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MR. JUSTICE BRENNAN AND HIS LEGAL PHILOSOPHY

*Francis P. McQuade and Alexander T. Kardos**

On September 29, 1956, William Joseph Brennan, Junior, associate justice of the New Jersey Supreme Court, received an apparently casual telephone call from Attorney General Herbert Brownell, Jr., inviting him to come to Washington, D.C., the following day. The reason for the invitation was not disclosed at that time. The next day, a rather surprised Mr. Brennan was informed that he was President Eisenhower's choice to be Associate Justice of the United States Supreme Court. His acceptance was immediate, and he took his oath of office on October 16, 1956.

I. THE EARLY YEARS

William J. Brennan, Jr., was born in Newark, New Jersey, on April 25, 1906, one of eight children of Irish-Catholic immigrants. His father had come from County Roscommon, Ireland, as a youth of twenty in 1893, and had worked as a coal shoveler in a brewery and as a metal polisher. Early in his life, the senior Brennan came into contact with the rapidly growing organized labor movement and regarded it with a sincere sympathy which

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ultimately developed into a life-long interest. He was business manager of the union local and served as delegate to the Essex County Trades and Labor Council. His reputation for honesty and integrity grew. In 1916 he was appointed to the Newark police board by Republican Mayor Raymond, an appointment all the more unusual because the elder Brennan, a staunch Democrat, had advised Republican Mayor Raymond that he had voted against him in the most recent election. His fairness and sense of justice brought him popular acclaim; and in 1917, running as a representative of labor, he was elected a Newark City Commissioner and Director of Public Safety. His office directed the police, fire, and license departments, normally tempting fields of public corruption and graft. His strict attention to duty and his utter hatred of dishonesty and graft brought him public gratitude. He was re-elected three times, serving the public to the day he died. This innate sense of justice and fair play was the younger Brennan's birthright and legacy.

As a boy, William, Jr., quickly learned the necessity for honesty and integrity and the value of discipline and hard work. In Newark, he made change for passengers waiting for trolley cars, worked as a "grease monkey" in a garage and gasoline filling station, and delivered milk in a horse-drawn wagon. He worked at various odd jobs before and after school, on weekends, and during the summer. His schooling and education, however, were not neglected. Indeed, they were emphasized by the elder Brennan. William, Jr., attended parochial school for three or four years, then public school in Newark, graduating from Barringer High School with an excellent record. He attended the Wharton School of Finance and Commerce of the University of Pennsylvania graduating with honors and a degree in Economics in 1928.

That same year he married Marjorie Leonard of East Orange, New Jersey, and began studies at Harvard Law School. Financial difficulties were partially met by Mrs. Brennan's remaining at home in New Jersey and working as a secretary and proofreader on a local newspaper. The Brennans' financial difficulties increased in 1930, when the elder Brennan died, leaving only a very small estate. However, a scholarship was obtained from the alumni foundation at Harvard, primarily on the basis of Mr. Brennan's fine scholastic record and his genuine need for financial assistance. One year later, in 1931, Mr. Brennan graduated high in his law class.

II. EARLY LAW PRACTICE AND MILITARY SERVICE

Upon graduation from law school, Mr. Brennan became associated with the law firm of Pitney, Hardin and Skinner, a leading Newark firm, where he had worked during a prior summer vacation. He was a law clerk there for the required period and was admitted to the New Jersey bar as an attorney in 1932 and as a counsellor in 1935. He rose rapidly, gaining considerable experience in corporate law and in management-labor problems and was made a partner in 1937. All appeared serene; there were then two healthy children in Brennan's household. Mr. Brennan's keen analytical mind, awesome discipline, and prodigious capacity for sustained work were winning him a fine reputation in the legal profession.

World War II, however, brought about an abrupt and temporary digression from Mr. Brennan's schedule. He entered the Army in July 1942, and was assigned to legal work in the Ordnance Department, where his knowledge and experience in labor law proved of great help. He was awarded the Legion of Merit for his contribution to the Army and Air Force Procurement programs; and, in September 1945, he was separated from the armed services, a full colonel.

III. THE JUDGE

He returned to private law practice in Newark with his original firm, now called Pitney, Hardin, Ward and Brennan, and resumed the comparatively even tenor of private life. However, his abilities and potentialities were not long unnoticed. In January 1949, Republican Governor Driscoll of New Jersey appointed him a Judge in the Law Division of the New Jersey Superior Court; and in September 1950, he was moved up to the Appellate Division of the New Jersey Superior Court, where he served until March 1952. At that time he was appointed by Republican Governor Driscoll to the New Jersey Supreme Court, the highest court in the State.

During this period of Justice Brennan's career, he evidenced a notable interest in the movement for judicial reform in New Jersey and in support of the major changes brought about by the adoption of the new state constitution in 1947. He ardently supported the streamlined and subsequently highly successful procedural changes in the New Jersey judiciary whereby docket congestion was lessened and delays in the administration of

justice were minimized. In Mr. Brennan's own opinion,¹ his interest in court reform and his advocacy of more enlightened trial procedures to avoid court congestion were probable factors in his appointment to the United States Supreme Court. In any event, when Mr. Brennan took his seat on the bench of the United States Supreme Court on October 16, 1956, it had 457 cases pending on its regular docket and 288 cases pending on its miscellaneous docket. This constituted the heaviest Supreme Court docket in modern times.

Public Reaction

Efforts are naturally made to classify and categorize a newly appointed judge as to his political leanings, school of jurisprudence, social philosophy, economic theories, governmental policies, and other characteristics. Justice Brennan was promptly labelled "a moderate liberal and a strict judge,"² "a foe of the law's delays,"³ "a defender of civil rights,"⁴ and a host of other names, almost all of them laudatory.⁵

Arthur Krock expressed his opinion of the new Justice thus:

In William Joseph Brennan, Jr., of Newark, N.J., the President found a nominee for membership on the Supreme Court with an unusual number of qualifications for the office.

Foremost among these, with respect to the judicial function, are that the new appointee is an experienced judge whose work has been generally applauded by the bar, was an outstanding trial lawyer, and is only fifty years old.⁶

Continuing his article, Mr. Krock relayed the following statements, which he acquired through personal interviews. Governor Meyner said of the new Justice:

He is very able indeed . . . a sound liberal of the highest personal character and with great intellectual drive [B]ut I suspect his opinions will not be quite as "middle-of-the-road" as some Republicans seem to think.

And Bernard Shanley was equally enthusiastic in his praise.

He is extraordinarily brilliant; he has a tremendous personality; and he is genuine from top to toe — a quality that stands out in him as it does in the President.⁷

¹ N.Y. Times, Oct. 1, 1956, p. 19, col. 3.

² *Id.*, Sept. 30, 1956, § 1 p. 76, col. 6.

³ *Id.*, Oct. 2, 1956, p. 34, col. 5.

⁴ *Id.*, Oct. 7, 1956, § 4 p. 8, col. 5.

⁵ For sympathetic presentation of Mr. Justice Brennan's capacities and accomplishments, see Jack Alexander, *Mr. Justice from New Jersey*, Saturday Evening Post, Sept. 28, 1957, p. 25. This article and the reports in the N.Y. Times form the basis of the biographical sketch.

⁶ N.Y. Times, Oct. 2, 1956, p. 34, col. 5.

⁷ *Ibid.*

An editorial in the New York Times referred to the newly nominated Associate Justice:

Justice Brennan, a man of high repute and recognized achievement, may go to his new post with the knowledge that he owes no service to anything but his own conscience. His record, even his comparative obscurity, promises well. He will take his seat, two weeks hence, amid general goodwill, and when the Senate meets again will be confirmed, we imagine, without controversy.⁸

Life magazine, in an article, *A Fine Judge Ready for His Biggest Job*, indicated complete approval of the appointment.

At fifty, Justice Brennan is the Supreme Court's youngest member and he brings to the Court one of the keenest, quickest judicial minds in the country. The opinions he has delivered in his seven years on the New Jersey bench are clear, forceful and middle-of-the-road . . . Brennan has been America's hardest working crusader for speedier trial procedure, having helped institute a pre-trial conference system that reduced his state's huge backlog of court cases to the point where it is now a national model.⁹

Time magazine described Justice Brennan as "hard working, respected by lawyers, who have often found themselves discomfited because [he] 'sometimes catches you off-guard.'" Time went on to say that, "His opinions are clear, thoughtful, moderate; his mind is quick and sharp."¹⁰

The U. S. News and World Report also praised the appointment in an article, *An Experienced Judge for the Supreme Court*:

William Joseph Brennan, Jr., has compiled a record — both as a lawyer and as a judge — of solid rather than spectacular achievement. As an Associate Justice of the New Jersey Supreme Court, he has been credited with combining painstaking preparation of opinions with independent judgment. Mr. Brennan has also given much attention to the problem of speeding up court procedure.

In some decisions handed down by the New Jersey Supreme Court, Justice Brennan has been outspoken in defending the rights of citizens. As a lawyer, he advocated compulsory arbitration in strikes against public utilities — a procedure that since has been written into New Jersey law.

A close study of the career of the new appointee to the Court indicates that he cannot be counted on to join either a "liberal" or "conservative" bloc on the nation's highest tribunal.

One Administration official who has known Justice Brennan for many years concedes that he is "a man with a lot of progres-

⁸ *Id.*, Oct. 1, 1956, p. 26, col. 1.

⁹ *Life*, Oct. 29, 1956, p. 116.

¹⁰ *Time*, Oct. 8, 1956, p. 25.

sive ideas." But he adds: "I would say that Mr. Brennan's beliefs are very close to President Eisenhower's on many issues. I would call him a middle-of-the-roader."¹¹

The only voice raised in public objection was that of the late Senator Joseph R. McCarthy, of Wisconsin, whose objection to his appointment was based upon two speeches made while Mr. Brennan was still a New Jersey justice.¹²

IV. HIS LEGAL PHILOSOPHY

Undoubtedly, the most accurate source of the true nature of Mr. Justice Brennan's legal characteristics and jurisprudential leanings are: first, his decisions in the New Jersey courts; second, his written statements and public addresses; and third, his decisions as Associate Justice of the United States Supreme Court. These sources indicate his basic legal premises, outline his fundamental juridical principles, and provide for a general prediction of his approach to future questions. Obviously, only the highlights can be presented here, but the following selections should prove sufficient to provide a fair and comprehensive view of his legal outlook on both substantive rights and adjective remedies. They will be arranged under appropriate headings, giving first his decisions as a New Jersey judge and then, at greater length, the important decisions he has participated in thus far as a Supreme Court Justice.

A. SUBSTANTIVE RIGHTS

1. *Civil Liberties*

Mr. Justice Brennan is widely known as "a defender of civil rights."¹³

(a) *Freedom of Religion.* He supports the classic separative concept and upholds the constitutional division between Church and State. The Nation said of him: "The new Justice is a Roman Catholic — the first to serve on the Court since Frank Murphy. On the New Jersey tribunal, he proved as rigorous as his co-religionist was in maintaining the constitutional barrier between Church and State."¹⁴ In *Tudor v. Board of Education*,¹⁵ he concurred in the opinion that distribution of Bibles by a

¹¹ U.S. News and World Report, Oct. 12, 1956, p. 70.

¹² *Hearings on Nomination of William J. Brennan, Jr. Before the Senate Committee on the Judiciary*, 85th Cong., 1st Sess. 5 (1957).

¹³ Huston, *Portrait of the Supreme Court*, N.Y. Times, Oct. 7, 1956 § 4, p. 8, col. 5 Huston adds: "Only time and his future conduct can tell whether he will become an addition to the group of so-called 'liberals.'" *Ibid.*

¹⁴ 183 Nation 299-300 (1956).

¹⁵ 14 N.J. 31, 100 A.2d 857 (1953).

Bible society through the public school system was violative of the religion clause of the first amendment as incorporated into the fourteenth amendment.

The question of a conflict of loyalties to his Church and to his office was raised in the Senate hearings on his appointment,¹⁶ and his honest and straightforward response brought praise from everyone.¹⁷

(b) *Freedom of Speech and Press*. His position on constitutional guarantees of free speech and freedom of the press follows generally accepted principles. The guarantees against prior restraint were extended to a burlesque show in *Adams Theatre Co. v. Keenan*,¹⁸ wherein Brennan stated:

The performance of a play or show, whether burlesque or other kind of theatre, is a form of speech and prima facie expression protected by the State and Federal Constitutions, and thus only in exceptional cases subject to previous restraint by means of withholding of a theatre license or otherwise.¹⁹

In *United Advertising Corp. v. Borough of Raritan*,²⁰ Brennan distinguished the guarantees as inapplicable to purely commercial advertising. He pointed out "that these guaranties impose no such restraint upon governmental regulation of purely commercial advertising."²¹ He concurred with the court in *City of Absecon v. Vettese*,²² which stated: "The free press is a bulwark of our democratic way of life and courts must be ever vigilant to curb insidious as well as candid attempts to restrict its vital public functions."²³

Probably his most controversial decision on freedom of expression was delivered in the obscenity cases of June 1957, *Roth v. United States and Alberts v. California*,²⁴ wherein he announced a new rule for determining violations of freedom of the press.

16 See note 12 *supra* at 32-34.

17 66 Commonweal 4 (1957).

18 12 N.J. 267, 96 A.2d 519 (1953).

19 *Id.* at 520.

20 11 N.J. 144, 93 A.2d 362 (1952).

21 *Id.* at 366.

22 13 N.J. 581, 100 A.2d 750 (1953).

23 *Id.* at 752.

24 354 U.S. 476 (1957). Chief Justice Warren, in a separate opinion, concurred in the result, expressing doubts as to the wisdom of the broad language used in the majority opinion. Justice Harlan concurred in *Alberts* but dissented in *Roth*, on the ground that the regulation of obscenity by federal statute was beyond federal power. Justice Douglas, joined by Justice Black, dissented in both cases, stating that both the federal and state statutes were violative of the constitutional guaranties of free speech and press.

In the *Roth* case, the petitioner was convicted of mailing obscene material in violation of the federal obscenity statute. In *Alberts* the appellant was convicted of keeping for sale obscene books and publishing an obscene advertisement of them, in violation of a state statute.

Emphasizing that historically the "unconditional phrasing of the First Amendment was not intended to protect every utterance,"²⁵ the Court upheld the convictions in an opinion written by Justice Brennan which declared that the "dispositive question is whether obscenity is utterance within the area of protected speech and press." It made no difference, the Court said, that the statutes in question punished incitation to impure sexual thoughts, not shown to be related to any overt antisocial conduct, adding that the proper standard for defining obscenity as used in these cases is: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."²⁶ Lack of precision is not offensive to the requirements of due process, the Court observed, and this test gives "adequate warning of the conduct proscribed and mark[s] . . . boundaries sufficiently distinct for judges and juries fairly to administer the law" He gave no indication as to what "contemporary community standards" might encompass, thus leaving himself open to the possible charge of relativism in moral matters.

On the same day, in *Kingsley Books, Inc. v. Brown*,²⁷ Mr. Justice Brennan dissented from a decision which upheld a New York statute providing for the enjoining of sales of obscene books. Mr. Justice Frankfurter, speaking for the Court, held that the state was entitled to use all its "weapons in the armory of the law," including injunction, to protect its people against pornography. In the Court's view, there was no more restraint upon booksellers under the New York statute than under the type of statutes in the *Roth* and *Alberts* cases. Mr. Justice Brennan dissented on the ground that the New York statute made no provision for trial by jury in an action thereunder.

(c) *Refusal to Testify*. Mr. Justice Brennan's thoughts on the fifth amendment and those who would seek refuge behind it

²⁵ *Id.* at 483.

²⁶ *Id.* at 489.

²⁷ 354 U.S. 436 (1957). Chief Justice Warren dissented, stating that the statute imposed an invalid prior restraint. Justices Douglas and Black also dissented on the ground that it gave the state the power of a censor and violated the first amendment.

have been well expressed in several New Jersey decisions. In *State v. Frary*,²⁸ he stated:

The privilege of a witness against being compelled to incriminate himself, of ancient origin, is precious to free men as a restraint against high-handed and arrogant inquisitorial practices It has survived centuries of hot controversy periodically rekindled when there is popular impatience that its protection sometimes allows the guilty to escape. It has endured as a wise and necessary protection of the individual against arbitrary power; the price of occasional failures of justice under its protection is paid in the larger interest of the general personal security

It is a fallacy, however, to regard the right of a witness to remain mute when a criminating fact is inquired about as a fixed barrier to the search of the judicial process for truth. The barrier is up as to any question only when the witness himself chooses to put it up, but the court, and not the witness, is the ultimate arbiter whether the witness is entitled to the protection of the privilege.²⁹

In an earlier decision, *In re Pillo*,³⁰ Mr. Brennan stated that: "The federal decisions interpret and apply the privilege as incorporated in the Fifth Amendment to the Federal Constitution. That amendment does not apply to the several states." Additionally, "[T]he privilege against self-incrimination does not extend to protect the witness as to matters that may tend to incriminate him under the laws of another jurisdiction."³¹ And finally, "The privilege, by unanimous authority, does not protect against disclosure of facts in respect of which prosecution is barred by lapse of time."³² According to Daniel M. Berman,³³ apparently referring to the *Pillo* decision, Mr. Justice Brennan did not look too enthusiastically on refusal to testify:

In a 1952 case, for example, Brennan had to deal with the privilege against self-incrimination. His opinion did not display unbridled enthusiasm for the Fifth Amendment; he expressed the belief that it serves to limit only the federal government. He seemed to have no sympathy with Justice Black's theory that the Fourteenth Amendment makes the entire Bill of Rights apply to the States.

The Justice did have words of praise for the self-incrimination privilege, but they were merely disarming introductions to

28 19 N.J. 431, 117 A.2d 499 (1955).

29 *Id.* at 501-02.

30 11 N.J. 8, 93 A.2d 176 (1952).

31 *Id.* at 180.

32 *Id.* at 181.

33 183 Nation 298 (1956). See also Berman, *Mr. Justice Brennan; A Preliminary Appraisal*, 7 CATHOLIC U. L. REV. 1 (1958), which appeared subsequent to the completion of this article.

rulings that cut the heart out of it: The privilege protects answers which might represent "any link in the chain which is necessary to convict," but "it will not do . . . to permit a witness to escape his obligations to provide his testimony for the state upon extremely remote and speculative possibilities of danger." We should interpret the privileges liberally "in light of its wholesome service to the cause of personal freedom," but not without regard to the public interest.³⁴

*Cortese v. Cortese*³⁵ involved a paternity suit wherein the mother refused to permit a blood test to be taken either of herself or of her child on the grounds of an invasion of the right of personal privacy and an alleged unconstitutionality of a statute providing for such blood tests. Mr. Brennan overruled her objections and reversed a trial court which held for the mother. "The discovery of truth" is the criterion to be followed. Mr. Brennan stated:

[J]udicial discretion is not an arbitrary or personal discretion to be exercised according to the whim or caprice of the individual judge; it is a mere legal discretion and he should use the authority reposed in him when the essential requisites for its exercise exist and the justice of the course is apparent

"The citizen holds his citizenship subject to the duty to furnish to the courts, from time to time and within reasonable limits, such assistance as the courts may demand of him in their effort to ascertain truth in controversies before them."³⁶

However, in several headlined cases before the Supreme Court, Mr. Justice Brennan supported the right of witnesses who refused to give testimony to legislative investigating committees. In *Watkins v. United States*,³⁷ he joined a majority of the Justices to reverse a conviction of contempt of Congress for failure to answer questions posed by the House of Representatives' Committee on Un-American Activities. The petitioner had agreed to answer any questions about himself and about persons still members of the Communist Party, but he refused to answer questions about former members of the Party "who to my best knowledge and belief have long since removed themselves from the Communist movement." The latter questions, he contended, were not relevant to the work of the committee.

After tracing the history of legislative investigations and the power of the legislature to punish for contempt from medieval

³⁴ *Id.* at 299.

³⁵ 10 N.J. Super, 152, 76 A.2d 717 (1950).

³⁶ *Id.* at 720-21.

³⁷ 354 U.S. 178 (1957). Justice Clark dissented. Justices Burton and Whittaker did not participate in the decision.

times in England to the landmark cases of *Kilbourn v. Thompson*,³⁸ *McGrain v. Daugherty*,³⁹ and *Sinclair v. United States*,⁴⁰ the Court, in the opinion delivered by the Chief Justice, noted that legislative investigations since World War II were of a "new kind" which "involved a broad scale intrusion into the lives and affairs of private citizens."⁴¹

The Court quoted the resolution authorizing the creation of the Un-American Activities Committee, noting that it was extremely broad and in essence gave the committee power to define its own authority, a power so broad that it was impossible to ascertain whether any legislative purpose was served by the disclosures sought by the committee.⁴² The statute under which the petitioner was convicted imposed penalties for refusal to answer "any question pertinent to the question under inquiry."⁴³ The vice, in this, the Court concluded, was that under the broad language of the resolution creating the committee the petitioner could not be sure what the "question under inquiry" was.⁴⁴ In the Court's view, the language of the committee chairman at the hearings was equally vague,⁴⁵ and the petitioner thus was not accorded a fair opportunity to determine whether he was within his rights in refusing to answer.

Mr. Justice Clark, however, vigorously dissented, arguing that the powers of the Un-American Activities Committee were no broader than the powers of any other congressional committee⁴⁶ and that the petitioner was fully informed of the subject matter of the inquiry and had a complete understanding of the hearings.⁴⁷

In a similar case, this time dealing with the power of the State of New Hampshire to punish for contempt during a legislative investigation, Mr. Justice Brennan again supported the individual's right to refuse to testify. *Sweezy v. New Hampshire*.⁴⁸ The investigation was carried out under a New Hampshire statute which, in effect, makes the state's attorney general a one-man legislative committee to investigate subversive activi-

³⁸ 103 U.S. 168 (1881).

³⁹ 273 U.S. 135 (1927).

⁴⁰ 279 U.S. 263 (1929).

⁴¹ 354 U.S. 178, 195 (1957).

⁴² *Id.* at 201-04.

⁴³ 54 STAT. 942 (1938), 2 U.S.C. § 192 (1952).

⁴⁴ 354 U.S. at 209.

⁴⁵ *Id.* at 214.

⁴⁶ *Id.* at 220-22.

⁴⁷ *Id.* at 226.

⁴⁸ 354 U.S. 234 (1957). Justices Frankfurter and Harlan concurred in the result, but Justices Clark and Burton dissented.

ties. Sweezy appeared twice before the attorney general and was co-operative for the most part although he denied the constitutionality of many of the questions posed. He refused, however, to answer any questions about the Progressive Party or certain lectures he had given at the University of New Hampshire and was judged guilty of contempt, the state supreme court affirming.

The judgment of the United States Supreme Court, reversing, was announced by the Chief Justice, who also wrote an opinion in which Mr. Justice Brennan and two others joined. Although the appellant had not met the jurisdictional requirements of 28 U.S.C. § 1257(2),⁴⁹ the Court treated his appeal as a petition for writ of certiorari which it granted. This opinion discussed at length the constitutional rights of witnesses before legislative inquiries, stressing the point that the New Hampshire Supreme Court had conceded that the witness' rights under the first and fourteenth amendments had been abridged. However, the state court viewed these rights as outweighed in this case by the need of the legislative branch to be informed on a subject vital to the preservation of the government. The majority opinion of the United States Supreme Court, however, rested its reasons for reversal on the ground that there was nothing to indicate that the state legislature wanted the information that the attorney general had sought. Without such a legislative desire, "the use of the contempt power, notwithstanding the interference with constitutional rights, was not in accordance with the due process requirements of the Fourteenth Amendment."⁵⁰ In a firm dissent it was argued that the Court had no right to strike down state action unless the interest in protecting the witness' rights was greater than the state's interest in uncovering subversive activities, and the Court had made no such findings in this case.⁵¹

It is interesting to note in this connection that it was precisely on this point that the late Senator Joseph McCarthy opposed the confirmation of Mr. Brennan as Associate Justice. In his statement to the Senate Judiciary Committee he said:

On the basis of that part of his record that I am familiar with, I believe that Justice Brennan has demonstrated an underlying

⁴⁹ "§ 1257. State courts; appeal; certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

".....
"(2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

⁵⁰ 354 U.S. at 254-55.

⁵¹ *Id.* at 269.

hostility to congressional attempts to expose the Communist conspiracy.

I can only conclude that his decisions on the Supreme Court are likely to harm our efforts to fight communism.

I shall, therefore, vote against his confirmation unless he is able to persuade me today that I am not in possession of the true facts with respect to his views.

I shall want to know if it is true that Justice Brennan, in his public speeches, has referred to congressional investigations of communism, for example, as "Salem witch hunts," and "inquisitions," and has accused congressional investigating committees of "barbarism."

I have evidence that he has done so. And such views, in my opinion, reflect an utterly superficial understanding — putting it mildly — of the Communist threat to our liberties, as well as an underlying contempt for the Congress of the United States.⁵²

In response to Senator McCarthy's direct question whether he approved of congressional investigations and exposures of the Communist conspiracy, Mr. Justice Brennan replied unequivocally and spiritedly:

Not only do I approve, Senator, but personally I cannot think of a more vital function of the Congress than the investigatory function of its committees, and I can't think of a more important or vital objective of any committee investigation than that of rooting out subversives in Government.⁵³

But after prolonged discussion between the two, based upon two of the Justice's speeches, the Senator remained "unconvinced still." In a letter to the committee chairman, he stated:

[I] am convinced, after yesterday's session, that there is no further doubt about the accuracy of my initial conclusion. I believe that the written record of this committee now confirms that Justice Brennan harbors an underlying hostility to congressional attempts to investigate and expose the communist conspiracy.⁵⁴

On the other hand, one of the regular members of the Senate Judiciary Committee, Senator Arthur V. Watkins, who sat throughout the questioning session, confidently reassured Mr.

⁵² *Hearings on Nomination of William J. Brennan, Jr. Before the Senate Committee on the Judiciary*, 85th Cong., 1st Sess., 5 (1957). Another question of the Senator's directed to Justice Brennan was whether he considered Communism merely a political party or a criminal conspiracy to overthrow the Government of the United States. *Id.* at 17-22. Mr. Justice Brennan took no part in *Yates v. United States*, 354 U.S. 298 (1957) which reversed the conviction of fourteen West Coast Communists for conspiracy to violate the Smith Act. Justice Harlan's majority view held that the Smith Act does not prohibit the teaching and advocacy of forcible overthrow of the Government as an abstract principle.

⁵³ *Hearings on Nomination of William J. Brennan, Jr. Before the Senate Committee on the Judiciary*, 85th Cong., 1st Sess. 17 (1957).

⁵⁴ *Id.* at 34.

Justice Brennan:

[I] have every confidence that you do have respect for the power of the Congress to investigate, that you have cast no reflection whatever on that power.

You may have said something that would indicate you were not always in agreement with the way we did our job. A good many Americans have that same point of view and I don't disagree with them, although I am one of the investigators as a member of the Internal Security Subcommittee.⁵⁵

(d) *Right to Inspect Records.* Mr. Justice Brennan's opinion on the rights of private citizens to gain access to public records was stated in *Casey v. MacPhails*.⁵⁶

The general principle of the right of any citizen and taxpayer to inspect and have access to public records when such inspection and access can be had without undue interference with the conduct of the public business is qualified not only by the right in the judicial discretion of the trial judge to deny the inspection or access when the motive is improper but also is qualified by any enactments of the legislature which may bear upon his right of use of the information.⁵⁷

In a later case Justice Brennan stated that this right of access should be even stronger in a criminal case. In *State v. Tune*,⁵⁸ involving a prosecution for murder wherein the accused was denied access to his own confession, Mr. Brennan, in a self-convinced dissent, stated:

It shocks my sense of justice that in these circumstances counsel for an accused facing a possible death sentence should be denied inspection of his confession which, were this a civil case, could not be denied. . . .

"
"To shackle counsel so that they cannot effectively seek out the truth and afford the accused the representation which is not his privilege but his absolute right seriously imperils our bedrock presumption of innocence."⁵⁹

This right to inspect records was pushed to the ultimate in Justice Brennan's opinion in *Jencks v. United States*.⁶⁰ Underlying this decision was the vexing problem of the Government's reluctance to make public certain confidential information im-

⁵⁵ *Id.* at 39.

⁵⁶ 2 N.J. Super. 619, 65 A.2d 657 (1949).

⁵⁷ *Id.* at 660.

⁵⁸ 13 N.J. 203, 98 A.2d 881 (1953).

⁵⁹ *Id.* at 896-97.

⁶⁰ 353 U.S. 657 (1957). Justice Frankfurter joined the opinion of the Court but noted that questions relating to instructions to the jury should have been dealt with. Justice Burton, joined by Justice Harlan, concurred in the result but argued the Court went too far. Documents should be produced for the trial court to determine relevancy as well as applicability of privilege claimed by the Government.

portant to national security in a criminal prosecution based on such information. Jencks was prosecuted for filing an allegedly false non-Communist affidavit required by the Taft-Hartley Act; the issue was whether, as a union officer, he swore falsely when he executed an affidavit stating that he was not a member of the Communist Party. The Government's case rested on circumstantial evidence and consisted principally of the testimony of two former Communist Party members, Matusow and Ford, who were undercover agents for the F.B.I. Jencks moved for an order directing an inspection of the reports Ford and Matusow made to the F.B.I. concerning Communist activities. The Government opposed the motion on the sole ground that a preliminary foundation was not laid to show inconsistency between the contents of the reports and the testimony of the witnesses at the trial. The court of appeals affirmed the conviction, "primarily upon that ground," to use the later language of the Supreme Court.

In the Supreme Court decision, delivered by Mr. Justice Brennan, the Court reversed, declaring that it was not necessary to show a conflict between the reports and the testimony. "[A] sufficient foundation was established by the testimony of Matusow and Ford that their reports were of the events and activities related in their testimony."⁶¹ The Court noted that "impeachment of the testimony [of Ford and Matusow] was singularly important"⁶² to Jencks.

Justice Brennan's opinion went on to say: "The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved."⁶³ And he added rather forbiddingly:

We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial.⁶⁴

This overruling of the trial judge's discretion to determine relevancy and Government privilege as to state secrets and the identity of confidential informants provoked Mr. Justice Clark, dissenting, to warn:

Unless the Congress changes the rule announced by the

⁶¹ *Id.* at 666.

⁶² *Id.* at 667.

⁶³ *Id.* at 669.

⁶⁴ *Id.* at 672.

Court today, those intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman Holiday for rummaging through confidential information as well as vital national secrets.⁶⁵

Perhaps it was the *Jencks* case, more than any other, which prompted Frank B. Ober to conclude in a recent study of the general trend of civil rights decisions under Chief Justice Warren who, with Justice Brennan and others, has joined Justices Black and Douglas to make a new majority:

[T]he Court has once again extended the Bill of Rights to a point where it presents great obstacles to the fight against Communism which has been carried on by the Executive, Congress and the states. True, some of its decisions may be distinguished from the decisions of the Vinson Court on narrow grounds. But the net effect of such decisions seems to subordinate the national security to an extreme extension of civil liberties through the due process clause and other provisions of the Bill of Rights.⁶⁶

(e) *Due Process*. Mr. Justice Brennan has always determinedly struck down every effort to encroach even the slightest degree upon the fundamental rights of all persons to due process and a fair trial. In *Palestroni v. Jacobs*,⁶⁷ a trial judge had innocently furnished a dictionary to jurors, at their request, while they were deliberating. This was done without prior notice to the defendant or his counsel. Brennan held this to be prejudicial error, stating:

The irregularity of the privy communication of the judge with the jury must be deprecated in the strongest terms Such communication borders perilously close in every case on an infringement upon the litigant's basic right to due process and, in particular circumstances, may in fact invade that right

Moreover, the trial of a law suit is public business usually to be conducted openly for all to see.⁶⁸

However, Mr. Brennan would not tolerate or accept objections or appeals for reversals based on inconsequential grounds or trivial reasons. In *Ex Parte Graham*,⁶⁹ where the defendant had been fairly tried and had been convicted of incest but was absent from the court when the verdict was returned, and had the conviction reversed on that technical ground, Mr. Brennan

⁶⁵ *Id.* at 681-82. Congress did promptly in some measure reverse the *Jencks* case by enacting 71 STAT. 595, 18 U.S.C.A. § 3500 (Supp. 1957) to keep the F.B.I. files confidential.

⁶⁶ Ober, *Communism and the Supreme Court*, 44 A.B.A.J. 35, 89 (Jan. 1958).

⁶⁷ 10 N.J. Super. 266, 77 A.2d 183 (1950).

⁶⁸ *Id.* at 184.

⁶⁹ 13 N.J. Super. 449, 80 A.2d 641 (1951).

affirmed the conviction. This was not a case of violation of the defendant's constitutional rights to confront witnesses or to make a defense on the merits. Mr. Brennan stated:

And while, when testimony is presented or the jury is instructed, the accused has the right to be present because he is entitled under the Constitution to confront the witnesses against him and to make his defense upon the merits with the assistance of counsel, . . . such reasons for his presence do not obtain after the jury has concluded its deliberations, and those constitutional provisions cannot be construed as requiring his presence when the verdict is reported.⁷⁰

Mr. Justice Brennan was a pivotal figure in the rehearing of *Reid v. Covert*⁷¹ which reversed two decisions upholding the court-martialing of two servicemen's wives accused of murdering their husbands.⁷² He, together with Mr. Justice Harlan, who had previously voted with the majority, joined the dissenters from the previous year's decisions. On this rehearing, the Court ruled that civilian dependents of American military personnel stationed abroad are not subject to trial by court martial. The opinion of the new majority held unconstitutional Article 2(11) of the Uniform Code of Military Justice, rejecting the idea that "when the United States acts against citizens abroad it can do so free of the Bill of Rights."⁷³ The Government had contended that Article 2(11) could be sustained by legislation "necessary and proper" to carry out the United States' obligations under the Status of Forces Agreement with Great Britain and a similar agreement with Japan. The opinion replied that, "The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any branch of Government, which is free from the restraints of the Constitution."⁷⁴

In two other cases before the Supreme Court involving military justice, Mr. Justice Brennan wrote dissenting opinions in

⁷⁰ *Id.* at 643.

⁷¹ 354 U.S. 1 (1957). Six members of the Court agreed that civilian dependents of members of the Armed Forces overseas could not constitutionally be tried by a court martial in times of peace for capital offences committed abroad. Justices Frankfurter and Harlan, in their opinions, limited their holdings to capital cases, while Chief Justice Warren and Justices Black, Douglas, and Brennan, in an opinion by Justice Black, expressed the broad view that the military trial of civilians is inconsistent with the Constitution.

⁷² *Kinsella v. Krueger*, 351 U.S. 470 (1956) and *Reid v. Covert*, 351 U.S. 487 (1956). Five members of the Court held Article 2 (11) of the UCMJ constitutional and that consequently the court martial had jurisdiction. Chief Justice Warren and Justices Black and Douglas dissented. Justice Frankfurter reserved decision.

⁷³ 354 U.S. at 5.

⁷⁴ *Id.* at 16.

which the Chief Justice, Mr. Justice Black, and Mr. Justice Douglas joined, *Jackson v. Taylor*⁷⁵ and *Fowler v. Wilkinson*.⁷⁶ In both cases, involving the crimes of premeditated murder and attempted rape, the petitioners contended that the Army Board of Review had no power to impose an original sentence. The majority of the Court rejected the contention, holding that it exercised "no supervisory power over the courts which enforce [military] law. . . ." If there is injustice in the sentence imposed it is for the Executive to correct, for since the board of review has authority to act, we have no jurisdiction to interfere with the exercise of its discretion."⁷⁷ But Mr. Justice Brennan saw the action of the board of review as an original imposition of sentence. He quoted with approval Judge Major's opinion in the similar *DeCosta v. Madigan*.⁷⁸

Imposition of sentence by the proper authority is an essential step in administration of criminal justice. Here, under the statute, only the court-martial was authorized to take this step; it failed to do so.⁷⁹

Another example of Mr. Justice Brennan's conception of due process is found in *In re Groban*.⁸⁰ The question presented was whether the appellants had a constitutional right to the assistance of counsel when they appeared as witnesses at an investigation conducted by the Ohio State Fire Marshal. The Supreme Court affirmed the Ohio Court of Appeals refusal to grant petitioners habeas corpus after they had been found guilty of contempt for refusing to be sworn or testify without their counsel. To the majority of the Court, the petitioners' situation was considered analogous to that of witnesses before a grand jury. For these persons there is no constitutional right to the assistance of counsel. The Court pointed out that the Fire Marshal's investigation was not a criminal proceeding nor an adjudication. Mr. Justice Brennan joined the Chief Justice and Mr. Justice Douglas in a strong dissent delivered by Mr. Justice Black.

2. Management - Labor

With reference to strikes, collective bargaining, and seizure, Mr. Brennan's views were succinctly expressed in an address to the Essex County Bar Association on April 1, 1946.⁸¹

⁷⁵ 353 U.S. 569 (1957).

⁷⁶ 353 U.S. 583 (1957).

⁷⁷ *Id.* at 584.

⁷⁸ 223 F.2d 906 (7th Cir. 1955).

⁷⁹ 353 U.S. at 582.

⁸⁰ 352 U.S. 330 (1957).

⁸¹ 69 N.J.L.J. 145-48 (May 9, 1946).

In the first place, I do not believe that all strikes are bad. I think that an industrial democracy inevitably must have some of them when free collective bargaining doesn't resolve differences. Strikes, with the exception, perhaps, of stoppages in industries of vital public importance, such as utilities, are not too great a penalty for industrial freedom. The alternative is solution of disputes by government fiat and that is a dead end road destructive of the interests of management and worker alike.

Again in *International Ass'n of Machinists, Ind. v. Bergen Ave. Bus Owners' Ass'n*,⁸² Mr. Brennan stated: "The sanctions of seizure and compulsory arbitration and the attendant prohibitions of stoppages and strikes are invoked only when the paramount public interest is threatened by an actual or imminent interference. . . ."⁸³

However, in the address before the Essex County Bar Association, Mr. Brennan had words of caution for labor and warned of a tendency toward abuse of power:

I say to labor that, unless they will join those who sincerely respect and accept labor's important place in our future to effect correctives which will do no more than assure an equal balance and wipe out known abuses of labor's power, the forces which in fact would destroy free labor (and they include the left and the right), will win the day and labor, not management, will be the greater loser.⁸⁴

Mr. Brennan made a very prophetic statement in that address:

No reflective American can doubt that the time has arrived when we must have some remedial legislation which recognizes the changes of the last ten years in labor's influence in our national life. Its present day great strength and power and the evidences we see toward abuse of that power, cry out for some measure of control.⁸⁵

An interesting Supreme Court opinion in this regard found Mr. Justice Brennan on April 1, 1957, holding that members of an employers' bargaining association did not commit an unfair labor practice when, during negotiations for a new contract with the union, they temporarily locked out their employees as a defense against a union strike called against one of their members. *NLRB v. Truck Drivers Local Union*.⁸⁶ In reversing a court of appeals decision which found the employers guilty of an unfair labor practice on the ground that a lockout could be justified only if there were facts showing unusual economic

⁸² 3 N.J. Super. 558, 67 A.2d 362 (1949).

⁸³ *Id.* at 365.

⁸⁴ 69 N.J.L.J. 146 (May 9, 1946).

⁸⁵ *Ibid.*

⁸⁶ 353 U.S. 87 (1957).

hardship, Mr. Justice Brennan made it plain that the Court was deciding a narrow question: whether a temporary lockout is lawful as a defense to a union strike tactic that threatened the destruction of the employer's interest in bargaining on a group basis. He noted that preservation of the integrity of the multi-employer bargaining unit is a circumstance under which employers' may lawfully resort to the lockout as an economic weapon.

3. *Monopoly and "Bigness"*

Mr. Justice Brennan delivered a trade regulation decision of far-reaching consequence on June 3, 1957, when he ruled that the acquisition of the stock of a customer corporation may be just as violative of anti-trust laws as the acquisition of the stock of a competing corporation. *United States v. E. I. du Pont de Nemours & Co.*⁸⁷

The fundamental issue in the case was whether the "commanding position" which du Pont occupied as the supplier of automotive fabrics and finishes to General Motors Corporation was gained because of its competitive merit or through its ownership of twenty-three percent of General Motors' stock. The district court had dismissed the Government's complaint that du Pont had used its stock in General Motors "to channel General Motors' purchases to du Pont." In reversing, the Supreme Court's decision, based upon the Clayton Act, rejected the argument that the statute applied only to "horizontal" stock acquisitions, saying that the FTC's failure to apply the statute to "vertical" acquisitions was not a binding administrative interpretation. The statute applies, the Court declared, "whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce."

After a fascinating review of the history of the relationship between two of the country's largest corporations from the time of du Pont's original purchase of General Motors' stock in 1917, Mr. Justice Brennan concluded:

The fact that sticks out . . . is that the bulk of du Pont's production has always supplied the largest part of the requirements of one customer in the automobile industry connected to du Pont by a stock interest. The inference is overwhelming that

⁸⁷ 353 U.S. 586 (1957). Justice Brennan was joined in his opinion by the Chief Justice and Justices Black and Douglas. Justices Burton and Frankfurter dissented, holding the majority erred in applying the Clayton Act vertically. Justices Clark, Harlan, and Whitaker did not participate.

du Pont's commanding position was prompted by its stock interest and was not gained solely on competitive merit.⁸⁸

Fortune magazine, commenting on Mr. Justice Brennan's opinion, interpreted it as the expression of a philosophy of "Anti-Bigness:"

Justice Brennan's sweeping assertion of the government's right to outlaw intercorporate relationships of long standing — even where no monopoly exists and where none is alleged — immensely strengthened the Clayton Act. Indeed, it is difficult to see why the Justice Department should henceforth trouble to prove monopoly or restraint as required under the Sherman Act when it can achieve the same end simply by showing the *possibility* of restraint under the newly interpreted Clayton Act. As New Deal brain-truster Adolf Berle puts it, "The Supreme Court has made a new law."

The Brennan "law," stripped of its literary flights (e.g., "the fire kindled in 1917 continues to smolder"), is basically an anti-bigness law. Professor S. Chesterfield Oppenheim, co-chairman of the Attorney General's Committee to Study the Anti-Trust Laws, says: "The implications are far-reaching and seem to imply a philosophical issue: anti-bigness."⁸⁹

It is interesting to note, however, that in an earlier anti-trust case, *Radovich v. National Football League*,⁹⁰ wherein the Court extended the Sherman Anti-trust Act to organized football's standard player contract, Justice Brennan was not so radical, electing to abide by *stare decisis*. Radovich, a former guard for the Detroit Lions, brought suit for treble damages under the Sherman Act, alleging a conspiracy to monopolize commerce in professional football. The district court dismissed the complaint, relying on the 1922 decision in *Federal Baseball Club v. National League*⁹¹ and *Toolson v. New York Yankees*,⁹² decided in 1953, both dealing with professional baseball and holding it a sport and not a business. In reversing the district court, the Supreme Court made no effort to draw any distinction between professional baseball and professional football insofar as the Sherman Act is concerned, saying in effect that the decision in the *Federal Baseball* case was of dubious validity and would not be extended beyond the sport of baseball.

Mr. Justice Harlan, joined by Mr. Justice Brennan, dissented, saying that he could not distinguish baseball from football under the rationale of the preceding cases, and that unless Congress

⁸⁸ *Id.* at 605.

⁸⁹ *Fortune*, July 1957, pp. 91-92.

⁹⁰ 352 U.S. 445 (1957).

⁹¹ 259 U.S. 200 (1922).

⁹² 346 U.S. 356 (1953).

changed the law, the rule of the *Federal Baseball* case should be applied to professional football.

B. ADJECTIVE REMEDIES

1. *Congestion in the Courts*

A graduate of the Wharton School of Finance and Commerce of the University of Pennsylvania, with a degree in Economics, Mr. Justice Brennan has always approached legal problems with a direct business-like approach. In his article, *Does Business Have a Role in Improving Judicial Administration?*, the general formula is stated simply:

I have been preaching a long time to all who will listen that the intelligent application of the principles of business management . . . will cure most of the problems of organization, processes and management which are plaguing the courts of our land.

The business of our courts is very big business indeed. The stuff of that business is, of course, litigation. The volume of litigation is increasing enormously and, at least in the larger states, the courts, state and federal, are bogging down under the strain. Calendar congestion is a problem of such gravity at some places as to threaten an actual breakdown in the administration of justice itself. . . .

. . . In New Jersey there is no problem of calendar congestion in any court of the state. . . . How was it done? Simply by applying principles of business management. . . . Simply by abandoning an archaic system of 17 virtually autonomous courts and substituting an integrated court system operated much as a business corporation under rules of practice and administration devised by the Supreme Court as the Board of Directors and supervised by the Chief Justice as Executive Head, assisted by a presiding judge in each county functioning much like the branch head of any far-flung business.⁹³

Using New Jersey as a paradigm, five business-like procedures are proposed by Mr. Justice Brennan to guarantee the elimination of court congestion: first, simplified rules of practice; second, an administrative director of the court; third, weekly work reports by the judges; fourth, assignment of justices by the chief justice; and fifth, pretrial discovery and mandatory pre-trial conferences.

(a) *Rules of Practice*. The adoption by the state courts of the Federal Rules of Civil and Criminal Procedure is strongly recommended and their use extolled. In his article, *After Eight Years New Jersey Judicial Reform*, Mr. Justice Brennan observed:

⁹³ 28 PENN. B.A.Q. 238 (1957).

The Federal Rules represented the most comprehensive, the most flexible, the most modern existing set of rules to accomplish the objective of ruling the disposition of particular cases according to the merits and to prevent their disposition for mere procedural reasons. Those rules represented years and years of work of outstanding experts and reflected the thoughtful criticisms of individual lawyers throughout the country.⁹⁴

(b) *An Administrative Director of the Courts.* The provision for an Administrative Director of the Courts is also enthusiastically urged. In his article, *New Jersey Tackles Court Congestion*, Mr. Brennan briefly described the functions of such an Administrator:

He and his staff perform the task without which efficient administration would be impossible. His office keeps a perpetual inventory of the case load in all the courts and collects and interprets the other pertinent statistical data which show the trouble spots where action is necessary. He also is continually studying operations and developing procedures the better and more efficiently to process court business.⁹⁵

(c) *Weekly Reports by Judges.* The use of weekly reports by the judges to equalize work loads also helps to avoid court congestion and minimize legal delays. In an address delivered to the Chicago Bar Association, November 27, 1956, on *The Congested Calendar in Our Courts — The Problem Can be Solved*, Mr. Brennan stated:

Every judge of the state files a weekly report of his week's activities with the Administrative Director. That report shows his hours on the bench each day, the names of the causes handled during the day and the time given to each. . . . If the judge reserves decision in any matter, he notes the fact on his weekly report and on each subsequent weekly report until the matter is decided. If the office of the Administrative Director notes that the decision is reserved for an undue length of time, an inquiry of the judge for a reason usually results in its prompt disposition. This device has been a valuable contribution toward the goal of minimizing unnecessary delays in handing down of decisions made by the judge rather than by the jury.⁹⁶

(d) *The Assignment Power of the Chief Justice.* The assignment power of the Chief Justice of the state court is a most delicate and important duty towards the lessening of court congestion. This duty is defined by Mr. Brennan in his article, *New Jersey Tackles Court Congestion*, as:

[T]he power vested by the Constitution in the Chief Justice to assign judges of the Superior and County Courts wherever in

⁹⁴ 43 A.B.A.J. 499 (1957).

⁹⁵ 40 J. AM. JUD. Soc'y 45, 46 (1956).

⁹⁶ 38 CHI. B. REC. 103, 105 (1956).

the state the work load requires more judicial manpower to keep lists current and the judges can be spared from the counties where they are regularly assigned.⁹⁷

(e) *Pretrial Discovery and Mandatory Pretrial Conferences.* This is a feature in favor of which Mr. Brennan has freely confessed to having what is perhaps an arbitrary prejudice and almost a closed mind to any argument opposing the mandatory requirement. In his article on *Pretrial Procedure in New Jersey — a Demonstration*, Mr. Brennan stated:

The key for the attainment of that ideal is, we think, proper pretrial discovery and pretrial procedures. The curtain, which under our former practice effectively hid from each party the true nature of his adversary's claim or defense until the trial, is torn aside by the discovery and pretrial conference procedures to permit each party, as soon as the issue is joined, and long before the trial date, to probe virtually without limit into the case of the other side, both to strengthen his own and to learn the true nature and the strengths and weaknesses of the other's case. He obtains the names of the other party's witnesses under our procedures and may take depositions of those witnesses or propound interrogatories to them. The ideal of a determination in every case according to right and justice on the merits is obviously furthered by a procedure which exposes the whole case for both sides to see and evaluate before the date of ultimate decision.⁹⁸

A further discussion of pretrial procedures is noted in Mr. Brennan's article in *Federal Rules Decisions*,⁹⁹ wherein exact procedures and applications of pretrial rules are described in great particularity.

Mr. Brennan's basic philosophy regarding legal procedures is summed up in his dissent in *State v. Tune*:¹⁰⁰ "Discovery, basically a tool for truth, is the most effective device yet devised for the reduction of the aspect of the adversary element to a minimum."¹⁰¹ An example of the importance of the pretrial procedures is noted in *Evtush v. Hudson Bus Transportation Co.*,¹⁰² in which Mr. Brennan concurred in the reversal of a trial court decision wherein, during pretrial procedure, the defendants in answering plaintiff's interrogatory stated that they had only two witnesses. However, at trial they produced a third witness who was permitted to testify. The appellate court found this to be

97 40 J. AM. JUD. Soc'y 45 (1956).

98 28 N.Y.S.B. Bul. 442, 444 (1956).

99 17 F.R.D. 437 (1955).

100 13 N.J. 203, 229, 98 A.2d 881 (1953).

101 *Id.* at 895.

102 10 N.J. Super. 45, 76 A.2d 263 (1950).

prejudicial error. Discovery must be complete and the substantial rights of the parties must be protected.

2. *Legal Conduct*

(a) *In Court.* Justice Brennan's stern attitude on the proper conduct of attorneys and judges in court was shown in *Stroming v. Stroming*,¹⁰³ when he deplored certain activities in the lower court. In Judge Brennan's opinion even the judge was rebuked.

Many of the exchanges with counsel and the court's examination of appellant display the use by the judge of a regrettable acerbity of language and an impatience of attitude toward the appellant which should have been avoided despite their provocation in many instances by the unwarranted persistence of appellant's counsel in pressing his position after adverse rulings. It must be borne in mind that, in the effectual maintenance of a strong and independent court system, the appearance as well as the actuality of fair and impartial judicial administration must at all times be sought. . . . The judge and counsel, as well as officers of the court, share the responsibility for the faithful and meticulous performance of this high duty.¹⁰⁴

(b) *In Public.* His strict concern for the conduct of officers of the court extends even to their actions and demeanor in public. In *In re Howell*,¹⁰⁵ he specially concurred in a per curiam decision suspending an attorney from the practice of law for six months for having committed a simple assault and battery upon a newspaper editor. This was a violation of the Canons of Professional Ethics:

A lawyer who attempts to avenge real or fancied personal grievances by resort to a personal code offensive to the criminal laws is deficient in that degree of fair private and professional character that the public rightly expects of every member of the bar. His office is a very badge of respectability and his conduct sullies the office. He invites and merits stern and just condemnation. . . . His conduct perforce imperils not him alone but the honor and integrity of his profession which depends for its very existence upon public trust and confidence. . . . Discipline must be imposed not primarily to punish him but to give assurance to the public that the profession is deserving of its trust and confidence and will demand that all attorneys meticulously adhere to the high standards imposed by the profession upon itself.¹⁰⁶

3. *Legal Aid*

Mr. Brennan firmly believes in the establishment of an

103 12 N.J. Super. 217, 79 A.2d 492 (1951).

104 *Id.*, at 493.

105 10 N.J. 139, 89 A.2d 652 (1952).

106 *Id.* at 654.

organized Legal Aid by the community. As stated in his address at the 4th Annual Meeting of the Monmouth County Legal Aid Society:

The heart and core of the Legal Aid idea is simply stated. Its object is to make it impossible for any man, woman or child in the United States to be denied the equal protection of the laws simply because he or she is poor.

The very foundation upon which a democracy is founded and without which it must inevitably fail is that equal justice shall be available to all citizens.

When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of a free democracy is not imaginary, it is very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness.¹⁰⁷

4. *Construction and Interpretation of Laws*

His view of the construction and interpretation of statutes was well expressed in *MacPhail v. Board*,¹⁰⁸ in which he stated:

The canon of construction applicable here is that recently pronounced by the Supreme Court in *Hackensack Water Co. v. Ruta*, 3 N.J. 139, at page 147, 69 A.2d 321, 325 (1949) where it is said: "We gather the sense of a law from its object and the nature of the subject matter and the whole of the context and the acts in *pari materia*. The parts of the Statute are to be reviewed in relation to the whole and the motive which leads to the making of the law, and reconciled, if possible, to carry out the reasonably probable legislative policy. The general intention of the act controls the interpretation of its parts. . . ."¹⁰⁹

It is inspiring to note that in the course of the hearings on his nomination to the Supreme Court, Mr. Justice Brennan patiently endured a gruelling examination by the committee chairman, Senator James O. Eastland, with regard to his personal conception of the Constitution, its meaning and construction, as well as of his understanding of the value of legal precedents and extra-legal writings. In the face of obviously leading inquiries as to his general judicial philosophy, Mr. Justice Brennan presented with restraint his admirable notion of the difficult role of the judge in interpreting laws. Although at first glance the

¹⁰⁷ 15 LEGAL AID BRIEF CASE 75 (1956).

¹⁰⁸ 6 N.J. Super. 613, 70 A.2d 508 (1950).

¹⁰⁹ *Id.* at 511-12.

¹¹⁰ *Hearings on Nomination of William J. Brennan, Jr. Before the Senate Committee on the Judiciary*, 85th Cong., 1st Sess. 36-38 (1957).

following transcript¹¹⁰ of that penetrating interchange may seem overly long, it is eminently worth reviewing:

The Chairman. Do you agree that it is a sound rule of constitutional law in construing the Constitution of the United States that the Constitution and amendments thereto have a fixed and definite meaning when they are adopted?

Mr. Brennan. I don't know, Senator, that I could answer that question categorically. I don't think I can. The question of the application of the Constitution and . . . the laws of the Congress come before the Court in every instance in a particular fact setting and all I —

The Chairman. It is an elemental principle, is it not, of constitutional law that an amendment to the Constitution has a fixed, definite meaning when it is adopted and that that meaning does not change at a later time?

Mr. Brennan, Again, Senator, I don't think I could answer that categorically because the application of the Constitution and of its amendments as well indeed as the interpretation of laws always involve their application in respect to particular facts. . . .

“

The Chairman. Well, now, what are the rules then to determine the construction of an amendment to the Constitution of the United States or to the Constitution itself?

Mr. Brennan. Senator, as I have suggested there is a great body of precedent that deals with every amendment as well as with every provision. I don't suppose there is a single provision or clause indeed of the main Constitution or of any of its amendments which hasn't at one time or another been the subject of litigation in which certain determinations have been made. . . .

The Chairman. Then you think that the meaning of the Constitution should be determined by the expressed provisions and by the precedents?

Mr. Brennan. I think that is right, sir. . . . [O]f course precedents change too as you know, Senator.

The Chairman. Certainly. What is a precedent?

Mr. Brennan. . . . I don't think I can answer that. I mean I can answer that any prior determination of the Court is a precedent.

“

The Chairman. Do you think that a book written by some college professor could be a precedent?

“

Mr. Brennan. There again, Senator, there have been precedents for reliance upon many materials in the determinations of cases before us. That has been done of course throughout the history of the Court.

The Chairman. You don't think then that a college professor when the current theories of psychology and sociology change that that changes the Constitution of the United States; do you?

Mr. Brennan. Well, of course it doesn't change the Constitution of the United States, Senator, but —

The Chairman. It couldn't change the meaning of the Constitution.

Mr. Brennan. But what I am trying to make clear is in the search in any case for the right decision, necessarily judges . . . consult a lot of things which may bear upon the particular case that is before you for decision. I think that is the judicial process, not only in the United States Supreme Court, but in every court. Certainly it was the process in the court on which I sat in New Jersey.

The Chairman. Do you think the Constitution of the United States could have one meaning this week and another meaning next week?

Mr. Brennan. I think that puts it in a rather narrow compass, Senator. The application of the Constitution is a problem of applying to living matter, cases that come before us. Where the differences often arise is in, like fingerprints, it is hard to say that any two cases are always alike. Rarely does that ever happen. All I can say for myself, Senator, is that as I have tried to do ever since I have been a judge, that is with an approach of disinterestedness if I may phrase it that way, conscientiously to the best of my ability to apply the law whether the applicable law is constitutional, legislative, or common law or otherwise to the facts of the given case that is before us.

V. CONCLUSION

At the conclusion of the Senate hearings on Mr. Justice Brennan's appointment, Senator Alexander Wiley, of Wisconsin, said to the committee chairman and to Justice Brennan:

I was very favorably impressed with the Justice's statements yesterday. He realizes very apparently we are living in a changing world. The Court has definitely spoken about the resulting powers and we have exercised it for a number of years. The Constitution is a living institution, it is not meant to be a dead thing. . . .¹¹¹

At present, Justice Brennan's juristic philosophy cannot be absolutely categorized. His flexibility and complexity render each of his decisions forceful and exciting. When one attempts to reconcile his various decisions and thus piece out his philosophy inconsistencies appear. But this is no doubt due to his insistence upon giving paramount importance to the facts of each individual case. "The Law," Justice Brennan says, "is not an end in itself, nor does it provide ends; it is pre-eminently a means to serve what we think is right."¹¹²

¹¹¹ *Id.* at 38.

¹¹² N.Y. Times, Nov. 26, 1957, p. 17, col. 1.

What the Justice fails to add is that, while the law does not provide ends, the judges do. Apparently, he recognizes this to some degree, for he is a foe of legal "isolationism." He defends the use by lawyers and the courts of truth wherever it can be found, even in the findings of social sciences such as economics, sociology, and social psychology. In answer to those who have criticized the Supreme Court for citing non-legal works in its 1954 decision outlawing school segregation, Mr. Justice Brennan would say:

The mind of the layman unfamiliar with the judicial process supposes it to exist in the air, as a self-justifying and wholly independent process. The opposite is of course true, that judicial decision must be nourished by all the insights that scholarship can furnish and legal scholarship must in turn be nourished by all the disciplines that comprehend the totality of human experience.¹¹³

Mr. Justice Brennan would urge lawyers to "turn their minds to the knowledge and experience of the other disciplines, and in particular to those disciplines that investigate and report on the functioning and nature of society."¹¹⁴ However, a serious word of caution should be added. In the search to solve the great problems of our day, *viz.*, the reconciliation of freedom with responsibility, of the desires of the individual with the good of the community, of the interests of the nation with the requirements of international amity, and, in general, the balancing of personal ambition with the moral demands of human nature, a lawyer and certainly a jurist may not rely solely upon the *descriptive* social sciences, as helpful as they are. Rather, one must supplement his factual, positivistic knowledge with interpretative and principled learning. The *normative* social sciences, such as individual and social ethics, political and economic philosophy, and general moral philosophy, must be incorporated into legal learning or else there will be anarchic, disjointed, unrelated, unpredictable results. Mr. Justice Brennan undoubtedly recognizes this. When he actually accomplishes it, he will become, with his great legal potential, one of America's outstanding jurists.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*