AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 10: The Reagan Era – Judicial Powers and Constitutional Authority/Judicial Structure and Selection

*Ron Klain***, Memo for Conversation between Bill Clinton and Stephen Breyer** (1993)[[1]](#footnote-1)

*In the summer of 1993, Byron White, an appointee of President John F. Kennedy, retired from the U.S. Supreme Court. President Bill Clinton moved quickly to nominate Ruth Bader Ginsburg for the vacancy. Judge Stephen Breyer, however, was on the president’s short-list for a Supreme Court vacancy. Breyer had been placed on the Court of Appeals for the First Circuit by Jimmy Carter, and like Ginsburg was expected to be an easy case for confirmation by the Democratic-controlled Senate to the U.S. Supreme Court. Although Breyer was not nominated for the White vacancy, he was nominated the next year when Harry Blackmun retired from the Court.*

*Associate Counsel to the President Ron Klain took the lead in the process of selecting a nominee for the Court and moving them through confirmation process. In June 1993, Klain wrote a memo to Bernie Nussbaum, who was then serving as White House Counsel. The memo was designed to provide guidelines to the president for his one-on-one meeting at the White House with Judge Breyer. The memo provides insights into how modern presidents have generally understood what they can – and cannot – appropriately ask a potential nominee to the Supreme Court. Notably, the memo warned the president not to ask Breyer any questions about specific legal issues or cases. Both the president’s questions and the judge’s expected answers were scripted in advance by the White House aides.*

Here are the areas that I would encourage the President cover – or to avoid – in his discussion with Judge Breyer.

Questions for Judge Breyer

I think the President can put the following questions to Judge Breyer, and expect these answers:

* What guides your overall constitutional philosophy? Breyer will likely speak of "human dignity" and a need to take a non-literal view of the Constitution's phrases.
* How do you define the scope of liberty in the Constitution? Breyer will talk about the need to balance the text's language with an expansive view of liberty.
* Why have you devoted your career to the dry subject of economic regulation? Breyer will discuss how these regulatory issues touch people's lives.
* Some say that your writings suggest an over-emphasis on economics: putting a cost on lives, for example. Breyer will talk about the limits of economic analysis, and the need to make hard choices among safety options.
* How does he respond to the criticism that his opinions are "bloodless"? Breyer will discuss he admiration for John Minor Wisdom, who had a similar writing style.
* How do you deal with your Republican colleagues on the bench? Breyer will talk about how he goes about persuading them to join him in cases.
* You are the architect of the Sentencing Guidelines. How do you defend them from criticism? Breyer will speak of how he "did good" by fighting "worse" versions of the Guidelines.
* What are the most significant Supreme Court decisions in your lifetime? Breyer will cite a variety of cases involving civil rights and personal liberties.
* Who are the great Justices in history? Breyer will cite a variety of Justices, past and present.

Areas Not to be Raised

I would discourage the President from questioning Judge Breyer on specific legal issues or specific cases. These would obviously include questions like:

* What is your view on the constitutionality of the death penalty?
* Do you agree with *Bakke v. Regents of California*, or *Roe v. Wade*?
* What test would you use to determine when an Establishment Clause violation has occurred?
* How do you define the "right to privacy?"
* When can race-conscious remedies be used under the civil rights laws?

While we can debate whether these questions are proper or not, they would indisputably be controversial, and I think, imprudent.

1. Excerpt taken from Ron Klain, Memorandum for Bernie Nussbaum, re: Areas of Discussion for the President (June 11, 1993), Clinton Library. [↑](#footnote-ref-1)