought to have, and whose background and temperament clearly qualify him to be an outstanding Associate Justice of the United States Supreme Court." So, I will send his nomination to the Senate for confirmation with great pride and high hopes.

Q Mr. President, when you had foregone the opportunity to name someone with greater political experience, such as Secretary Babbitt, what makes you think that Judge <Breyer> will be able to reshape the Court or forge a new consensus or --

PRESIDENT <CLINTON:> I think Judge <Breyer> actually has quite a lot of political savvy -- and I would say two things. First of all, the -- as you know, when I talked about Senator Mitchell -- I would not have offered the position to Senator Mitchell if he were running for re-election and were willing to stay as majority leader of the Senate. And I felt the same way, in the end, about Secretary Babbitt. I mean, here's a man that is dealing with issues of incredible magnitude -- especially in the west, a very important part of our county. And so, I just couldn't bear to think about that.

And then the more I thought about Steve <Breyer> and the time I spent with him the last time I had a vacancy on the Court, the more I realized he had proved that he had the kind of political capacity and judgment we need, because he'd been exposed to the full range of issues working here as the chief of

staff for the Senate Judiciary Committee. he obviously has a lot of political skills because of his reputation as a consensus builder on a court where most of the appointees were made by Republican presidents. And look at the people supporting his nomination. I mean, he's gotten Senator Kennedy and Senator Hatch together. I wish I had that kind of political skill. (Laughter.)

Q Have you spoken to all three men today?

Q (Off mike) -- I mean, between two others who might not be as easy to confirm enter into your selection?

PRESIDENT <CLINTON:> No. I'm convinced all three of them would have been handily confirmed. I know -- I mean, I have heard all this, but I'm convince all three of them would have been handily confirmed. I have no doubt about it whatever. And I spent quite a lot of time on that.

Q Mr. President, does is surprise you how quickly --

Q Mr. President, why do you -- why -- in the end, why do you think that there was so much -- maybe it's our fault as much as it is your aide's fault -- so much confusion in which direction you were leading? Earlier in the week, we thought that Secretary Babbitt had the best choice, then later it was Judge <Arnold,> and now, of course, you've made your decision.

PRESIDENT <CLINTON:> Well, because --

Q This process --

PRESIDENT <CLINTON:> -- because you all didn't talk to me. When we have these appointments that only I make -- especially if it's something where, with all respect to my aides, I think I know as much or more about it as they do. And I told you all, they worked hard for me, and they did a wonderful job, and there's an enormous amount of work to do. But one of the best jobs I ever had was teaching the Constitution of the United States to law students. I care a lot about the Supreme Court. I read people's opinions. I read articles. I read letters that people send me about perspective candidates. I think about this a lot. And I care very deeply about it.

Q Mr. President --

PRESIDENT <CLINTON:> And I was going to take whatever time I had to take to think this through. In the course of those conversations with my staff, I always try to take -- when we get down to the finals, where I'm down to three or four folks -- I try to take every strong suit I can about a candidate and work through it, every weakness -- and we worked through it. But I think, you know, on these Supreme Court cases, we may never get another appointment, but if I get another one, you're just going to have to ride along with me, because -- in the end -- I'm going to make the decision, and I'm going to do what I think is right.

But I told you what happened today. All three of them had a great claim. I couldn't bear to lose Bruce Babbitt. With Judge <Arnold,> I think we had to have the progress of his health ultimately resolved. He is a magnificent man, and I think a lot of this stated opposition to him was based on a

misunderstanding and was flat wrong. And I would have been happy to defend him against all comers from now to the doomsday. But I think I have done the right thing by my country with this appointment, and I feel very good about it.

Q Mr. President, when you look at the mark that you want to leave on the Court, what specifically does Judge <Breyer> bring to the court?

PRESIDENT <CLINTON:> I think he brings three things that I think are important -- besides the ability to get people together and work with him. I think he brings, one, a real devotion to the Bill of Rights, and to the idea that personal freedoms are important to the America people. And I think he will strike the right balance between the need for discipline and order, being firm on law enforcement issues, but really sticking in there for the Bill of Rights and for the issue of personal freedoms.

You know, this country got started by people who wanted a good letting alone from government. And every time we think about doing anything around here, we have to recognize that Americans have always had a healthy skepticism about government reaching into their lives. I think he understands that. The second thing I think he understands is the practical implications of governmental actions that the Court may have to review. I know that some of his writings have been a little bit controversial in some quarters in analyzing the economic impacts of government actions and things of that kind. But I think that he shows that he really understands that.

The third thing that I think he can do is cut through the incredible complexities that surround so many of the issues that we're confronted with in our world today, and render them simple, clear and understandable -- not only, first of all to himself, secondly to his colleagues, and thirdly to the American people. I think it is important that the American people have confidence in the Supreme Court, and feel that somehow it is accessible to them. And I believe that Judge <Breyer> will do a good job of that.

Thank you very much. (Applause.)

END
LANGUAGE: ENGLISH
LOAD-DATE-MDC: May 13, 1994

SHOW: NEWS 6:14 pm ET
<May> 13, 1994
Transcript # 764-4

TYPE: Live Report
SECTION: News; Domestic

HEADLINE: <Clinton> Nominates <Breyer> to Nation's Highest Court

HIGHLIGHT:
President <Clinton> has nominated Judge Stephen <Breyer> of Boston to replace Harry Blackmun on the Supreme Court. <Clinton> called <Breyer> a consensus builder and a highly regarded legal scholar with a keen mind.

BODY:
JUDY WOODRUFF, Anchor: We want to interrupt this story right now. We are told President <Clinton> is ready to make that Supreme Court announcement. Here's the president.

Pres. BILL <CLINTON:> Good afternoon. Today, I am proud to nominate Judge Stephen <Breyer> to serve on the United States Supreme Court. I believe a president can best serve our country by nominating a candidate for the Supreme Court whose experience manifests the quality in a justice that matters most - excellence; excellence in knowledge, excellence in judgment, excellence in devotion to the Constitution, to the country, and to the real people. It is a duty best exercised wisely and not in haste. I have reflected on this decision now for the last several weeks, about 37 days. I have been well served by the White House Counsel, Lloyd Cutler, and the other members of our legal staff who have worked very hard, by our Chief of Staff, Mr. McLarty, who's kept the process going in an orderly way, and by others who worked on it. We have worked hard to achieve the pursuit of excellence.

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ANDREA MITCHELL, NBC News: Mr. President, because you have forgone the opportunity to name someone with greater political experience, such as

Secretary Babbitt, what makes you think that Judge <Breyer> will be able to reshape the Court or forge a new consensus, or-

Pres. <CLINTON:> - No, I think Judge <Breyer> actually has quite a lot of political savvy, and I would say two things. First of all, as you know, when I talked about Sen. Mitchell, I would not have offered the position to Sen. Mitchell if he were running for reelection or were willing to stay as majority leader of the Senate. And I felt the same way in the end about Secretary Babbitt. I mean, here's a man that is dealing with issues of incredible magnitude, especially in the West - a very important part of our country. And so, I just couldn't bear to think about that.

And then, the more I thought about Steve <Breyer> - and the time I spent with him last time I had a vacancy on the Court - the more I realized he had proved that he had the kind of political capacity and judgment we need he'd been exposed to the full range of issues, working here as the chief of staff for the Senate Judiciary Committee. He obviously has a lot of political skills because of his reputation as a consensus builder on a court where most of the appointees were made by Republican presidents. And look at the people supporting his nomination. I mean, he's gotten Sen. Kennedy and Sen. Hatch together. I wish I had that kind of political skill [laughs].

MITCHELL: Have you spoken to all three men today?-

REPORTER: - [unintelligible] by choice, I mean, between two others who might not be as easy to confirm enter into your selection?

Pres. <CLINTON:> No. I'm convinced all three of them would have been handily confirmed. I know- I mean, I've heard all this, but I'm convinced all three of them would have been handily confirmed. I have no doubt about it whatever, and I spent quite a lot of time on that.

WOLF BLIZTER, CNN Senior White House Correspondent: Mr. President, why do you- in the end, why do you think that there was so much- maybe it's our fault as much as it is your aides' fault- so much confusion in which direction you were leaning. Earlier in the week, we thought that Secretary Babbitt had the best choice, then later, it was Judge <Arnold,> and now, of course, you've made your decision-

Pres. <CLINTON:> - Well, because y'all didn't talk to me. When we have these appointments that only I make, especially for something where, with all respect to my aides, I think I know as much or more about it as they do- and I've told you all, they worked hard for me and they did a wonderful job, and there's an enormous amount of work to do. But one of the best jobs I ever had was teaching the Constitution of the United States to law students. I care a lot about the Supreme Court. I read people's opinions. I read articles. I read letters that people send me about prospective candidates. I think about this a lot, and I care very deeply about it. And I was going to take whatever time I had to take to think this through.

In the course of those conversations with my staff, I always try to take- when I get down to the finals, where I'm down to three or four folks, I try to take very strong suit I can about a candidate and work through it, every weakness, and we work through it. But I think, you know, on these opinions, on these

Supreme Court cases, we may never get another appointment, but if I get another one, you're just going to have to ride along with me, because in the end, I'm going to make the decision. I'm going to do what I think is right.

But I've told you what happened today. All three of them had a great claim. I couldn't bear to lose Bruce Babbitt. With Judge <Arnold,> I think we had to have the progress of his health ultimately resolved. He is a magnificent man, and I think a lot of the stated opposition to him was based on a misunderstanding and was flat wrong, and I would have been happy to defend him against all comers from now to doomsday. But I think I have done the right thing by my country with this appointment and I feel very good about it.

REPORTER: Mr. President, when you look at the mark that you want to leave on the Court, what specifically does Judge <Breyer> bring to the Court?

Pres. <CLINTON:> I think he brings three things that I think are important besides the ability to get people together and work with him. I think he brings, one, a real devotion to the Bill of Rights and to the idea that personal freedoms are important to the American people. And I think that he will strike the right balance between the need for discipline and order, being firm on law enforcement issues, but really sticking in there for the Bill of Rights and for the issue of personal freedoms.

You know, this country got started by people who wanted a good lettin' alone from government. And every time we think about doing anything around here, we have to recognize that Americans have always had a healthy skepticism about government reaching into their lives. I think he understands that.

The second thing I think he understands is the practical implications of governmental actions that the Court may have to review. I know that some of his writings have been a little bit controversial in some quarters - in analyzing the economic impacts of governmental actions and things of that kind. But I think that he shows that he really understands that.

The third thing that I think he can do is cut through the incredible complexities that surround so many of the issues that we're confronted with in our world today and render them simple, clear and understandable, not only, first of all, to himself; secondly, to his colleagues, and thirdly, to the American people. I think it is important that the American people have confidence in the Supreme Court and feel that somehow it is accessible to them, and I believe that Judge <Breyer> will do a good job with that. Thank you very much.

WOODRUFF: And so, President <Clinton> announces the choice that I suppose we've expected for the last half hour or so, and that is federal appeals court Judge Stephen <Breyer> of Boston. He has served on the appeals court in the First Circuit for the last 14 years. The president said he is one of the outstanding jurists of our age. He described him as having a 'searching and restless intellect.' He talked about his ability to get people to work together. He said that of the other judges who serve on the Court of Appeals that is based- that has as its home Boston- most of them were appointed by a Republican president, and even so, President <Clinton> said, Judge <Breyer> has been a consensus builder.

Again, Judge <Breyer> - 55 years old, a graduate of Stanford and a graduate of the Harvard Law School. When we come back in just a moment, we will talk with two United States senators who sit on the important Judiciary Committee that will have to vote on Judge <Breyer> confirmation - Sen. Metzenbaum- Howard Metzenbaum of Ohio, Democrat, and Republican Senator Hatch.

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LOAD-DATE-MDC: May 14, 1994

CNN

SHOW: NEWS 7:41 pm ET

<May> 13, 1994

Transcript # 813-1

TYPE: Live Report
SECTION: News; Domestic

HEADLINE: <Clinton> Nominates Stephen <Breyer> to Supreme Court Post

GUESTS: Pres. BILL <CLINTON;> Sen. ORRIN HATCH, (R-UTAH);

BYLINE: WOLF BLITZER

HIGHLIGHT:
President <Clinton> today announced that federal Judge Stephen <Breyer> of Massachusetts is his choice to replace Harry Blackmun on the Supreme Court. <Breyer> expressed his pleasure at being chosen for the job.

BODY:
BERNARD SHAW, Anchor: President <Clinton> says he has picked, quote, 'one of the outstanding jurists of our age,' for the United States Supreme Court. With more on the selection of appeals court Judge Stephen <Breyer,> here's our senior White House correspondent, Wolf Blitzer.

WOLF BLITZER, Senior White House Correspondent: Bernie, by all accounts, including his own, this has been an agonizing decision for Mr. <Clinton.> The president emerged from the Oval Office to make his long-awaited announcement. Federal Judge Stephen <Breyer> of Massachusetts is his nominee to succeed retiring Supreme Court Justice Harry Blackmun.

Pres. BILL <CLINTON:> Without dispute, he is one of the outstanding jurists of our age. He has a clear grasp of the law, a boundless respect for the constitutional and legal rights of the American people, a searching and restless intellect, and a remarkable ability to explain complex subjects in understandable terms.

BLITZER: Mr. <Clinton> reached his decision Friday afternoon, not enough time for <Breyer> to come to Washington from Boston. <Breyer> had come in second place last year when Mr. <Clinton> named Ruth Bader Ginsburg to the court. <Breyer> was clearly delighted to get the nod.

STEPHEN <BREYER:> Extremely honored that the president would nominate me. I believe very deeply, as he said, in the Constitution and the laws of the United States and the way in which the lives of ordinary people, and I think that's the most important thing that we have to understand.

BLITZER: Why did it take so long? The president confirmed he was torn between

<Breyer> and two other finalists, federal Judge Richard <Arnold> of Arkansas, a long-time friend; and Interior Secretary Bruce Babbitt. Mr. <Clinton> said he did not pick <Arnold> because he's still being treated for <cancer.> And Babbitt, he says, was bypassed because he's too valuable in the cabinet.

Pres. <CLINTON:> Although I know he would be a good addition; indeed, a superb addition, to the court, frankly, I came to the same conclusion I have every time I've thought about him. I couldn't bear to lose him from the cabinet, from his service in the Interior, from his service as an adviser to me and a vital and leading member of our domestic policy team.

BLITZER: Mr. <Clinton> insists that any of the three would have been confirmed by the Senate, though aides concede <Arnold> and Babbitt would have generated more political opposition than <Breyer,> a former chief counsel of the Senate Judiciary Committee who has broad bipartisan support.

Sen. ORRIN HATCH, (R-UTAH): You may differ with him on certain aspects of constitutional law or other law, but he's a sincere, dedicated, honest, intelligent, intellectually sound person who has a good heart, is compassionate, and yet understands the needs of society.

BLITZER: But at least one liberal Democrat raised concerns about the <Breyer's> moderate stance.

Sen. HOWARD METZENBAUM, (D-Senate Judiciary Cmte.): I think he'll be confirmed, but some of his writings having to do with small business and the need to protect small business or his failure to see the need to protect small business- some of his writings in the area of anti-trust give me some cause for concern.

BLITZER: With this decision ow out of the way and a smooth confirmation for <Breyer> very, very likely, the president says he can now get back to some of his other major issues, and his aides are looking for a very active decision on his part right now to push health care reform through Congress. Bernie?

SHAW: Wolf, I want to ask you a question two different ways. The first way is did Bill <Clinton> duck a political fight? The other way is, is this a politically safe nomination for the president?

BLITZER: Well, there's no doubt he did duck a fight in the sense that both Babbitt and <Arnold> would have been more problematic for the president in getting confirmation. As far as Babbitt was concerned, there were many Republican conservatives who were pledging that they would fight this nomination. Even though the president is convinced he would have won, at this particular point he didn't, presumably, think he needed another big fight with members of Congress. On the other hand, Judge <Arnold,> while he does have <cancer,> and everyone acknowledges that, including himself, there's also no doubt that there was a certain amount of concern here at the White House over allegations of Arkansas cronyism. Questions were raised. Whether there could have been anything in Judge <Arnold's> background that could have been anything in Judge <Arnold's> background that could have embarrassed the president, brought questions forward over some of his own problems. So there's no doubt that Judge Stephen <Breyer> was, by all accounts, the safety net, the safe choice, and that's what the president decided to do.

SHAW: Thank you, Wolf Blitzer, live from the White House.

The preceding text has been professionally transcribed. However, although the text has been checked against an audio track, in order to meet rigid distribution and transmission deadlines, it may not have been proofread against tape.
LOAD-DATE-MDC: May 14, 1994

The <Washington Post>

<May> 14, 1994, Saturday, Final Edition

SECTION: FIRST SECTION; PAGE A1

HEADLINE: Boston Judge Breyer Nominated to High Court; After Long Process, <Clinton's> Choice of Centrist Likely to Avoid Confirmation Controversy on Hill

SERIES: Occasional

BYLINE: Ann Devroy, Washington Post Staff Writer

BODY:

President <Clinton> yesterday nominated Boston appellate judge Stephen G. Breyer to the Supreme Court, opting for a politically safe choice that should spare the president a fight in Congress or controversy in the country.

In an unusual ceremony on the White House lawn, absent the nominee who had been informed too late to be there, <Clinton> praised Breyer as "one of the outstanding jurists of our age." The president offered praise that was nearly as effusive for the two losing finalists: Interior Secretary Bruce Babbitt and federal judge Richard S. <Arnold.>

Breyer was a runnerup in the nomination search that ended with <Clinton's> choice of Ruth Bader Ginsburg. Breyer's selection was publicly and privately promoted by Sen. Edward M. Kennedy (D-Mass.) on one end of the political spectrum and Sen. Orrin G. Hatch (R-Utah) on the other, suggesting his journey through the confirmation process will be relatively smooth.

Reaction in the Senate was virtually all favorable. Minority Leader Robert J. Dole (R-Kan.) called Breyer "a top-notch intellect and a person of integrity." Dole said that absent something "unforeseen," he sees "smooth sailing ahead." Hatch called him a "fine addition to the court." Sen. Howard M. Metzenbaum (D-Ohio), who raised some concerns about Breyer on antitrust issues, said, nonetheless, that he had "no doubt" Breyer would be confirmed.

The selection came 37 days after <Clinton> began what aides had said would be a more orderly and less public process than took place when he selected Ginsburg. It turned out to be shorter than the 87 days it took <Clinton> to make his first selection but was almost as disorderly and public. It began with the decision of Senate Majority Leader George J. Mitchell to say no.

Over the last week, <Clinton> was portrayed by aides as agonizing over the choice, his heart with <Arnold,> a fellow Arkansan and longtime friend, and then with Babbitt, the favorite of many of his political advisers because he was not the usual legal scholar-jurist choice but closer to people, possessing the "big heart" <Clinton> once described as the ideal quality he sought in a nominee.

Breyer, 55, chief judge of the U.S. Court of Appeals for the First Circuit, was chief counsel of the Senate Judiciary Committee under Kennedy, who was a powerful advocate for Breyer with <Clinton> and probably will be the same in the Senate during the confirmation process.

After watching the president announce his nomination, Breyer said in a brief statement in Boston that <Clinton> had phoned him about an hour earlier. "It was a conversation I very much enjoyed," Breyer said.

He said his role on the court would be "to make the average person's ordinary life better. That's an incredible challenge, and I feel very humbled

simply thinking about it."

Aides said <Clinton> finally settled on Breyer yesterday after what one called "pretty agonizing life-and-death" discussions about <Arnold,> a man from the outset described as the president's emotional favorite, and after a three-hour late-night conversation with Babbitt on Wednesday.

Of <Arnold, Clinton> noted his "extraordinary character," his role as a jurist and that about 100 judges, an eighth of the federal bench, endorsed his candidacy. But, said <Clinton, Arnold> "has cancer and is undergoing a course of treatment."

<Arnold> has lymphoma and was recently treated with low-level radiation. His doctor described <Arnold> as healthy and his life unthreatened.

But aides said <Clinton> called for a full review of the medical situation and that "many doctors were consulted" as the president wrestled with a lifetime appointment. Even as that occurred, opposition to <Arnold> was growing among some Senate Democratic women over his rulings on all-male clubs and abortion rights. One official yesterday suggested <Arnold's> nomination might not have been the smooth-sail the White House early envisioned.

Last night, <Arnold> told reporters in Little Rock, Ark., that Breyer "will be a wonderful justice. He's a good friend of mine, a distinguished judge and law professor. It's a great appointment."

Praising Babbitt, <Clinton> said he would bring "the responsibility and discipline of service in public life," along with a "feel for the law at the state level" and "life at the grassroots." But, said <Clinton,> "I could not bear to lose him from the Cabinet."

<Clinton> called Interior one of the most "sensitive, complex and difficult posts" in the administration. It has also become one of the most politically sensitive, a fact that weighed heavily in <Clinton's> decision, officials said.

Since he took over Interior, Babbitt has been an extremely controversial figure in the West, where he pledged to overhaul federal policies on grazing, mining, timber production and water. His agenda has caused friction between the administration and some of its western allies, particularly western governors who helped <Clinton> carry normally Republican states such as Montana, Nevada and New Mexico.

Some sources said the White House was warned that Republicans planned to spotlight not only what they called Babbitt's liberalism, but also his western policies should he be the nominee, with the hope of souring the West on Democrats in an election year. A senior official said western politics played "some role" in the decision to pass up Babbitt for a second time but "it was not a conclusive factor."

Babbitt had said over the past week, when he has been described as the "favorite" and as the likely choice by many White House officials, that he was content to be in either job, the Interior post or the court.

In a statement issued last night, Babbitt said, "As enticing as the Great Indoors was, the Great Outdoors is where I want to spend my time. I have the job I want, it's where I want to stay, and I think the president made a great choice. Now, I'm off to Yellowstone."

<Clinton> insisted yesterday that neither western politics nor fear of a confirmation battle scared him away from Babbitt. But Metzenbaum said he had been told that Babbitt was "in good shape" for the nomination until Hatch objected, causing what the Ohio senator called "some reverberations at the White House."

At the outset of the search process five weeks ago, senior officials said it was extremely unlikely that Breyer would be seriously considered to replace

retiring Justice Harry A. Blackmun. Officials described a lack of "chemistry" between <Clinton> and Breyer following their meeting last year when Breyer, who left his hospital bed to come to Washington, lost to Ginsburg. Breyer also had the added burden of not having paid Social Security taxes for household help. He paid the taxes but got a refund when the Internal Revenue Service ruled that he was not liable for the taxes, White House aides said. But Breyer turned out to be the safe, no-waves choice for <Clinton,> who is facing stormy going in Congress on numerous fronts, including his prized health care reform.

<Clinton> said he chose Breyer because "he has a clear grasp of the law, a boundless respect for the constitutional and legal rights of the American people, a searching and restless intellect and a remarkable ability to explain complex subjects in understandable terms." He is a consensus-builder, <Clinton> said, with an ability to get people of diverse views to work together.

In his 13 years on the bench, Breyer, a graduate of Stanford, Oxford and Harvard, has developed a reputation as an antitrust and administrative law expert and being leery of government interference in private enterprise.

On one critical issue, abortion rights, Breyer's precise views are not known, but abortion rights supporters believe, based in part on his association with Kennedy, that he would vote to uphold the right to abortion.

On the appeals court, Breyer voted to strike down the "gag rule" prohibiting federally funded family planning clinics from providing information about abortion to their patients. Following Supreme Court precedent, he upheld a Massachusetts provision requiring parental consent for minors to obtain abortions.

As a member of the federal sentencing commission, Breyer played a major role in ensuring that the guidelines would not include the death penalty. But Breyer supporters said yesterday that should not be taken as an indication of his views. There are no states within Breyer's federal circuit that have the death penalty, so he has had no occasion to vote on the issue as a judge.

As an academic, Breyer concentrated on some of the driest issues in the law -- the regulatory process and antitrust law. "It's going to be deadly dull," one Democratic Senate staffer said of confirmation hearings for Breyer.

Staff writers Helen Dewar, Tom Kenworthy and Ruth Marcus in Washington and special correspondent Christopher B. Daly in Boston contributed to this report.
GRAPHIC: PHOTO, HIGH COURT NOMINEE JUDGE STEPHEN G. BREYER, LEFT, AT LUNCH YESTERDAY WITH LAW CLERK MICHAEL ROSENTHAL IN BOSTON. AP
LANGUAGE: ENGLISH
LOAD-DATE-MDC: May 12, 1994

The Recorder
<May> 17, 1994, Tuesday

SECTION: COMMENTARY; Taking Issue; Pg. 10

HEADLINE: Supreme Indignities in the Supreme Court Selection Process; The president had plenty of time to select a nominee without waffling before his fourth-favorite choice. After his destructive vacillations over issues like Bosnia, Haiti, and gays in the military, <Clinton> hardly needed to advertise his inability to make what should have been a fairly easy decision.

BYLINE: STUART TAYLOR JR.; Stuart Taylor Jr. is a senior writer with American Lawyer Media, L.P., and The American Lawyer magazine. "Taking Issue" appears every other week in The Recorder.

BODY:

All over Washington, for the second year in a row, members of Congress and their staffs, representatives of interest groups, judges and <Clinton> administration officials -- as well as reporters -- greeted the denouement of the president's Perils-of-Pauline approach to filling a Supreme Court vacancy with a mixture of respect for his nominee and derision for the spectacle he made of the selection process.

The president deserves credit for choosing, in Chief Judge Stephen Breyer, a brilliant, hard-working centrist with a rare ability -- proven during his tenure as chief counsel for the Senate Judiciary Committee before his appointment to the First Circuit U.S. Court of Appeals in 1980 -- to reason persuasively with conservative Republicans and liberal Democrats alike.

Judge Breyer has also shown the courage to speak truth to power, in his forceful denunciation last summer of the grotesquely excessive mandatory-minimum sentences for small-time drug offenders that President Bill <Clinton> and Congress have so cravenly embraced in their tough-on-crime posturing. Perhaps Judge Breyer's confirmation testimony will afford him an opportunity to do some salutary public education on this front.

But for all Judge Breyer's virtues, and those of the other excellent candidates on the <Clinton> short list, the administration's technique of running them up the flagpole, one by one, for inspection by interest groups and the press over 37 days -- through a process of serial leaking that was part calculation and part sheer indiscipline -- does the president no credit.

The other nominees have had "frontrunner" status dangled before them by press leak and then jerked away. That's what happened to Judge Breyer himself 11 months ago, when the president summoned him to Washington from a hospital bed, only to pass over him for judge Ruth Bader Ginsburg of the D.C. Circuit.

Now he has been quite publicly identified as the president's fourth choice, after Senate Majority Leader George Mitchell, Interior Secretary Bruce Babbitt, and <Clinton's> Arkansas friend, Richard <Arnold,> chief judge of the Eighth Circuit. Meanwhile, Chief Judge Jose Cabranes of the U.S. District Court in Connecticut has seen his considerable virtues obscured by

the widespread impression that the administration was floating his name primarily as a sop to the Hispanic lobby.

Through all this, President <Clinton> has come across as a portrait of irresolution. After his destructive vacillations over issues like Bosnia, Haiti, and gays in the military, he hardly needed to advertise his inability to make what should be a fairly easy decision with firmness and finality. In the unlikely event that the Stalinists who run North Korea followed the Supreme Court selection process, it could only have enhanced their doubts as to the president's professed determination to do what it takes to stop their efforts to build a nuclear arsenal.

WELL-AIRED REASONS

At his hastily scheduled 6:15 p.m. press conference Friday announcing the Breyer nomination (sans Breyer), President <Clinton> suggested that he had taken 37 days to choose a nominee because he is a former professor of constitutional law who cares deeply about the Supreme Court and needed to take the time for careful study of the potential nominees' work.

It won't wash. He had already studied their work during last year's 88-day selection process. The president himself indicated at the same press conference that he had settled on Judge Breyer because of concern about Judge <Arnold's> health and because "I couldn't bear to lose Bruce Babbitt" from the Cabinet. Those factors have nothing to do with constitutional law or with the three finalists' views thereof.

Nor were those professed reasons for choosing Breyer over Babbitt and <Arnold> convincing in their own right. Babbitt's value at Interior and <Arnold's> longstanding bout with a mild <cancer> have been well known to the White House since long before Justice Harry Blackmun announced his retirement April 6. Indeed, in Babbitt's case, the same reason for passing him over was given last June, when he was a finalist (along with Breyer) for the nomination that went to Ginsburg.

The more likely explanation of the president's final choice is neither Babbitt's indispensability to the Interior Department, nor <Arnold's> health, nor any great affinity on <Clinton's> part for the cool, cerebral Breyer, either as a constitutional thinker or as a person. (The two men didn't have much chemistry when they met last June, according to the reports that leaked out of the White House at the time.)

The more likely explanation is that the president didn't want a fight. He didn't want to take on the 20 or so Republican senators who would have opposed Babbitt. And he didn't want to offend the feminist groups and women senators who had told the White House that Judge <Arnold> had flunked their litmus tests by showing insufficient ardor for stamping out all abortion restrictions and all-male private clubs.

In short, Judge Breyer represented the path of least resistance. A man of his talents and accomplishments surely deserves better than to be advertised as a politically inoffensive fourth choice. But <Clinton's> selection process virtually invited the press to hang that label on him.

SILENCE PLEASE

The main problem with the process was not that it took 37 days to come full circle back to last year's runner-up. This delay was harmless enough in and of itself; Breyer will easily be confirmed in time to take his seat on the first Monday in October. Besides, while the White House had virtually all the information about the various candidates a month ago (when Mitchell removed himself from consideration) that it has now, the president was right to reflect for some time on the relative virtues of the many first-rate candidates, rather than rushing his choice.

The problem was undisciplined leaking, combined with ill-considered predictions of an imminent nomination every single day of last week. The president himself said Tuesday that he would have a nominee by Thursday. Meanwhile, the leaking was becoming so profligate that the front-runner status shifted from Babbitt to <Arnold> to Breyer, all in the course of a single day -- the last day.

I will probably cure myself for saying this the next time I have occasion to solicit a leak from an official who has read this column, but I can't stop myself: The president and his aides should learn to stop themselves. They should just shut up when no useful purpose is served by talking.

A few strategic leaks serve a useful purpose. Floating the names of the leading contenders for any big nomination brings useful feedback on how senators and interest groups will react to them, on any skeletons in their closets, and the like.

But this day-to-day, week-to-week process of serial leaking -- this wallowing in <Clinton's>-sentimental-favorite-is-<Arnold>-but-Babbitt-is-closing-fast-while-Cabranes-and-Amalya-Kearse-the-brillinat-black-female-one-have-faded-in-the-stretch-and-by-the-way-we-may-still-fall-back-on-Breyer-if-the-front-runners-catch-too-much-flak -- is undignified, demeaning to the candidates, and unnecessary. The world did not need to know that the president was vacillating form one day to the next, or that he was afraid to tangle with a bunch of Western Republicans, or that the feminists were having their way with him once again, or that Judge Breyer was his fourth choice. And if the president doesn't like those perceptions, he can blame himself and his staff for creating them.

<Clinton> and his aides should learn to give reporters who solicit tidbits like the name of the front-runner du jour in the Supreme Court derby the same response that the president should have given the MTV teeny-booper who asked whether he wears boxers or briefs: That's for me to know and you to find out.

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LOAD-DATE-MDC: May 20, 1994

The New York Times
<May> 15, 1994, Sunday, Late Edition - Final

SECTION: Section 1; Page 1; Column 1; National Desk

HEADLINE: THE SUPREME COURT;
As Political Terrain Shifts, Breyer Lands on His Feet

BYLINE: By NEIL A. LEWIS, Special to The New York Times
DATELINE: WASHINGTON, May 14

BODY:

It was last Saturday, May 7, when President <Clinton> first began to appreciate that his effort to choose a Supreme Court nominee was going to be far more difficult than he had hoped. Although Interior Secretary Bruce Babbitt's name had been under consideration for some weeks, Mr. <Clinton> realized that his choice of the moment would not sail through the Senate and could create a wider set of political problems.

Further, one of the President's other two top candidates, Judge Richard S. <Arnold,> a friend from Arkansas, has <cancer.> That left only Judge Stephen G. Breyer of Boston. Mr. <Clinton> had regarded him as aloof and unappealing when they met last year, but in the end, Judge Breyer presented the fewest problems, and his friends convinced the President that he had misjudged him.

Although they had been engaged in a search for the past six weeks, Mr. <Clinton> and his top advisers, including, at important moments, his wife, Hillary, found themselves plunged into a tumultuous deliberation over the last week. The process was more public than they had wanted and hinged far less on jurisprudence than on personal and political considerations, including a possible fight over Mr. Babbitt's successor that could complicate Mr. <Clinton's> highest priority, health care.

The President found himself lobbied heavily by supporters of Judge Breyer, the man he named on Friday. Judge Breyer's backers lauded him as one of the nation's top jurists. One even sent a videotape meant to humanize the man Mr. <Clinton> had rejected for an earlier Court vacancy.

And Mr. <Clinton> found himself in the extraordinary position of conducting detailed discussions on the telephone with eminent <cancer> specialists about Judge <Arnold's> health.

Despite Mr. <Clinton's> statements through the week that he was taking a long time in finding a nominee because of his own deep concern about constitutional law, which he once taught, he and his advisers were becoming enmeshed in a decidedly political calculus. They became increasingly concerned, for example, about the prospect of two simultaneously difficult appointment issues: the Babbitt confirmation and, more important, the accompanying messy search to replace him at the Interior Department.

A public debate over land and water policies in the West that would likely ensue from both confirmation fights could hurt Mr. <Clinton's> chances for getting the Senate to focus on health care. A senior Administration adviser

said Mr. <Clinton> had also feared that the land and water debates would ultimately damage his reelection chances.

The President, aides said, was determined to make a quick and clean decision this time after the criticism he endured last year for having a drawn-out process in naming a Supreme Court justice. But in the week before he announced his choice of Judge Breyer, his efforts to find a nominee had to wait on intricate discussions of, in the case of one candidate, environmental issues intertwined with sensitive Western state politics and, in the case of another, the candidate's health.

While Mr. Babbitt presented the President with unwelcome political side effects, the other finalist, Judge <Arnold> of Little Rock, who sits on the United States Court of Appeals for the Eighth Circuit, presented Mr. <Clinton> and his advisers with an ambiguous prognosis about his continuing battle with "chronic lymphocytic leukemia."

In the end, Administration officials said, Judge Breyer, the Chief Judge of the Court of Appeals for the First Circuit, was chosen because, in the words of one senior official, "he was the one with the fewest problems."

Judge Breyer was a finalist last year when President <Clinton> chose Judge Ruth Bader Ginsburg as his first nominee to the Court. White House officials said they had turned away from Judge Breyer then because he had not fully paid Social Security taxes for a nanny, a hot issue at the time in Washington.

But in truth, officials acknowledged, the principal reason for the rejection was that Mr. <Clinton> found Judge Breyer didactic and distant when they met to discuss the nomination. The President, one White House official said, thought him distinctly uncharming.

This time, Judge Breyer benefited from a concerted campaign by his many influential friends to convince the President that the man he met in June 1993 was not the real Stephen Breyer. The friends, including Senator Edward M. Kennedy, Democrat of Massachusetts, reminded Mr. <Clinton> that Judge Breyer was in great discomfort at the time because he had just left a hospital bed where he had been recuperating from a collapsed lung and broken ribs suffered in a bicycle accident.

One mutual friend of Mr. <Clinton's> and Judge Breyer's, in an attempt to demonstrate that the President's perception was inaccurate, even sent him a 20-minute videotape of the judge giving a witty and erudite speech to a group of trial lawyers.

Although Justice Harry A. Blackmun announced his retirement six weeks ago, the White House search for a nominee to replace him took several detours that delayed the President's final decision.

Mr. <Clinton> first wanted to name Senator George J. Mitchell, the Maine Democrat who is the Senate Majority leader. Mr. <Clinton's> aim was to place a politician in the midst of the current crop of justices, all but one of whom were judges before they joined the Court.

When Mr. Mitchell took himself out of the running, Mr. <Clinton> remained intrigued by the notion of shaking up the Court with someone with proven political skills.

Until earlier this month, he also considered expanding the court's ethnic diversity by naming either Judge Jose A. Cabranes of New Haven, a Federal District Court judge who was born in Puerto Rico and would have been the Court's first Hispanic justice, or Judge Amalya Kearse of New York City, a black woman who sits on the Court of Appeals for the Second Circuit.

But Mr. <Clinton> was cool to both judges, a senior adviser said, adding that at one point, Mr. <Clinton> turned to his advisers and asked in exasperation if they could find him a Hispanic candidate other than Judge Cabranes.

Last weekend, Mr. <Clinton> seemed to settle on Mr. Babbitt as someone who could fulfill his model of a politician on the Court. One Senator with whom he spoke by telephone said they had a conversation about whether Mr. Babbitt would be a justice like Hugo Black, a former Senator who was appointed to the court in 1937 and served as an influential justice for 34 years.

But last Saturday, Mr. <Clinton> began to perceive the magnitude of the potential problems in a Babbitt nomination. Senator Orrin G. Hatch of Utah, the ranking Republican on the Judiciary Committee, let Mr. <Clinton> know during a telephone conversation that he would oppose Mr. Babbitt's nomination. And he said he would do so by raising the argument that Mr. Babbitt's policies at the Interior Department showed he would be a liberal judge who would legislate from the bench.

Mr. Hatch, in an interview, said he had also told the President that he would support both Judge Breyer and Judge <Arnold.>

Mr. <Clinton> was also talking frequently that weekend with Senator Joseph R. Biden Jr., the Delaware Democrat who chairs the committee and who delivered a different assessment of a Babbitt nomination's chances.

Mr. Biden made several telephone calls to fellow senators and reported back to the President that he believed Mr. Babbitt would be easily confirmed, with no more than 20 votes against the nomination out of 100.

But Mr. <Clinton> continued to hesitate to commit to Mr. Babbitt, said another Senator who spoke with him. The Senator, who asked not to be named, said that Mr. <Clinton> "perceived this turning into a Republican-inspired referendum on the Interior Department and the West, and it could turn into a campaign issue two years from now."

This Senator said it was clear that Mr. <Clinton> feared the battle over Mr. Babbitt less than the accompanying issue of how to fill Mr. Babbitt's place at the Interior Department.

Interviews with several senior officials provided an account of the next few days that culminated in Judge Breyer's selection. By Wednesday, Mrs. <Clinton> had returned to the office after her trip to South Africa to witness the inauguration of Nelson Mandela as president. Mrs. <Clinton,> who

had practiced law often before Judge <Arnold,> spoke warmly of him and rejuvenated his candidacy.

Mr. <Clinton> then began interviewing doctors in Little Rock and at the National Institutes of Health in Bethesda, Md., where Judge <Arnold> is a patient. he spoke by telephone to Dr. Bill Tranum, a leading <cancer> specialist in Arkansas who had treated Judge <Arnold,> and to Dr. Paul Okunieff, the chief of the radiation oncology branch at N.I.H.

"In the end, 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," said a senior White House official.

By this time, the campaign on behalf of Judge Breyer was taking hold. Mr. <Clinton> was taken with the idea that he might have been unfair in evaluating Judge Breyer's personality. When the President appeared on Tuesday at a Washington Hotel to address the American Federation of Teachers about health care, he met Senator Kennedy in the lobby. The two men drew close and turned their backs on reporters.

Mr. Kennedy briefly talked about how fine a judge Stephen Breyer was and how he had the support of both Democrats and Republicans in the Senate where he had once worked.

On Wednesday night into early Thursday morning, Mr. <Clinton> talked at length with Mr. Babbitt at the White House about the problems in sending him to the Court.

Mr. Kennedy spoke by telephone again to the President at mid-day on Friday.

Hours later, Mr. <Clinton> called Judge <Arnold> to say he was naming someone else and then reached Judge Breyer in Boston with the good news.

GRAPHIC: Photos: Judge Stephen G. Breyer jogging in Boston yesterday. (Reuters)
LANGUAGE: ENGLISH
LOAD-DATE-MDC: May 15, 1994

St. Louis Post-Dispatch
<May> 15, 1994, SUNDAY, FIVE STAR Edition

SECTION: NEWS; Pg. 6A

HEADLINE: NEGATIVES KNOCKED OUT BABBITT, <ARNOLD>

BYLINE: William H. Freivogel Of the Post-Dispatch Staff Kathleen Best and Tim Poor of the Post-Dispatch Washington Bureau and Post-Dispatch wire services contributed information for this story.

BODY:

If Bill <Clinton> had chosen Interior Secretary Bruce Babbitt for the Supreme Court, the president would have shot himself in the political foot.

Arkansas jurist Richard <Arnold's> health problem was the main reason he wasn't chosen. In addition, White House telephone calls floating <Arnold's> me among women senators sparked a last-minute flurry of lobbying from women's rights groups against the Little Rock judge.

Meanwhile, federal appeals court Judge Stephen G. Breyer elicited little opposition.

That summary of the political handicapping behind the president's choice of Breyer comes from interviews with congressional and administration sources.

Politics aside, Breyer's writings on government regulation and antitrust issues impressed the president as "intellectually powerful and creative," a high administration official said.

The president also appreciated Breyer's wit. Breyer's supporters even sent the White House a videotape of a clever speech by Breyer.

Nominating Babbitt would have triggered several negative political reactions, a top administration official said:

Babbitt is critical to <Clinton's> popularity in the West, which has one-fifth of the nation's Electoral College votes.

Appointing Rep. Bill Richardson, D-N.M., to replace Babbitt would have angered environmentalists; but passing Richardson up would have been doubly disrespectful to Hispanics, after <Clinton> had cut U.S. District Judge Jose Cabranes from his Supreme Court list.

Babbitt could have faced confirmation trouble because of the opposition of Western senators.

After a long conversation Wednesday night, Babbitt advised <Clinton> to leave him at the Interior Department.

Late Thursday, the White House floated <Arnold's> and Breyer's names among senators. Women, including Sen. Carol Moseley-Braun, D-Ill., were sounded out

on <Arnold.>

The calls resulted in lobbying Friday morning from women's groups opposing <Arnold.> They objected to two of <Arnold's> decisions, one approving a Minnesota abortion restriction and the other permitting the Jaycees to reject women members.

On Friday, <Clinton> defended <Arnold> against this criticism. But an administration official said the women had a point: "<Arnold> had stepped up to the plate twice on women's issues and struck out twice."

Still, the official said, the deciding factor on <Arnold was his cancer,> which had required additional treatment last August. <Clinton> telephoned top <cancer> specialists to evaluate it.

<Arnold> said Friday that he was "very distressed at the suggestion I am in any way hostile to women's rights." But he didn't quarrel with <Clinton's> concerns about <Arnold's> health. He said he has had a low-grade lymphoma for 20 years but began getting radiation in August. Doctors told him the treatment was "completely effective."

LANGUAGE: English
LOAD-DATE-MDC: May 16, 1994

The Houston Chronicle

<May> 14, 1994, Saturday, 2 STAR Edition

SECTION: A; Pg. 1

**HEADLINE: Circuit judge is nominated to high court;
Centrist characterized as a consensus-builder**

BYLINE: GREG McDONALD, Houston Chronicle Washington Bureau; Staff
DATELINE: WASHINGTON

BODY:
WASHINGTON -- President <Clinton> nominated federal appeals court Judge Stephen Breyer of Boston to the U.S. Supreme Court on Friday, choosing a moderate jurist with deep experience on the bench and a wealth of bipartisan support in the Senate.

<Clinton,> in a hastily arranged news conference outside the Oval Office, called Breyer ""one of the outstanding jurists of our age'' and said he had proven in his job as chief judge of the 1st U.S. Circuit Court of Appeals that ""he can build an effective consensus and get people of diverse views to work together for justice's sake. ''

""He has a clear grasp of the law, a boundless respect for the constitutional and legal rights of the American people, a searching and restless intellect, and a remarkable ability to explain complex subjects in understandable terms,'' <Clinton> said.

Because the president's decision was made late on Friday afternoon, Breyer was unable to make the journey from Boston for the 6:15 p.m. announcement. But the president said he would hold a formal Rose Garden ceremony on Monday to present Breyer, 55, to the American people as his choice to replace retir ing Justice Harry Blackmun.

Speaking to reporters in Boston, Breyer said he was ""extremely honored'' and noted that he would have ""big shoes to fill'' in replacing Blackmun, one of the court's more liberal members and architect of the landmark 1973 Roe vs. Wade decision protecting a woman's right to abortion. Breyer is known to support that decision and as an appeals court judge once ruled against the Bush administration's efforts to permanently ban abortion counseling at clinics receiving federal funding.

Breyer said he would strive ""to make the average person's ordinary life better'' if confirmed as the nation's 108th Supreme Court justice.

""That's an incredible challenge,'' he said, ""and I feel very humbled simply thinking about it. ''

In choosing Breyer, <Clinton> passed over Interior Secretary Bruce Babbitt and federal Judge Richard <Arnold> of Arkansas, mentioned repeatedly by senior White House officials as the other top contenders for the nomination.

It was the second time in 11 months that Babbitt had been touted as a leading candidate only to be passed over. He lost out last June when <Clinton> turned to Ruth Bader Ginsburg to fill the seat of retiring Justice Byron White. Breyer was a leading candidate then as well, and <Arnold> also was considered.

<Clinton> acknowledged that Babbitt would make a ""superb justice'' and did not rule out the possibility of considering him again if given another opportunity to nominate a Supreme Court justice. But he said he decided against him this time around because ""I couldn't bear to lose him from the Cabinet. ''

A senior White House official said later, however, that Babbitt would have faced opposition during confirmation hearings before the Senate Judiciary Committee. Sen. Orrin Hatch of Utah, the ranking Republican on the committee, had pressured <Clinton> in telephone conversations this week to choose someone else. He had lobbied on behalf of Breyer, telling <Clinton> that a number of senators felt that Babbitt was too liberal and would try to ""legislate from the bench'' rather than simply ""interpret'' the law.

The White House official denied that <Clinton> had caved in to Hatch, noting that the senator had acknowledged that Babbitt would likely be confirmed in the end. But he said <Clinton> would have been saddled with an ""unnecessary political fight'' if he had chosen Babbitt.

The official said <Arnold> also would have faced opposition from some senators and women's groups who have raised questions about his views on abortion. <Clinton,> however, said he decided against his old friend from Arkansas because he is being treated for lymphoma, a form of <cancer.>

White House special counsel Lloyd Cutler told reporters that <Arnold's> health problem raised questions in the president's mind about ""how long he would be able to sit on the court. ''

Overall, Breyer was hailed as a safe pick politically for the president by both Democrats and Republicans. They predicted speedy confirmation.

""He's a very good choice . . . He's got real credibility up here'' in the Senate, said Sen. Dennis DeConcini, D-Ariz. ""It's a wise decision for the president. He doesn't have to put up with a lot of junk'' during the confirmation process.

Senate Minority Leader Bob Dole, R-Kan., called Breyer ""a top-notch intellect and a person of integrity. ''

""Unless something unforeseen happens, I see smooth sailing ahead for Judge Breyer's confirmation,'' Dole said.

But at least one member of the Judiciary Committee questioned Breyer's judicial philosophy, calling it too conservative for his tastes. Sen. Howard Metzenbaum, D-Ohio, said he feared that Breyer had consistently sided with big business and government over the interests of consumers, small-business people and the environment.

Breyer, an avid bicycler and jogger, was named to the 1st Circuit by President Carter in 1980 and became chief justice of the court in 1990.

He gained important political experience and became well-known on Capitol Hill when he served as an assistant prosecutor during the Watergate break-in trials in the 1970s and later joined the Senate Judiciary Committee as chief counsel. It was on that committee that he formed the close ties with members that helped him win <Clinton's> approval for the Supreme Court.

Breyer, a multimillionaire, is a graduate of Stanford University and Harvard Law School. He also was a Rhodes scholar. He is married and has three children.

LANGUAGE: ENGLISH
TYPE: Appointments
LOAD-DATE-MDC: May 16, 1994

Los Angeles Times

<May> 14, 1994, Saturday, Southland Edition

SECTION: Part A; Page 1; Column 6; National Desk

HEADLINE: <CLINTON> PICKS MODERATE JUDGE BREYER FOR SUPREME COURT SPOT; JUDICIARY: PRESIDENT SAYS THE SCHOLARLY NOMINEE HAS 'PROVEN THAT HE CAN BUILD AN EFFECTIVE CONSENSUS.' THE FEDERAL JURIST HAS WIDE BIPARTISAN SUPPORT IN THE SENATE.

BYLINE: By PAUL RICHTER, TIMES STAFF WRITER
DATELINE: WASHINGTON

BODY:
Rejecting candidates who appeared to be politically riskier, President <Clinton> on Friday chose federal Judge Stephen G. Breyer, a scholarly centrist jurist with bipartisan support, to fill his Administration's second vacancy on the Supreme Court.

In a hastily convened press conference, <Clinton> hailed the 55-year-old Boston jurist as a candidate of "excellence," with a keen mind, a respect for civil rights and an ability to explain the laws to average Americans. He said that Breyer, who would replace retiring Justice Harry A. Blackmun if confirmed
by the Senate, has "proven that he can build an effective consensus. . . . Without dispute, he is one of the outstanding jurists of our age."

Breyer has sat on the U.S. 1st Circuit Court of Appeals in Boston since 1980 and was named chief judge in 1990. A runner-up in last year's Supreme Court search, Breyer earlier was chief counsel to the Senate Judiciary Committee, under Sen. Edward M. Kennedy (D-Mass.).

The Rose Garden announcement ended a tortuous and increasingly fevered 37-day search in which <Clinton> apparently had been ready, in recent days, to choose Interior Secretary Bruce Babbitt or federal appeals Judge Richard S. <Arnold> of Arkansas.

But <Clinton> said he "couldn't afford to lose" Babbitt from his sensitive Cabinet post. And, he said, he could not risk choosing his old Arkansas friend
until questions about his nearly two-decade-old <cancer> were resolved.

With enthusiastic support from Republicans, Breyer's nomination is likely to sail through the Senate confirmation proceedings, sparing <Clinton> any distracting controversy as his health reform bill wends its way through Congress.

But the selection leaves <Clinton> open to criticism that he yielded to pressure from Senate conservatives who had expressed unhappiness at the prospect that the more liberal Babbitt could be chosen. Indeed, some aides had been pushing <Clinton> to choose Babbitt and prove that he would not allow the opposition of Sen. Orrin G. Hatch (R-Utah), ranking minority member

of the Senate Judiciary Committee, or other conservative Republicans to influence his Supreme Court choices.

The announcement brought plaudits from conservatives and hesitation from some liberals. Sen. Strom Thurmond (R-S.C.), for example, called Breyer an "excellent choice," and he drew praise as well from Hatch and Sen. Alan K. Simpson (R-Wyo.), both Judiciary Committee members.

But Sen. Howard M. Metzenbaum of Ohio, a liberal Democrat, said that he had concerns about Breyer's "moderate to conservative" record. "He's been more concerned about the situation of big business" and less about that of smaller companies and the less well off, Metzenbaum said.

Breyer is said to have given up a promising political career for a life on the bench. He has been described as skilled in forging consensus among his colleagues.

One sign of his talents was the fact that he won over both the parties while he was majority counsel to the Judiciary Committee. Indeed, he was confirmed to the federal court after his sponsor, President Jimmy Carter, was defeated in 1980, because he had become so well-liked by committee conservatives.

Lawyers who have worked with him in New England praise him as quick, scholarly and nonpartisan, if a bit imperious.

Financial disclosure forms show he is worth several million dollars in stocks and bonds. The Supreme Court annual salary is $164,100.

Although Breyer's legal credentials may be unassailable, he is not the nationally respected political figure that <Clinton> once said he wanted to appoint to ensure that social realities are represented on the court. <Clinton's> first choice last year for the previous court opening was New York Gov. Mario M. Cuomo, and this year he first sought Senate Majority Leader George J. Mitchell, who withdrew his name from consideration.

With a scholarly manner that Georgetown University law professor Paul Rothstein called "almost egghead," Breyer is probably not the person with a common touch and "big heart" that <Clinton> had said he was seeking.

And, indeed, Breyer -- despite his impressive judicial credentials -- also may not be the major figure <Clinton> had sought -- one who would be immediately hailed by all sides as a towering addition to the high court.

The selection also leaves <Clinton> vulnerable to criticism that he has disappointed minorities, and, in particular, Latinos, after raising hopes that one of their number might be chosen. Federal Judge Jose A. Cabranes of Connecticut was mentioned as a candidate during the search, but he faded from contention. Some liberal advocates have complained that the presence of his name was "window dressing."

<Clinton's> finalists were all white males from Harvard, a fact that will make it far harder for the diversity-conscious <Clinton> to choose anyone but a minority if he receives a third opportunity to name a justice. Some

court-watchers believe that Justice John Paul Stevens may retire next year.

The selection also leaves <Clinton> vulnerable to criticism that in his deliberations on the court he treated other candidates poorly by raising expectations that they were about to be chosen. Such criticism was directed at <Clinton> last year when he passed over Breyer -- after a highly publicized Oval Office meeting -- in favor of Justice Ruth Bader Ginsburg.

<Clinton> seemed to be trying to prevent such criticism by lavishly praising Babbitt and <Arnold> in his Rose Garden press conference. As a former governor, Babbitt would bring to the court "the responsibility and discipline of service in public life," and a feel "for life at the grass roots."

He cited <Arnold's> reputation, noting that 100 federal judges, a full eighth of the federal bench, had written him to endorse <Arnold's> character. And he said that if he had another chance to select a Supreme Court justice "I will consider Judge <Arnold> at the top of the list."

As <Clinton> increasingly focused on the issue this week, he first appeared to favor Babbitt, then <Arnold> but only on Friday -- within two hours of the announcement -- made up his mind to name Breyer.

Between Monday and Wednesday <Clinton> seemed ready to name Babbitt, and many White House aides were highly enthusiastic at the prospect of selecting the one-time presidential candidate. But at a meeting in the White House residential quarters, it became clear that "the President wasn't there," said one aide.

Chief of Staff Thomas (Mack) McLarty took the President aside in a White House kitchen, and the pair decided to consider <Arnold,> an old friend and the President's "sentimental favorite."

But a review of the Senate revealed that the selection of <Arnold> would stir unhappiness among a number of women Democratic senators -- Dianne Feinstein and Barbara Boxer of California, Barbara A. Mikulski of Maryland, Patty Murray of Washington and Carol Moseley-Braun of Illinois. There also, of course, was the question of <Arnold's cancer.>

On Thursday, McLarty asked for additional reports on the prognosis for the <cancer,> for which <Arnold> is soon to receive additional treatments.

The final decision was made by the President at about 4 p.m. Friday, after he spent about half an hour reflecting by himself on the choice.

Last year, <Clinton> had met Breyer in the Oval Office, where, aides said later, the "chemistry" between the two had been bad. But aides told <Clinton> this year that the problem may have been only that Breyer was too ill from a long railroad trip from Boston and a punctured lung he had suffered in a bicycle accident, to give the meeting the required concentration.

After the decision Friday, <Clinton> called Breyer, who was "thrilled," according to an aide. <Clinton> suggested that Breyer visit the White House with his wife this weekend, telling him they could stay in the Lincoln

Bedroom.

Aides acknowledged that there was some concern that a Babbitt confirmation proceeding "wouldn't be completely clean." But he insisted that that consideration was far less important than concerns that it would be hard to replace Babbitt at Interior, a post that <Clinton> considers key to his Western political strategy.

The aide played down suggestions that the selection would draw criticism that <Clinton> was not willing to fight for what he wanted. "He's not afraid of a fight -- anyone who watched him on the (North American Free Trade Agreement) knows that," the aide said.

The 6 p.m. Friday announcement came at a time Presidents usually reserve for information they wish to play down in the media. But the aide called this "pure happenstance."

From Harvard to High Court Nominee

Stephen G. Breyer is a highly respected Boston jurist with a background in teaching. If confirmed, he will replace retiring Justice Harry A. Blackmun. Though Breyer is considered a moderate, it is unclear whether his opinions would lean toward the liberal or conservative side.

PROFILE
Birthplace: San Francisco
Age: 55
Education: Stanford University, Oxford University, Harvard Law School.
Experience: U.S. 1st Circuit Court of Appeals judge since 1980, former professor at Harvard Law School.

CURRENT SUPREME COURT MAKEUP
Liberal: Harry A. Blackmun
Moderate-liberal: David H. Souter
Ruth Bader Ginsburg
John Paul Stevens
Moderate-conservative: Anthony M. Kennedy
Sandra Day O'Connor
Conservative: William H. Rehnquist
Antonin Scalia
Clarence Thomas

'He is one of the outstanding, jurists of our age.' -- President <Clinton>
GRAPHIC: Photo, COLOR, Stephen G. Breyer speaks with reporters after his nomination. Associated Press; Photo, COLOR, President <Clinton> ; Chart, COLOR, From Harvard to High Court Nominee, Los Angeles Times
LANGUAGE: ENGLISH
LOAD-DATE-MDC: May 15, 1994

The Washington Times

<May> 14, 1994, Saturday, Final Edition

SECTION: Part A; COMMENTARY; EDITORIALS; Pg. D2

HEADLINE: They also serve who wait

BODY:

There will be plenty of time in the weeks ahead to look into the record of Judge Stephen Breyer, President's <Clinton's> nominee for the Supreme Court. But while it's still fresh, another question: What to make of the strange non-selection of Judge Richard <Arnold?> In news accounts in the past week, President <Clinton> was described as agonizing over his choice for a Supreme Court nominee. His most fervent desire, according to news reports citing unnamed White House aides, was to nominate his old friend Judge <Arnold> of the 8th Circuit Court of Appeals. But there was something stopping him from doing so - some unspecified "problems," as reporters said, with the nomination.

At his Rose Garden announcement yesterday, Mr. <Clinton> offered an explanation that is supposed to be a conversation-stopper. Judge <Arnold has> <cancer,> the president said, and though his prospects are excellent, with his health situation yet to be fully resolved, it would be inappropriate to put his name forward.

Well, first of all, godspeed to Judge <Arnold.> May his recovery be swift and complete. But the conversation is too curious to stop.

Besides, Mr. <Clinton's> discussion of his reasons for passing over Interior Secretary Bruce Babbitt for the high court seat did not exactly drip with candor. Mr. <Clinton> said he couldn't bear the prospect of losing Mr. Babbitt from his Cabinet.

Ahem. Not even to free him to make a permanent mark on the most important legal questions the nation confronts, not just through 1996 (or even 2000) but for the rest of Mr. Babbitt's life? If that was what the president really thinks, then his judgment is highly questionable.

The fact is that Mr. Babbitt faced a serious fight in the Senate - something Republicans made clear as the week wore on. Mr. <Clinton> said that he believed any of the three white males (sorry, he didn't put it that way) whom he discussed yesterday would have been confirmed. That may be true. Democrats do, after all, outgun Republicans in the Senate, nor is it remotely plausible even that all GOP senators would have opposed a Babbitt nomination. But victory sometimes exacts a high price in blood and treasure, and indications were that such would have been the case with Mr. Babbitt's confirmation.

Mr. Babbitt would certainly have been grilled on his rather extreme record as an environmentalist, and he would have been asked a series of questions about why he wants to compel the Boy Scouts to allow openly gay members. (The latter would have been a bit of a caricature, but hey,

Republicans learned that technique from Democrats, specifically, the way Democrats distorted the views of Supreme Court nominee Robert Bork). Mr. <Clinton> might perceive danger in being so publicly identified with the highly liberal views of his nominee.

Were there, then, similarly unspoken reasons behind Judge <Arnold's> non-selection? Maybe there were.

Judge <Arnold's> name had come up prominently once before, in the search process that ultimately led - after a similarly agonizing process - to the selection of Ruth Bader Ginsburg. At that time, an editorial here pointed to what really ought to have been deemed a substantive problem in Judge <Arnold's> record on the Eighth Circuit. As homage to the Socratic dictum, "Shouldn't one say the same things about the same things?" here's what the April 9, 1993 editorial said, contemplating an <Arnold> confirmation hearing:

"Judge <Arnold,> too, may have a bit of explaining to do. In Delo vs. Lashley, a capital punishment case decided last month, he found himself in the extremely unusual position of being summarily reversed by the Supreme Court.

"Judge <Arnold> had written an opinion in a 2-1 decision in the 8th Circuit that overturned a death sentence. He ruled that the trial judge had erred in failing to comply with a defense request to instruct the jury that the convicted killer, Frederick Lashley, had no prior criminal record - a mitigating factor in considering whether or not to impose a death penalty -despite the fact that the defense had introduced no evidence on his prior record.

"Missouri appealed the ruling, asking the Supreme Court to review the case.

In most instances, if the court wants to review a case, it will grant certiorari, request briefs from the parties and schedule arguments. In this case, in a 7-2 decision, it granted certiorari and, dispensing with briefs and argument, summarily reversed Judge <Arnold.> This unusual course (which crops up only every couple of terms on the court) is employed typically only in cases in which the lower court has badly erred in applying the law. That was true in this case: 'the majority [on the 8th Circuit for whom Judge <Arnold> wrote] plainly misread our precedents,' the unsigned opinion said. 'Today we make explicit the clear implication of our precedents: Nothing in the Constitution obligates state courts to give mitigating circumstance instructions when no evidence is offered to support them.'

"A summary reversal is a sharp rebuke, a true black eye for an appeals court judge. The question for Judge <Arnold> is whether this summary reversal goes to his competence as a jurist or to his willingness as an appeals court judge to be bound by precedents established by the Supreme Court."

Probably the latter. Judge <Arnold's> true-blue liberal record has since been much remarked. His Delo vs. Lashley opinion is probably an indicator of a deep and abiding hostility to the death penalty.

It resembles, in certain respects, some of the jurisprudence of Judge Rosemary Barkett, the former chief judge of Florida's highest court whom Mr. <Clinton> elevated to an appeals court seat only after a serious fight. Her decisions were quick to grab hold of reasons to overturn death sentences. The suspicion engendered by their cumulative effect was that Judge Barkett supported capital punishment not out of the conviction that 1) the Constitution does not forbid it and 2) it's up to legislatures to decide whether it will be law, but rather out of prudential considerations - opposing it outright is not a good career move for persons aspiring to the loftier perches of the federal judiciary, since someone who unequivocally stated that the death penalty is unconstitutional could not be confirmed by the Senate.

And yet, Judge <Arnold> certainly had no less wiggle room in his record than Judge Barkett, who, after all, made it through. Moreover, in their zeal to derail a Babbitt nomination, apparently, a number of Senate Republicans found it necessary to indicate support for Judge <Arnold.> Sen. Robert Dole, for example, sent Mr. <Clinton> a letter indicating he could support either Judge Breyer or Judge <Arnold> for the seat, pointedly making no mention of Mr. Babbitt.

The fact that many Republicans in the Senate should weigh in early with affirmations of support for the elevation of Judge <Arnold,> the liberal's liberal, speaks volumes about Senate Republicans. Perhaps this is why the GOP has not been able to block so much as single piece of Democratic legislation since the "stimulus package." Perhaps this is why there may well be a bad health care bill on President <Clinton's> desk this year. Perhaps this is why Mr. Dole is seen as just another Republican these days, not the fire-breathing opposition leader who was on all the Sunday shows little more than a year ago. Perhaps - well, perhaps The Washington Times editorial page is ranting its way off the subject. In any case, the votes for Judge <Arnold> seemed to be there.

In the absence, that is, of some sort of embarrassing disclosure.

On Tuesday, there appeared this oddly crafted passage in a story in the New York Times:

"The White House is especially sensitive to how Judge <Arnold's> nomination would be received. Officials say they are aware of potential problems in selecting an acquaintance of the President's from Arkansas to such a highly visible post.

"One Administration official said the reluctance to name Judge <Arnold> because of his ties to Arkansas is not so much because of the appearance of cronyism that has been suggested in published reports. Rather, the official said, it is because Mr. <Clinton> would not welcome the additional attention on Arkansas by news organizations that would inevitably follow the nomination as reporters look into Judge <Arnold's> history."

What on earth was that about? True, the Wall Street Journal did subsequently report that Judge <Arnold> made a killing in precious metals in the 1970s. But even if that were a problem, why would Mr. <Clinton> be the one not welcoming the attention on Arkansas? The passage almost seems as if

it were written to misdirect attention to a problem in "Judge <Arnold's> history" when the real problem is not with Judge <Arnold,> but rather one reporters might come across when they "look into" Judge <Arnold's> history. Something "Mr. <Clinton> would not welcome," maybe?

It also almost seems as if the author of that passage knows perfectly well what the problem is. Is there something here a lot of people aren't saying?

Politics aside, it all seems like a rather mean thing to do to Judge <Arnold,> who has been through a lot - including his recent illness as well as being twice passed over twice now for the Supreme Court by his close friend, Mr. <Clinton.>

LANGUAGE: ENGLISH

The Houston Chronicle
<November> 8, 1992, Sunday, 3 STAR Edition

SECTION: A; Pg. 8

HEADLINE: Firm sued under <Disability> Act;
Man, 59, given 1-day's notice after reporting <brain> cancer

BYLINE: STEPHEN FRANKLIN, ANDREW GOTTESMAN; <Chicago> Tribune
DATELINE: <CHICAGO>

BODY:

<CHICAGO> -- When a doctor told Charles L. Wessel last April that <brain> cancer might take his life within a year, he made up his mind to keep working. For a while, it looked like he would.

In July, however, the 59-year-old Wessel says, he was given one day's notice and told it was time to retire from his job as executive director of AIC Securities Inc., a 320-worker firm in <Chicago.>

""I couldn't believe it. I began to laugh. I said, "I can't afford to retire,' '' Wessel recalled.

But his employer apparently was serious, and last week the federal government got serious, too: It filed its first lawsuit against a private employer under the new Americans with <Disabilities> Act.

Ruth Vrdolyak, the company's owner, in disputing the federal lawsuit, said Wessel was ""let go because he is ill. ''

Moments later, however, she said Wessel was not fired, his position was eliminated. AIC provides security guard services for commercial and residential properties.

Vrdolyak is the widow of former <Chicago> Alderman Victor Vrdolyak, who was suffering from lung cancer at the time of his death last June of heart failure.

Under the ADA's employment provisions, employees who have been discriminated against can take their bosses to court and seek compensatory damages of up to $ 300,000.

Companies with 25 or more workers were covered as of July 26; those with 15 or more workers must be in compliance by July.

Despite the ballyhoo about the phasing in of the new law, government officials say there has not been a flood of complaints by the estimated 43 million people defined by the act as disabled.

Wessel's complaint is one of 200 filed with the <Chicago> district office of the U.S. <Equal Employment Opportunity>

<Commission.> There have been 1,477 complaints filed nationally as of Oct. 30.

""We had projected an increase of 15 to 20 percent, and it's been a bit lower than that,'' said Dawn Weyrick Celo, an <EEOC> official.

If there were a surge of complaints, however, officials concede that their staffs would be even more overworked -- and slower in completing their investigations -- because there has been no increase in the number of <EEOC> workers.

In <Chicago,> for example, the <EEOC's> investigations are taking about one year, about three times as long as Congress has indicated it would like to see.

But the delay is expected to reach 17 months by spring, when more people will have become familiar with the law, said John P. Rowe, director of <Chicago's> district office.

Nationally, it takes an average of eight months for the <EEOC> to investigate a complaint.

In Wessel's case, however, <EEOC> officials say they did not wait and completed their investigation within five weeks.

""It didn't take a rocket scientist to figure out that a speedy investigation was critical,'' said John C.Hendrickson, a regional attorney with the <EEOC.>

Wessel said he worried about finding another job. Since July, he has sent out 30 resumes and had three interviews but no offers.

Nonetheless, he was not giving up hope. He said he's beaten the odds before. Five years ago, he was diagnosed with lung cancer.

""I was given a 1-in-4 chance of living one year,'' he said.

LANGUAGE: ENGLISH
LOAD-DATE-MDC: November 10, 1992

The New York Times
<November> 7, 1992, Saturday, Late Edition - Final

SECTION: Section 1; Page 7; Column 1; National Desk

HEADLINE: U.S., in Job Case, Files First Lawsuit Under New <Disabilities> Law
BYLINE: By TAMAR LEWIN

BODY:
The Federal Government yesterday filed its first lawsuit under the Americans With <Disabilities> Act on behalf of a <Chicago> executive who lost his job after his employer, a security-guard company, learned he had <brain> cancer.

The <Equal Employment Opportunity Commission> filed the suit on Thursday against AIC Security Investigations Ltd., saying the company had illegally dismissed its executive director, Charles Wessel, because of his medical condition even though he was able to perform his job.

Mr. Wessel, who is 59 years old and lives in Oak Lawn, Ill., a <Chicago> suburb, directed a staff of 20 people and supervised 310 security guards. Among his duties was to see to it that the company complied with the terms of the new <disabilities> law.

The law, which took effect on July 26, makes it illegal for employers to base decisions about hiring, promotion or dismissal on a worker's medical condition except when the condition interferes with the performance of the job. Those who prove they have been discriminated against can recover both compensatory and punitive damages, as well as the job they were denied.

'Emotional Stress' Cited

"We're asking for reinstatement, back pay for the time he's been off and, in his case, the insurance payments he's had to pick up," said Jean Kamp, one of the commission's lawyers handling the case. "We're also looking for compensatory damages for the emotional distress he suffered, after 30 years in the industry and six years with this company -- being dismissed and having to live on unemployment and worry about how to support his wife."

The company issued a statement saying it had not violated the law.

In June 1987 Mr. Wessel developed lung cancer. Last April, after being diagnosed as having <brain> cancer, he was given 18 days of radiation treatment and was told that he probably had six months to a year to live.

Mr. Wessel and the commission charge that Ruth Vrdolyak, who became the owner of AIC after her husband died in June, told Mr. Wessel to retire in July.

"Mrs. Vrdolyak had her assistant, who had started work about three weeks prior, tell me that she wanted me to retire," Mr. Wessel said in an interview yesterday. "At first I thought it was a joke. When I saw she was serious, I said, 'I'm not old enough to retire, there's no retirement plan and, like

everybody else, I live paycheck to paycheck.' "

Mr. Wessel said he was never able to talk to Mrs. Vrdolyak about the dismissal. Instead, he was told not to report to work the next day, but to pick up his paycheck and personal belongings a few days later. His last workday was July 29 -- three days after the <disabilities> law went into effect.

"One of the things I was working on was a memo and job descriptions for compliance with the <disabilities> act," Mr. Wessel said. "So when I realized they were serious, one of the things I asked the assistant was if they wanted to get rid of me, why didn't they do it last week, before the law went into effect? I still don't understand why Mrs. Vrdolyak did this. It doesn't make sense."

Mrs. Vrdolyak was not available for comment yesterday. A statement issued by the company said that AIC would not comment on pending litigation and that, in any case, it had not yet received a copy of the complaint.

'We Acted Appropriately'

"We at AIC International Ltd. and its subsidiaries have great sympathy for Mr. Wessel and his family," the statement said. "We are deeply convinced, however, that once all of the facts come out in court, it will be shown that there was absolutely no violation of any law and that we acted appropriately, under the circumstances."

According to The Associated Press, Mrs. Vrdolyak said earlier that Mr. Wessel had been "let go because he is ill," and later said he had not been dismissed but that his position had been eliminated.

"I'm very sympathetic the man is sick," the news agency quoted her as saying. "But with all the medication he had, he was not functioning."

The commission gave a different account. "We're alleging that he was fired because of his <disability,> although he was able to do the job and in fact was doing the job," Ms. Kamp said.

No trial date has been set. If the case does go to trial the central issue to decide will likely be whether Mr. Wessel was able to perform his job adequately while he was ill. He says he is.

"I'm feeling great," Mr. Wessel said in the interview. "Because of my lungs, I've had limitations for years. I don't run up any stairs. I don't do heavy lifting. But my job was mental, and I know I can do it."

Since his dismissal he has been paying $590.84 a month to continue his health insurance, and $238 a quarter for his life insurance.

LANGUAGE: ENGLISH
LOAD-DATE-MDC: November 7, 1992

<Chicago> Tribune
<November> 6, 1992, Friday, NORTH SPORTS FINAL EDITION

SECTION: CHICAGOLAND; Pg. 1; ZONE: C

HEADLINE: <Disabilities> Act suit is first in U.S

BYLINE: By Stephen Franklin and Andrew Gottesman.

BODY:
When a doctor told Charles L. Wessel last April that <brain> cancer might take his life within a year, he made up his mind to keep working. For a while, it looked like he would.

In July, however, the 59-year-old Wessel says, he was given one day's notice and told it was time to retire from his job as executive director of AIC Securities Inc., a 320-worker firm in <Chicago.>

"I couldn't believe it. I began to laugh. I said, 'I can't afford to retire,' " Wessel recalled.

But his employer apparently was serious, and Thursday the federal government got serious, too: It filed its first lawsuit against a private employer under the new Americans with <Disabilities> Act.

Ruth Vrdolyak, the company's owner, in disputing the federal lawsuit, said Thursday Wessel was "let go because he is ill."

A few moments later, however, she said Wessel was not fired, his position was eliminated. AIC provides security guard services for commercial and residential properties.

Vrdolyak is the widow of former <Chicago> Ald. Victor Vrdolyak, who was suffering from lung cancer at the time of his death last June of heart failure.

Under the ADA's employment provisions, employees who have been discriminated against can take their bosses to court and seek compensatory damages up to $300,000. Companies with 25 or more workers were covered as of July 26; those with 15 or more workers must be in compliance by next July.

Despite the ballyhoo about the phasing in of the new law, government officials say there has not been a flood of complaints by the estimated 43 million people defined by the act as disabled.

Wessel's complaint is one of 200 filed with the <Chicago> district office of the U.S. <Equal Employment Opportunity Commission.> There have been 1,477 complaints filed nationally as of Oct. 30, according to federal officials.

"We had projected an increase of 15 to 20 percent, and it's been a bit lower than that," said Dawn Weyrick Celo, an <EEOC> official in Washington.

If there were a surge of complaints, however, officials concede that their

staffs would be even more overworked - and slower in completing their investigations - because there has been no increase in the number of <EEOC> workers.

In <Chicago,> for example, the <EEOC's> investigations are taking about one year, about three times as long as Congress has indicated it would like to see.

But the delay is expected to reach 17 months by spring, when more persons will have become familiar with the law, said John P. Rowe, director of <Chicago's> district office.

Nationally, it takes an average of eight months for the <EEOC> to investigate a complaint.

"Anyplace that we go to try to get redress for people with <disabilities> we find delays of this long (eight months) or longer because they have a chronic level of underfunding, and that's regrettable," said Linda Hoke, an official with the Legal Center for <Disability> Rights in <Chicago.>

In Wessel's case, however, <EEOC> officials say they did not wait and completed their investigation within five weeks.

"It didn't take a rocket scientist to figure out that a speedy investigation was critical," said John C. Hendrickson, a regional attorney with the <EEOC.>

When the case comes to court, Hendrickson predicted, the issue to be decided will not be whether Wessel was let go because of his illness "but whether he was able to perform the job at the time."

The government is asking the court to make the company pay for Wessel's lost wages, his life and health insurance costs and other damages from losing his job, according to Hendrickson.

Wessel, who said he had earned a good reputation after 30 years' work with security firms, including six with AIC Securities, said he worried about finding another job.

Since July, he has sent out 30 resumes and had three interviews but no offers.

"They aren't going to take me on with these added (health) costs," said Wessel, a tall, thin, balding man, who speaks with a low, raspy voice.

Nonetheless, he was not giving up hope, he said.

He said he's beaten the odds before.

Five years ago, he was diagnosed with lung cancer.

"I was given a 1-in-4 chance of living one year," he said.

LOAD-DATE-MDC: 11-07-92

USA TODAY

<November> 6, 1992, Friday, FINAL EDITION

SECTION: MONEY; Pg. 2B

HEADLINE: <Disability> act suit filed
BYLINE: Wire reports

BODY:
The <Equal Employment Opportunity Commission> said Thursday that it has filed the federal government's first lawsuit under the Americans with <Disabilities> Act, against a security-guard company that fired an executive who has terminal cancer.

The law, which went into effect July 26, is designed to prevent discrimination against disabled people in hiring and firing, among other things.

The suit was filed in U.S. District Court in <Chicago> on behalf of Charles Wessel, former executive director of AIC International and AIC Security Investigations. The agency says Wessel was fired after being diagnosed as having inoperable <brain> tumors, even though he was performing his job.

<EEOC> lawyer John Hendrickson says the case involves a classic example of the type of discrimination the ADA is intended to prevent: ''An employee was fired, apparently not because of his inability to do his job, but because of predictions about future health problems and because of stereotypical fears about <disability.> It appears that the employee was in fact performing his job up to the very time he was discharged.'' The lawsuit seeks back pay with interest, reinstatement and monetary damages.

<Chicago> Tribune
<June> 9, 1993, Wednesday, NORTH SPORTS FINAL EDITION

SECTION: BUSINESS; Pg. 2; ZONE: N

HEADLINE: Jury award reduced in firing of man with cancer
BYLINE: By Wilma Randle.

BODY:
A federal judge has sharply reduced the $572,000 judgment a jury awarded a <Chicago> man who charged he was fired from his job because he had brain cancer.

U.S. Magistrate Ronald A. Guzman said Tuesday the most Charles H. <Wessel> can collect as a result of his unfair firing is $222,000, of which $200,000 is for pain and suffering and $22,000 is for lost wages. <Wessel's> case, filed last fall, was the first filed against a private employer under the new Americans with <Disabilities> Act.

Guzman also issued an injunction prohibiting <Wessel's> former employer, AIC Security Investigations Ltd., from discriminating against disabled workers in the future, and for the company to submit to monitoring by the <Equal> <Employment Opportunity Commission> of its treatment of disabled workers for three years.

Calls made to AIC's lawyers Tuesday were not returned. The suit was filed on <Wessel's> behalf by the <EEOC.>

<<Wessel,> 59, charged he was fired as executive director of AIC, a security guard company at 1837 S. Michigan Ave., after the company learned he had brain cancer. He maintained he was still able to perform his duties. He had worked at the company for six years.

Because it was the first lawsuit filed under the <disabilities> act, the case attracted national attention. AIC's owner, Ruth <Vrdolyak,> is the widow of former Ald. Victor <Vrdolyak> (10th) and sister-in-law of former Ald. Edward <Vrdolyak.>

The reduction in the jury award did not come as a surprise. The <disabilities> act limits the amount of monetary damages according to the size of a company. The monetary limit for a company with 201-300 workers is $200,000, and AIC employs 300.

Guzman said he issued the injunction against AIC because he wasn't convinced the company had gotten the message it had done something wrong. And, he said, "The evidence at trial provided no assurance" that a similar instance would not happen again.

Guzman's decision does not signal an end for <Wessel> to this matter, nor that he will recover damages right away. "What it means is there is now a final judgment, and now everybody has the right to appeal," said Jean Kamp, lead attorney for the <EEOC> on the case.
LOAD-DATE-MDC: 06-11-93

<Chicago> Tribune
<March> 24, 1993, Wednesday, NORTH SPORTS FINAL EDITION

SECTION: BUSINESS; Pg. 1; ZONE: N

HEADLINE: Heavy fine in firing of employee with cancer
BYLINE: By Wilma Randle

BODY:
Businesses should learn from the mistakes of a <Chicago> company that has been ordered to pay more than $500,000 in fines for firing an employee who has cancer, advocates for the disabled say.

At issue is the case of Charles <Wessel,> who was fired as executive director of AIC Security Investigations Ltd. after the company learned of his brain cancer. <Wessel,> 59, of Oak Lawn, worked six years at AIC, a security guard company based at 1837 S. Michigan Ave.

<Wessel> has since been hospitalized. But at the time of his firing, he had been performing all his duties, according to a federal lawsuit filed in <Chicago.> The suit, filed on <Wessel's> behalf by the <Equal Employment> <Opportunity Commission,> charged that AIC Security violated his rights under the new Americans with <Disabilities> Act.

A federal jury last week agreed. It ordered AIC Security and its owner, Ruth <Vrdolyak,> to pay <Wessel> $572,000, of which $550,000 was earmarked as "compensatory and punitive" damages. The rest was for back pay.

<Wessel> probably will be able to collect only $200,000 of that amount, according to Jean P. Camp, the <EEOC> attorney who handled his case. The Americans with <Disabilities> Act limits the amount of monetary damages according to the size of a company, Camp said, and stipulates that the total cannot exceed $300,000.

AIC Security lawyers have said they plan to appeal.

Calls to <Vrdolyak> were not returned.

The suit was of special note in <Chicago because Vrdolyak> is the widow of former 10th Ward Ald. Victor <Vrdolyak> and sister-in-law of former Ald. Edward <Vrdolyak.>

The lawsuit drew national attention because it was the first suit against a private employer under the <disabilities> act.

The act provides sweeping civil rights protection in employment and accessibility to the nation's estimated 43 million disabled people. About 1.5 million disabled people are estimated to live in Illinois.

"I think the case demonstrates just how important it is for businesses to educate themselves about the ADA," said Jo Holzer, executive director of the Council for <Disabilities> Rights in <Chicago.>

"The question is whether companies understand that there is more impact from a negative decision and the lawsuit that follows than taking the initiative and dealing with the issue, sensitively, beforehand," Holzer said.

The Americans with <Disabilities> Act was signed into law in 1990. Because its reach is so wide - in addition to employment and accessibility, public accommodations and services, it covers telecommunications - key areas are being phased in over a three-year period.

In July 1992, the first phase of the employment provision, prohibiting companies with 25 or more employees from discriminating against the disabled in hiring and promotion, went into effect. In July 1994, the provision will be extended to include employers with 15 or more employees.

AIC Security, where <Wessel> worked, employed 300, Camp said.

Advocates for businesses as well as those representing the disabled say the <Wessel> lawsuit is just the first of many. And, they say, it's most likely going to be small and midsize companies that find themselves in court.

"Businesses should pay attention to the <Vrdolyak> lawsuit," said Joe Dragonette, chairman of Dragonette Inc., a <Chicago>-based public relations firm. Dragonette, who uses a wheelchair, has been an advocate for encouraging businesses to educate themselves on the details of the <disabilities> act.

"I've heard a lot of conversations from people who were surprised by the swiftness through which the complaint moved through the system and also with the amount awarded," Dragonette said.

"I don't think this award is going to trigger a new wave of lawsuits; the lawsuits are already in the pipeline waiting to happen," Dragonette said.

Recently released figures from the <EEOC,> the federal agency charged with enforcing the <disabilities> act, support this view. Last week the agency reported that since the employment provisions of the act went into effect last July, the agency has been flooded with more than 5,000 complaints, almost of half of which are related to the <disabilities> act. It said it is now receiving about 1,000 complaints a month, most of which stem from <disabilities> and sexual harassment.

Because the <EEOC> is short of staff, it's estimated that it will take as long as five or six years for many complaints to be resolved. The agency estimates that about 10 percent of the complaints filed actually wind up in court.

Still, there are those who say the agency is going to pursue high-profile cases, such as AIC Security, to get the point across that it's serious about enforcing the new law.

However, an agency spokeswoman in Washington said the AIC case was handled so quickly because of <Wessel's> severe illness. <Wessel> was able to testify only one day during the nine-day trial.

For business owners, education about the <disabilities> act is the best

way to avoid a lawsuit, said Terry Hill, spokesman for the Washington, D.C.-based National Federation of Independent Business Owners, the nation's largest organization representing small-business owners.

"We've been sending out information to our membersip to make sure they are aware of the law and comply with it. Most don't realize how encompassing the law is. They think it's enough to widen a door or put in a wheelchair lift. It's more than that," Hill said.

And because the law is vague, clarifications will most likely be made by the courts, he said.

Ignorance of the law is going to cost companies, said Marc Fiedler, a Washington, D.C., attorney who uses a wheelchair and who is a disabled-rights advocate.

"Small companies that say they don't get it (understand the law) may be forced to. They remain ignorant at their own risk," Fiedler said.
LOAD-DATE-MDC: 03-25-93

Newsday

<March> 20, 1993, Saturday, ALL EDITIONS

SECTION: BUSINESS; Pg. 16

HEADLINE: Cancer Victim Wins Job Bias Suit;
<EEOC> wins first lawsuit under Americans With <Disabilities> Act
BYLINE: By Susan Harrigan. STAFF WRITER

BODY:
A federal jury in <Chicago> has ruled in favor of a man who charged his employer with discrimination when he was fired from his job after developing cancer, handing the U.S. government a victory in its first lawsuit under the Americans With <Disabilities> Act.

After deliberating one and a half hours, the jury awarded Charles <Wessel,> 59, $ 572,000 in back pay and damages against AIC Security Investigations Ltd., a firm providing security guard services, and its owner, Ruth <Vrdolyak.>

<<Wessel> complained to the <Equal Employment Opportunity Commission> after he was fired as the company's executive director last July 31 following a diagnosis of inoperable brain tumors. His case was the first brought by the <EEOC.>

The agency is responsible for enforcing the employment section of the federal Americans With <Disabilities> Act that had become effective just a few days before <Wessel> was fired. That section bans employers from firing workers with <disabilities> as long as they can perform the essential functions of a job.

The ruling was seen as setting a precedent for a wave of similar lawsuits, both public and private, expected during coming months.

"The jury's verdict should send a message to employers about what Americans think of discrimination against people with <disabilities,>" said Gary Phelan, an attorney with the New Haven, Conn., firm of Garrison & Arterton, who has written a book on <disability> discrimination in the workplace. "It indicates the danger of employers acting on assumptions and stereotypical beliefs that because someone is disabled, they can't do the job anymore."

A big increase in both public and private lawsuits is expected in coming months as the more than 5,500 complaints filed so far work their way through the <EEOC's> processes and into the courts.

Chris Bell, a former <EEOC> expert on <disabilities> now with Jackson, Lewis, a large management law firm, said employers already are settling ADA charges at three to four times the rate they settle other discrimination complaints.

"A jury verdict like this will enhance this," Bell said. "No employer in

his or her right mind wants to be in front of a jury on this kind of case."

Bell said the verdict also would increase pressure to get rid of caps Congress has placed on damages in <disability> cases. Because of those caps, <Wessel's> award probably will be lowered to about $ 200,000, he said.

Frank Bowe, a professor of <disabilities> issues at Hofstra University, said the case "goes to the central issue of the ADA - that people should be judged on the basis of their ability to do a job, not on their <disability.">

<<Wessel,> whose doctors have described his condition as terminal, was said by <EEOC> attorneys to be ill and unavailable for comment yesterday. <Vrdolyak> didn't respond to a request for an interview. AIC has said previously that it didn't violate the law.

Allison Nichols, an <EEOC> attorney who worked on the case, said the agency contended that contrary to AIC's assertions, <Wessel> was capable of performing his job at the time of his firing. A key witness was a former president of the company who testified as to <Wessel's> capabilities, she said.

<Chicago> Tribune
<March> 19, 1993, Friday, NORTH SPORTS FINAL EDITION

SECTION: CHICAGOLAND; Pg. 3; ZONE: N

HEADLINE: <Disabilities> Act violated, jury rules
DATELINE:

BODY:
A federal jury ruled Thursday that the widow of Ald. Victor <Vrdolyak> and her security-guard business violated the Americans with <Disabilities> Act by firing an executive last year because he had terminal cancer.

In a precedent-setting decision that took only a few hours, the jury also awarded Charles <Wessel,> the former executive, $550,000 in damages and $22,000 in back pay. But the law limits the damages to $200,000 in this case, said attorneys for the <Equal Employment Opportunity Commission,> which filed the suit.
LOAD-DATE-MDC: 03-20-93

<Chicago> Sun-Times
<March> 19, 1993, FRIDAY , LATE SPORTS FINAL

SECTION: NEWS; Pg. 4

HEADLINE: Jury Award of $ 572,000 Is 1st Under <Disabilities> Act
BYLINE: Adrienne Drell

BODY:
A federal jury here created a legal milestone Thursday when it awarded $ 572,000 to a 59-year-old Oak Lawn man who was fired from a security company because he had brain cancer.

The verdict is the first in the nation to result from a lawsuit brought against a private employer by the U.S. <Equal Employment Opportunity Commission> under the Americans with <Disabilities> Act.

Terminally ill Charles <Wessel,> who was fired as executive director of a security company, was not in U.S. Magistrate Ronald Guzman's courtroom when the seven-person jury returned its verdict only an hour and a half after receiving the case following a nine-day trial.

The jury's conclusion was "a bittersweet victory for Chuck <Wessel,> since he is still ill, and a terrific victory for the disabled," <EEOC> attorney Allison Nichol said.

<Wessel's> daughter, Deborah Regan, an attorney specializing in <disabilities> law, and son, Randall <Wessel,> a computer contractor, cried after hearing the verdict, which both said showed "justice was finally served."

Brother and sister called their father who they reported called the verdict "great news."

Ruth <Vrdolyak,> widow of former 10th Ward Ald. Victor <Vrdolyak> and sister-in-law of former Ald. Edward <Vrdolyak,> was ordered to pay <Wessel> $ 500,000 in punitive damages, $ 50,000 in compensatory damages and $ 22,000 in back pay.

The <EEOC> charged Mrs. <Vrdolyak,> owner of AIC Security Investigations and AIC International - fired <Wessel> last July 29 after learning he had terminal cancer of the brain.

The dismissal came just four days after the ADA went into effect. The law bars employers with 25 or more employees from discriminating against persons with a wide range of <disabilities.>

Nichol and <EEOC> attorney Jean Kamp said a company is not allowed to take unfavorable action against a disabled employee simply on the basis of an impairment.

The ADA protects individuals as long as they are capable of performing the essential functions of a job at the time.

"Don't judge the diagnosis but the person. The question is not what a person cannot do, but what he or she can do at the time," said Nichols, who told the jury an employer is not permitted to consider the future abilities of a disabled worker nor to demand a perfect job.

Defense attorneys James Sherman and Frank Gumina maintained that the company bent over backward to assist <Wessel,> who first developed lung cancer one year after joining AIC in 1986 and only fired him because he could no longer do the job.

Under the ADA, <Wessel> will be permitted to keep only $ 222,000 of the jury award because of a $ 200,000 cap on damages.

Defense attorneys plan to appeal the verdict.

MDC-ACC-NO: ADA19031993
LOAD-DATE-MDC: March 31, 1993

<Chicago> Tribune
<March> 10, 1993, Wednesday, NORTH SPORTS FINAL EDITION

SECTION: CHICAGOLAND; Pg. 8; ZONE: N

HEADLINE: Ill worker who was fired says he had good ratings
BYLINE: By Matt O'Connor.

BODY:
The former head of a security-guard business, fired last summer while he had terminal cancer, said in a videotaped interview played Tuesday to a federal jury that he always received excellent job ratings from his bosses.

The jury will decide if AIC Security Investigation Ltd. and its owner, Ruth <Vrdolyak,> widow of former Ald. Victor <Vrdolyak,> violated the Americans with <Disabilities> Act by dismissing Charles <Wessel.>

It is the first civil suit brought by the federal government under the 1992 law to go to trial, according to a lawyer for the <Equal Employment Opportunity> <Commission,> which filed the suit.

In the first day of testimony, the jury viewed the videotaped deposition of a raspy-voiced <Wessel,> executive director of AIC Security Investigation, a 320-worker firm in <Chicago.>

Though <Wessel> is still alive, the interview was taped in November to preserve his testimony in case he died.

<Vrdolyak,> who inherited AIC after her husband's death last June 6, contends <Wessel's> job was eliminated last July because his brain cancer and radiation treatments hurt his work performance.

<Vrdolyak's> husband also suffered from brain cancer when he died of heart failure.

AIC has claimed that during the last year of his employment, <Wessel> was absent from work about a quarter of the time.

However, in his taped interview, <Wessel> said he had always been given excellent job reviews by Victor <Vrdolyak> and his immediate boss, David Pack, president of AIC International Ltd., parent of the security-guard business.

<Wessel> also said he was able to work more often than Victor <Vrdolyak> after they developed brain cancer.

Pack also testified, saying he was "very satisfied" with <Wessel's> job performance as the head of the security-guard business since he first developed lung cancer in 1987.

In 1992, when <Wessel> developed brain cancer, he was hospitalized and later underwent radiation treatments.

"I expected Mr. <Wessel> to make that time up, and that happened," Pack said.

Pack said he was fired by Ruth <Vrdolyak> last July 6 and told it was because of "incompatibility" with her.

LOAD-DATE-MDC: 03-11-93

The Associated Press
March 19, 1993, Friday, PM cycle

SECTION: Domestic News

HEADLINE: Man Wins $ 222,000 in Lawsuit Under <Disabilities> Act
DATELINE: <CHICAGO>

BODY:
A worker fired after his company learned brain cancer might kill him in a year was awarded more than $ 220,000 in a lawsuit filed under the Americans with <Disabilities> Act.

The U.S. District Court jury deliberated only 90 minutes Thursday before returning the verdict for Charles <Wessel,> 59.

<Wessel> was executive director of AIC Securities Inc. until July 29. He said he was told it was time to retire after owner Ruth Vrdolyak learned of his prognosis.

The verdict was "a bittersweet victory for Chuck <Wessel,> since he is still ill, and a terrific victory for the disabled," said <Equal Employment> <Opportunity Commission> attorney Allison Nichol.

The Americans with <Disabilities> Act, which took effect July 26, prohibits employers from firing, refusing to hire or otherwise discriminating against people because of <disabilities> as long as they can do the work.

The commission sued Mrs. Vrdolyak Nov. 5, wanting the company to pay <Wessel's> lost wages, life and health insurance costs and other damages.

The jury ordered Mrs. Vrdolyak to pay <Wessel> $ 500,000 in punitive damages, $ 50,000 in compensatory damages and $ 22,000 in back pay. <Wessel> can keep only $ 222,000 of the award because the act limits damages to $ 200,000.

Defense attorneys argued that the company tried to help <Wessel> and only fired him after he could no longer perform the work. They plan to appeal the verdict.

<Wessel> was diagnosed with lung cancer in 1987. Doctors told him last April that he had brain tumors and gave him six months to a year to live.

MEMORANDUM

Date: May 23, 1994
To: Senator Dole
From: Alec Vachon
Re: Floor Statement/Clinton, ADA, and Rejection of Judge Arnold as a Supreme Court Nominee

* As I wrote you Friday, Clinton rejected Judge Richard Arnold because of a history of cancer -- wanting someone who might last 15-20 years on the Court. Clinton is also reported as having spoken directly with Arnold's doctors.

* Whether cancer was Clinton's real reason for rejecting Arnold is debateable -- press reports indicate Arnold had problems on both the left and right. Nonetheless, cancer is Clinton's stated reason (although it would have been better if Clinton had said nothing, and simply commended Breyer).

* Although a clear violation of the spirit of both ADA and the Rehab Act, Clinton's action did not break either law. The 1991 Civil Rights Act exempts Presidential appointments requiring Senate confirmation from civil rights laws, including ADA and the Rehab Act.

* But there is a double standard -- one for business, state & local government, and most Federal jobs -- and another for "important" Presidential nominations. Although Clinton's reason is understandable, longevity in making employment decisions is not acceptable for businesses. Indeed, the first EEOC ADA lawsuit was against a business on behalf of an individual with less than a year to live.

* Attached is a floor statement that reflects both sides of this issue -- and would begin to build a record if changes to ADA are eventually needed. Normally, I advise staying away from even implied criticism of ADA -- disability groups are volatile, and are looking for a prominent member of Congress to attack as soft on ADA, if only for fundraising. However, the President makes excellent cover.

* DO YOU WANT TO:

_____ READ STATEMENT ON FLOOR.

_____ INSERT IN RECORD.

_____ HOLD OFF.

cc: D. Shea

SENATOR BOB DOLE
FLOOR STATEMENT
PRESIDENT CLINTON, JUDGE RICHARD ARNOLD, AND ADA

MR. PRESIDENT, ON MAY 13TH PRESIDENT CLINTON ANNOUNCED HIS NOMINATION OF JUDGE STEPHEN BREYER TO THE SUPREME COURT. IN HIS MAKING THIS ANNOUNCEMENT, THE PRESIDENT NOT ONLY DESCRIBED JUDGE BREYER'S MANY EXCELLENT QUALITIES, BUT ALSO EXPLAINED WHY HE REJECTED JUDGE RICHARD ARNOLD, CHIEF JUDGE OF THE EIGHTH CIRCUIT COURT OF APPEALS.

THE PRESIDENT SAID, AND I QUOTE, "JUDGE RICHARD ARNOLD . . . HAS BEEN A FRIEND OF MINE FOR A LONG TIME. . . . BUT, AS HAS BEEN WIDELY REPORTED IN THE PRESS, [HE] HAS CANCER AND IS NOW UNDERGOING A COURSE OF TREATMENT."

PRESIDENT CLINTON'S REMARKS HAVE BEEN WIDELY CRITICIZED. THE ORLANDO SENTINEL SUGGESTED THE PRESIDENT'S MEDICAL INQUIRIES MAY BE "UNETHICAL." A USA TODAY ARTICLE FOUND HIS WORDS A SHARP REMINDER OF THE STIGMA FACED BY THE NATION'S 8-MILLION CANCER SURVIVORS. FRANK RICH, WRITING IN THE NEW YORK TIMES, SAW ARNOLD'S CANCER AS UNPARALLELED REAL WORLD EXPERIENCE, EXACTLY WHAT THE PRESIDENT HAD SAID HE WANTED IN A SUPREME COURT NOMINEE. AND THE WALL STREET JOURNAL CORRECTLY NOTED THE PRESIDENT'S ACTION WOULD BE ILLEGAL UNDER THE AMERICANS WITH DISABILITIES ACT.

MR. PRESIDENT, I ASK UNANIMOUS CONSENT THAT THESE FOUR ARTICLES BE PRINTED IN THE RECORD.

ALTHOUGH THE PRESIDENT DID VIOLATE THE SPIRIT OF ADA, HE DID NOT BREAK THE LAW. THE CIVIL RIGHTS ACT OF 1991 SPECIFICALLY EXEMPTS PRESIDENTIAL APPOINTEES SUBJECT TO SENATE CONFIRMATION FROM THE NATION'S CIVIL RIGHTS LAWS, INCLUDING ADA.

IN MY VIEW, THIS IS A DOUBLE STANDARD -- ONE FOR TOP PRESIDENTIAL APPPOINTMENTS, ANOTHER FOR EVERYBODY ELSE. INDEED, THE FIRST LAWSUIT BROUGHT BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION UNDER ADA WAS ON BEHALF OF AN INDIVIDUAL WITH BRAIN CANCER WHO WAS EXPECTED TO LIVE LESS THAN A YEAR.

MR. PRESIDENT, THE AMERICAN PEOPLE DO NOT LIKE DOUBLE STANDARDS. THEY ARE UNFAIR, AND THEY CAN DISCREDIT OUR BEST INTENTIONS. IF WE HAVE RULES, THEY SHOULD APPLY TO EVERYONE.

BUT THIS CONTROVERSY CAN SERVE A USEFUL PURPOSE. IF WE ARE TO MAKE ADA WORK -- AND I THINK WE ARE ALL COMMITTED TO DOING THAT -- WE MUST LOOK CANDIDLY AT THE TOUGH ISSUES. THE PRESIDENT'S UNFORTUNATE REMARKS ARE AN OCCASION TO DO JUST THAT.