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THE NOMINATION OF JUSTICE BRENNAN: EISENHOWER'S MISTAKE? A LOOK AT THE HISTORICAL RECORD

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The nomination of William J. Brennan, Jr. in 1956 to be an associate Justice of the U.S. Supreme Court occupies that familiar place in modern American legal history that is at once both a tangible event and a subject of considerable mythology and speculation.

The mythology centers on several issues about the selection of Justice Brennan, including how he came to the attention of the White House, whether his mentor—the eminent legal scholar Arthur Vanderbilt—supported the choice, and whether the appointment was a mistake for President Eisenhower.

This article seeks to demystify the appointment of Justice Brennan by describing his selection and examining the widely circulated myths. Research for this work is based on numerous interviews with major participants in Justice Brennan's selection, including Justice Brennan himself, and on an extensive documentary record that has not previously been examined in full by researchers.

After describing the selection and appointment of Justice Brennan, this paper concludes that, while complaints expressed by President Eisenhower about Brennan in the years after his appointment may have reflected genuine frustration with Brennan's liberal bent, this dissatisfaction was not reflective of the factors that influenced Eisenhower when he selected Brennan. In marked contrast to the focus of the current nomination process on judicial philosophy and changing Supreme Court outcomes, little attention was paid to the substance of Brennan's legal views at the time of his nomination. Brennan fulfilled the

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specific purposes for which he was chosen: he was a Democrat, a Catholic, and a state court judge; he was comparatively young for a Supreme Court nominee; and he remained committed to reform efforts to reduce delays and backlogs in the nation's courts. All of these were important qualities for the White House, which was then little more than five weeks away from a presidential election.

I

A brief biographical sketch helps set the stage. Brennan was born in Newark in 1906, the son of Irish immigrant parents. His father was a laborer who rose in the ranks of the union to become executive of the local. Concern over the union's welfare at the hands of local officials and police prompted the elder Brennan to run for the Newark City Commission, the equivalent of the city council. A top vote-getter, the elder Brennan served as Public Safety Commissioner throughout the 1920's while his son attended the Wharton School of Finance at the University of Pennsylvania and then the Harvard Law School. Justice Brennan graduated Harvard Law in 1931, a year after his father died.

Before and after World War II, Brennan's law practice focused heavily on labor relations. The establishment Newark firm in which he practiced, Pitney, Hardin & Ward, later Pitney, Hardin, Ward & Brennan, represented management, not workers, an often uncomfortable position for Brennan.

After World War II, Brennan became active with a group of young lawyers who were pressing for reform of the New Jersey judicial system. In 1947, New Jersey adopted a new constitution, including restructured courts; and Brennan agreed to help put the new plan into effect. He was appointed to the new superior court bench in 1949 by a Republican governor, although Brennan was a Democrat. His mentor was Arthur Vanderbilt, the nationally prominent legal figure and New Jersey Supreme Court Chief Justice for whom Brennan quickly became a trusted lieutenant and for whom Brennan led statewide efforts to eliminate congestion and long delays in the courts. For Brennan, this interest in court reform was not simply a matter of efficiency; it was directly connected to his view of the need for fairness and compassion in the law. Brennan was quickly promoted to the superior court's appellate division, and in 1952 to the New Jersey Supreme Court, where Vanderbilt was Chief Justice. There, Brennan cemented his relationship as Vanderbilt's right-hand man, no small achievement since Brennan frustrated Vanderbilt by disagreeing with

him on a number of important court decisions.[1] Brennan traveled the state advocating the reforms that he and Vanderbilt favored, particularly pre-trial conferencing in all cases and docket control and calendar management for state court judges, which in those days were controversial propositions.

Brennan's record on the New Jersey Supreme Court has long been the focus of speculation. The popular view is that he was a moderate who turned liberal once on the U.S. Supreme Court. However, both Brennan's friends in New Jersey at the time and other local legal observers knew that he was unmistakably liberal, and his record of decisions affirms that view.[2]

Although the state court had little occasion to deal with federal constitutional questions, Brennan wrote a few opinions that foreshadowed his approach on the U.S. Supreme Court. In *In Re Pillo*,[3] he took a broad view of the privilege against self-incrimination, finding the privilege in New Jersey to be based on common law tradition, rather than on the Fifth Amendment. In *Adams Theatre Co. v. Keenan*,[4] he took a strong position against prior restraint of free expression. He also expressed strong support for the guarantee against double jeopardy in *State v. Midgeley*.[5]

In his most famous state court dissent, *State v. Tune*,[6] he excoriated the majority for refusing to allow an accused murderer to inspect his own confession. "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," he wrote.[7] To Chief Justice Vanderbilt's argument that greater use of discovery in criminal cases would lead to increased perjury,[8] Brennan responded:

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1. See the discussion of the cases in text accompanying notes 3-12, infra.

2. This conclusion is based on the author's interviews with a number of Brennan's contemporaries in Red Bank and Rumson, New Jersey at the time.

There is also contemporaneous documentation. The November 1956 issue of the Passaic County Bar Association newsletter observed, "We have a 'hunch' that Justice Brennan will be heard from more and more in a way to gratify liberal sentiment in the country." J.L. Bernstein, *The Philosophy of Mr. Justice Brennan*, The Reporter, November, 1956, 1, 3.

3. 93 A.2d 176 (N.J. 1952).

4. 96 A.2d 519 (N.J. 1953).

5. 105 A.2d 844 (N.J. 1954).

6. 98 A.2d 881 (N.J. 1953).

7. Id. at 896.

8. Id. at 893.

> That old hobgoblin perjury, invariably raised with every suggested change in procedure to make easier the discovery of the truth, is again disinterred from the grave where I had thought it was forever buried under the overwhelming weight of the complete rebuttal supplied by our experience in civil causes where liberal discovery has been allowed.[9]

An academic commentator at the time noted the strength of Brennan's dissent and agreed that discovery should be available in criminal cases. "To employ the tool in civil cases, and to rely upon adversary proceedings in murder cases, when the defendant's life may be at stake, is an anachronism," Rutgers Professor Robert E. Knowlton wrote.[10] When the case returned to the New Jersey Supreme Court one year later for a second decision,[11] yielding the same result, another commentator observed "that Brennan, J.'s forceful dissent in the first hearing in the *Tune* matter is still a burr under the saddle in which the majority of the court rides."[12]

II

It is impossible to identify the precise moment at which Brennan first became the focus of the Supreme Court nomination process. There are no records available to pinpoint the process with that degree of precision.[13] Most participants agree, however, that the story really began in May 1956, more than four months before Brennan was chosen.[14]

On May 21 and May 22, 1956, the Justice Department convened the Attorney General's Conference on Court Congestion and Delay in Litigation. The unprecedented gathering of more than 80 judges, bar association presidents, and other lawyers took place in the Great Hall of the Justice Department. William P. Rogers, Deputy Attorney General at the time to Attorney General Herbert Brownell, was the impresario of the conference.

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9. Id. at 894.

10. Robert E. Knowlton, *Criminal Law and Prodedure*, 8 Rutgers L. Rev. 78, 79 (1953). (Knowlton was then an assistant professor of law at Rutgers University School of Law.) Id. at 78.

11. *State v. Tune*, 110 A.2d 99 (N.J. 1954).

12. Lewis Tyree, *Evidence*, 10 Rutgers L. Rev. 324, 326 (1955).

13. John V. Lindsay, who was an aide to Attorney General Brownell at the time, confirms that Brownell often did not keep written records of events and meetings.

14. There was general agreement between former Attorney General Herbert Brownell and former Deputy Attorney General William P. Rogers, in separate interviews, on this account. In addition, it reflects the way Justice Brennan has always understood the sequence of events.

Brennan, then an associate New Jersey justice, delivered one of the major addresses of the two-day meeting on May 22, outlining New Jersey's experience with court reform. Brennan also served as moderator for the entire morning's discussion of the court reform experiences in New Jersey, Maryland, New York and elsewhere.[15]

One story that has circulated widely[16] is that Brennan was called by Vanderbilt at the last minute and asked to substitute for him, and that Brennan read from Vanderbilt's notes. His Supreme Court nomination, this story continues, was a mistake because it was based on an impression created by Brennan's remarks, which were really Vanderbilt's. This story is significant because it was largely the favorable impression created by Brennan at the conference, as well as his possession of the correct demographic qualities, that led to his selection. If the story is correct, then Brennan's selection would literally have been a mistake.

There is substantial evidence to contradict, although perhaps not to entirely put to rest, this myth that Brennan simply read Vanderbilt's notes, although the factual record makes for a less interesting story. First, Brennan's own office files contain a copy of a speech that is marked, "Address By Honorable William J. Brennan Jr., Prepared for Delivery before the National Conference on Congestion in the Courts."[17] In the upper left corner of the title page, the document admonishes, "For Release At 10:00 A.M. EDT, Tuesday, May 22, 1956." The FBI's background investigation of Brennan in 1956 also observes that the Bureau's files include a copy of this speech, prepared for delivery.[18] Lest it appear that the obvious conclusion has been omitted, this text matches verbatim the printed transcript of what Brennan said at the conference, except for an ad-libbed introduction.[19]

Underlying the story that Brennan only read Vanderbilt's notes is a broader misconception, the assumption that he would

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15. The full text of the sessions was published as *Proceedings of Attorney General's Conference on Court Congestion and Delay in Litigation* (1956) ("*Proceedings*").

16. For one version of this story, see Stanley H. Friedelbaum, *Justice William J. Brennan, Jr.: Policy-Making in the Judicial Thicket* in Charles M. Lamb, et al., eds., *The Burger Court: Political and Judicial Profiles* 100, 102 (U. Ill. Press, 1991) ("In part, the nomination may have resulted from Eisenhower's misplaced reliance on the contents of a 'conservative' speech that Brennan had not written but had merely agreed to deliver for an ailing Vanderbilt.")

17. A copy of this speech is on file with the author.

18. The notation is included in FBI files obtained through a Freedom of Information Act [FOIA] request, on file with the author.

19. *Proceedings* at 78-88 (cited in note 15).

not have been able to give his own address because Vanderbilt was the reformer and Brennan just a functionary. This is a misconception. Throughout his four-year tenure on the New Jersey Supreme Court, Brennan often gave speeches on state court reform efforts, and the speech at the Attorney General's conference draws on his earlier efforts. He traveled the state, advocating, explaining, and implementing pre-trial conferencing rules that he helped write. But his reputation in the technical world of court reform also extended beyond the borders of New Jersey. Brennan's office files include major addresses on court reform to the North Carolina Bar Association on June 25, 1954, the American Bar Association annual convention in Philadelphia on Aug. 23, 1955, and the Suffolk Law School Alumni Association in Boston on Oct. 21, 1955.[20] Although by no means a nationally prominent figure, he had a reputation in his own right in judicial reform circles and it is both demeaning and misleading to suggest that he needed Vanderbilt's notes.

A less substantive, more procedural interpretation of the myth is possible: that Brennan drew on Vanderbilt's notes because he did not have time to prepare his own material. However, this, too, is a matter of some doubt. Brennan remembers that he was asked to fill in for Vanderbilt. He has no recollection, however, of how short the notice was, and he is adamant that he received no notes from Vanderbilt. Records show that Brennan had, at an absolute minimum, at least three days to prepare. According to the transcript of his remarks at the conference, he did not attend the first day, Monday, May 21, and only arrived in Washington late Monday night. A story in the Newark Evening News of Saturday, May 19, announced that Brennan would be one of two New Jerseyans at the conference.[21] So, Brennan had at least May 19, May 20, and part of May 21 to prepare for remarks that were similar to those he had delivered in the past. Brennan describes his preparations: "I prefer for something like this, to talk from a speech. So I wrote mine out, down at the Congressional Hotel, as it then was."[22]

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20. Copies of these speeches are on file with the author. The ABA address is published. William J. Brennan, *Remarks on Pre-Trial*, 17 F.R.D. 437, 479 (1955). He also delivered a similar address soon after the Attorney General's conference, appearing on June 7, 1956, before the Kansas City Bar Association.

21. *Court Jams Under Study*, Newark Evening News, May 19, 1956, page number omitted, copy of article located in papers of Arthur T. Vanderbilt, Wesleyan University Archives.

22. Author's tape-recorded interview with Justice Brennan #5 of 66, October 28, 1986, transcript p. 21.

The final evidence against the myth is that after he concluded his prepared remarks and other panelists had finished speaking, Brennan made additional impromptu remarks that occupy three full pages of transcript.[23]

It is far from clear why Vanderbilt did not attend. The only reference in the 137-page transcript is a remark by a member of Brennan's panel, Judge Fred Brune of the Maryland Supreme Court, who said of Vanderbilt, "It is very regrettable that he can not be here today because, I believe, his court is in session, but I'm very glad they could spare Justice Brennan. . ."[24] The most common explanation for Vanderbilt's absence is that he had suffered a stroke, but his stroke was some years earlier and the only record of any illness at the time of the conference is that he had slowed down and cut back on speaking and appearances because of the continued effects. Robert Seaver, then Assistant Deputy Attorney General and later clerk of the U.S. Supreme Court, did much of the staff work for the conference, and does not recall ever having Vanderbilt actually scheduled to participate. "In trying to get hold of Vanderbilt, I learned from his office that he was in no shape to do it and that Brennan had taken the mantle," Seaver said. "We didn't even really talk to Vanderbilt about participating," recalled Seaver. "He was too ill."[25] Rogers, who as deputy attorney general took principal responsibility for the conference, has no recollection of Vanderbilt being invited and then canceling.[26] He does remember Vanderbilt recommending Brennan highly to participate in the conference.[27]

III

By nearly all accounts, it was Brennan's performance at the conference, and Eisenhower's interest in demographics, that put the spotlight on Brennan a few months later. Justice Sherman Minton, a Democrat from Indiana, announced on September 7, 1956, that he planned to retire on October 15th. The daily office diary kept by Eisenhower's secretary, Ann Whitman, noted that Minton's announcement was on the wire service ticker before Ei-

23. *Proceedings* at 110 (cited in note 15).

24. *Proceedings* at 95 (cited in note 15).

25. The author's interview with Robert Seaver was conducted by telephone on July 13, 1990.

26. Rogers gave this account in an interview with the author on September 1, 1987, in Washington, D.C. This account was reconfirmed in a telephone interview at Rogers' Washington office on May 12, 1994.

27. Id.

senhower actually got the letter and that the staff, at least, was irked by this abrupt announcement.[28]

Within minutes, President Eisenhower called Attorney General Brownell, who was in New York, and told him of the impending Supreme Court vacancy. Ann Whitman was on the extension phone taking notes,[29] and summarized the conversation:

> President suggests the Attorney General start thinking again about a very good Catholic, even a conservative Democrat—thinks we really would be better off to appoint a Democrat to show that we mean our declaration that the Court should be non-partisan (in spite of the fact that the ratio now is Democrat 6, Republican 3). Some discussion of Judge Daniher [sic].[30] Brownell said he was a good practicing Catholic. But the President asked the Attorney General to canvas the field, to try to find outstanding man, with Court experience, regardless of his political affiliation.[31]

Later in the day, Republican chairman Leonard Hall called and Ann Whitman reported:

> Chmn. Hall called.
> He just heard of Justice Minton's letter of retirement. Makes room for Catholic.
> President said he called Brownell about it this noon. Thought of a good conservative Democrat, particularly if he had been on the Bench for some time—politics would be of no moment. Hall said if the area could be Midwest, would be wonderful. President said only one he knows with qualifications is Daniher of Connecticut.[32]

The first steps that led to the selection of Brennan actually preceded Minton's retirement by some weeks. According to Bernard Shanley, a New Jersey lawyer who was then an aide to Eisenhower, Francis Cardinal Spellman, the Archbishop of New

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28. The diary entry is in the files of the Eisenhower Library.

29. One Eisenhower biographer, William B. Ewald, Jr. has chronicled how Eisenhower's secretary often took notes on an extension phone and even how Eisenhower occasionally used a hidden tape recorder. William B. Ewald, Jr., *Eisenhower The President: Crucial Days, 1951-1960* 87 (Prentice-Hall, 1981).

30. Judge John A. Danaher of the U.S. Court of Appeals for the District of Columbia Circuit was 57 years old at the time of Minton's retirement and had served on the appeals court for three years. He was not a Democrat; indeed, he was active in Republican circles and served one term as a U.S. senator from Connecticut from 1939 to 1945.

31. Ann Whitman's phone call summaries were obtained from the Eisenhower Library.

32. Ann Whitman's summary of phone call from Leonard Hall. Obtained from Eisenhower Library.

York, had visited Eisenhower earlier in 1956 and asked that a Catholic be named to the next vacancy,[33] since no Catholic had sat on the Court since Frank Murphy died in 1949.[34] Shanley said that Eisenhower turned to him during the meeting with Spellman and told him, "I want you to let me know when there is an opening—remind me of what the Cardinal has just said."[35]

In the days after Minton's announcement, President Eisenhower mentioned the process of filling the vacancy at several news conferences, but he gave few clues. Brennan's name was not among those on which speculation focused in the news media; those included Secretary of State John Foster Dulles, former New York Governor Thomas E. Dewey, and Attorney General Brownell.[36] Also mentioned was a suggestion for the first black Supreme Court Justice: Judge William H. Denman, chief judge of the Ninth Circuit, wrote to Eisenhower to urge him to appoint Judge William H. Hastie of the Third Circuit.[37] Finally, the President publicly ruled out due to age Judge John J. Parker, chief judge of the Fourth Circuit, whose nomination to the high court was rejected by the Senate in 1930.[38]

No one is quite sure when Brennan's name first surfaced. William P. Rogers, then deputy attorney general, believes that he suggested Brennan to Attorney General Brownell.[39] Brownell is not sure where the name first surfaced.[40] It was readily apparent to both men, however, that Brennan fit a number of the demographic qualifications in which Eisenhower was interested.

He was a Catholic, and would enable Eisenhower to fulfill his promise to Cardinal Spellman. Indeed, they later had Shanley check with Brennan's parish priest to see if he regularly attended Mass, and Shanley reported him to be a good Catholic.[41]

Shanley and Brennan had known each other since their school days in Newark, and it has been widely assumed that Shanley pushed Brennan's nomination. Shanley denied playing

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33. Author's tape-recorded interview with Shanley, June 11, 1987, Morristown, N.J.

34. The replacement of Justice Murphy in 1949 with Justice Tom C. Clark, a Protestant, marked the first time since 1894 that there was no Catholic Justice on the Supreme Court. *Congressional Quarterly's Guide to the U.S. Supreme Court* 788 (1979).

35. Interview with Shanley (cited in note 33)..

36. *Dewey Mentioned For Supreme Court*, N.Y. Times, September 9, 1956, at 56.

37. *Negro Urged For High Court*, N.Y. Times, September 12, 1956, at 33.

38. *President Keeps Court Post Open*, N.Y. Times, September 12, 1956, at 23.

39. Notes of author's interview with Rogers, September 1, 1987, Washington, D.C.

40. Transcript of author's tape-recorded interview with Brownell, February 10, 1988, New York.

41. Shanley said this caused him some difficulty with Cardinal Spellman, who complained to him soon after the announcement that he did not consider Brennan to be a proper, practicing Catholic. Shanley trancript (cited in note 33).

any significant part, however, and said his only role was to check on Brennan's status in the church. Brennan had another old friend in Washington, Labor Secretary James Mitchell, a fellow New Jerseyan. Curiously, there is no record of Mitchell or Shanley playing much of a role in Brennan's behalf.

Brennan—50 at the time—was also young enough to satisfy Eisenhower's desire to appoint Justices who were younger than age 62.[42] He also had court experience, another Eisenhower requirement.[43] Brennan also came from a well-regarded state court, an important factor because Eisenhower was under pressure from the Conference of Chief Justices to foster greater consideration of state court authority and jurisdiction on the part of the Supreme Court and the federal government.[44] Finally, Brennan was a Democrat, another factor Eisenhower had said he was seeking in his first conversation with Brownell about the vacancy.[45]

Two questions are most compelling about Brennan's nomination: Why were these factors so important to Eisenhower? And what was Arthur Vanderbilt's role?

However, a few more details are necessary to round out the picture before turning to these essential matters. Although there is little record of how it developed, Brennan's nomination emerged and moved along quickly. Some time during the last two weeks of September, Brownell said he read all of Brennan's New Jersey court opinions; there are more than 400. Said Brownell:

> So I read all his opinions on the New Jersey Court and he seemed to have, to be qualified. His experience had been somewhat limited in that he specialized in the labor field. There were no opinions of his that really grappled with the constitutional problems that the Supreme Court constantly faces but we felt that with, there's no doubt about his charac-

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42. During the search for Minton's successor, Eisenhower referred at a news conference to the requirement of "a reasonable age." *President Keeps Court Post Open* (cited in note 38).

Almost six months later, Eisenhower prepared a statement for Ann Whitman's daily diary of February 5, 1957, discussing Supreme Court qualifications and noting that their nominees had been "under 62 years of age." Memorandum obtained from Eisenhower Library.

43. This quality is also mentioned in the Ann Whitman diary entry of February 5, 1957.

44. Brownell recalled, "There were a couple of political pressures. One was the chief justices of the state courts had petitioned the President to see to it that more consideration was given by the Supreme Court to the problems of the state courts and the relationships between the state courts and federal courts." Brownell interview (cited in note 40).

45. See text accompanying note 31, supra.

> ter, and his legal and judicial experience were not only adequate but really outstanding.[46]

If this is an accurate description of the process, then Brownell either missed, missed the significance of, or was not upset by the handful of visible, liberal decisions or dissents that Brennan crafted on the New Jersey Supreme Court. It would not be difficult at all to miss a handful of highlights in quickly reviewing hundreds of pages of dry, largely state-law rulings. According to commentators at the time, Brennan was not one of the leading dissenters either in number of votes or in number of opinions, making it even more possible that a handful of dissenting opinions could be overlooked.[47] It is also possible that Brownell was not reading the opinions for their merits as much as he was for their craftsmanship and overall competence.

Brownell maintains that he read the opinions, knew what was in them, and made no mistake. "The fact that he was a rugged individualist and had his own opinions didn't bother me," said Brownell. "There were some criminal opinions, but they didn't bother me."[48]

The first record of Brennan as the focal point of the nomination process comes from the FBI. On Tuesday, September 25, 1956, the FBI Newark field office cabled the headquarters in Washington a five-page doubled-spaced memo that was requested on Monday, September 24, the day before.[49] The cable was a background check on Brennan, finding that all of those interviewed held him in the highest regard. The memo was anxiously awaited, because a second, typed version of it bears the notation that it was delivered by an FBI supervisor to Attorney General Brownell's home at 9:35 p.m. on Tuesday night. Rogers received his copy at the office at 9:45 a.m. on Wednesday, September 26.

At about this time, there was another investigation underway. Rogers called Bernard Segal, Philadelphia lawyer and chairman of the American Bar Association Standing Committee

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46. Transcript of Brownell interview (cited in note 40).

47. David Stoffer, *The Work of the Judicial System: 1954-55*, 10 Rutgers L. Rev. 381, 393 (1955). Stoffer says Brennan cast only ten dissenting votes in the 1954-1955 term of the New Jersey Supreme Court, compared with more than twenty for three other colleagues and more than thirty for one Justice. His dissenting opinions numbered only five, making him the third-ranked in volume, well-behind the leading dissenter who had twelve.

48. Brownell's comments, confirming his earlier statements, see note 40 supra, were made in a telephone interview on March 29, 1994.

49. The memo was obtained through an FOIA request, but the names of those interviewed by the FBI field agents in New Jersey remain blacked out.

on the Federal Judiciary. The ABA had checked some of Eisenhower's lower court nominations, but had not previously been asked to review a Supreme Court nomination. Rogers asked Segal to conduct a confidential evaluation of Brennan and to report back as soon as possible.

By September 27, the decision was all but final, and Eisenhower gave a subtle hint at a news conference. He responded to a reporter's question by saying, "[W]hen you come to the Supreme Court, my people look up the record of every sitting judge that they can find, district courts and circuit courts in the Federal and all of the supreme court justices in the states."[50]

On Friday, September 28, Brownell, Eisenhower and presidential adviser Sherman Adams met in the Oval Office at 3:00 p.m.[51] There is no record of the conversation, but it seems likely that they decided to go ahead and bring Brennan down to meet the President. At about 5:30 p.m., Brennan and his law clerk, Clyde Szuch, were working unpacking law books in brand new chambers that had been designed just for Brennan and to which they had just moved in Red Bank, New Jersey, overlooking the Shrewsbury River. The telephone rang, Brennan recalled, and it was Brownell, asking him to come see the President on Saturday morning.[52] Brennan assumed that Brownell wanted him to join the Attorney General's task force on reducing congestion and delays, and he resisted, telling Brownell, "You know how I feel about that." But he said that Brownell told him that if the President wanted to see him, he could not refuse.

Brennan was driven to Newark, some 50 miles away, to board a train in the middle of the night. It most likely was the Midnight Keystone, leaving Newark after midnight and arriving at Union Station after 5 a.m. Brennan remembered arriving about 5:30 a.m. on Saturday, September 29 and was shocked to find Brownell waiting to meet him. They drove to Brownell's house in northwest Washington for breakfast, and along the way, Brennan recalled, Brownell asked if he knew why he was there. Brennan said he knew and he wanted no part of the task force. Brownell interrupted and told him it was for the Supreme Court vacancy and that they were going to meet Eisenhower. Brennan

50. *The Transcript of Eisenhower's News Conference on Foreign and Domestic Affairs*, N.Y. Times, September 28, 1956, at 14.

51. Sherman Adams appointment books, Sept. 28, 1956. Listing for 3 p.m. says, "The President, Att. Gen. Brownell." Sherman Adams papers, Dartmouth Library.

52. Unless otherwise indicated, this account and the details that follow come from transcript of author's interview with Justice Brennan, #5, October 28, 1986.

was flabbergasted. "To this day," Brennan said, "I know we had breakfast, but I can't remember it."

They went to the White House, where they were met by Sherman Adams and were ushered into the Oval Office. Brennan recalled that Brownell and Adams left and he spent a few minutes alone with Eisenhower. He said Eisenhower told him he would have liked to have appointed Arthur Vanderbilt to the Supreme Court, but that Brennan's mentor was too old and too weak at that point. The President, Brennan recalled, said they would wait until Monday to announce the appointment because New Jersey's two senators, Clifford Case and Alexander Smith, had not even been consulted yet. The meeting ended, Brennan having accepted the job. President Eisenhower's calendar for the day shows that the meeting, including the initial introductions by Adams and Brownell, lasted from 9:17 a.m. to 9:37 a.m., 20 minutes exactly.[53]

Brownell took Brennan back to the Justice Department so he could call his mother and his wife and tell them the news, but to ask them to remain silent about it. While he was making the phone calls, he recalls that Brownell came back in and said the President wanted to see him again. The two men went back to the White House, and Eisenhower said he wanted to announce it right away instead of waiting until Monday. The calendar shows that Eisenhower met with Brennan, Brownell and presidential news secretary James Hagerty from 1:03 p.m. to 1:12 p.m. The announcement was made and pictures were taken. Brennan answered one or two questions, responding that he did not vote in the 1952 presidential election because he did not satisfy the residency requirement in Rumson, where he had just moved his family, and declined to say who he would vote for in the imminent 1956 election.[54]

Why the sudden rush? No one knows for sure. Eisenhower told him that he was afraid it would leak out, Brennan recalled. Another reason may be that a missing piece of the puzzle arrived between the two sessions at the White House: the ABA report. Segal telephoned his report to Rogers at about 11 a.m. on September 29,[55] and that left only the notification of the two senators outstanding.

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53. *The President's Appointments, Saturday, September 29, 1956*, obtained from Eisenhower Library.

54. *Jersey Judge Is Named To U.S. Supreme Court*, Sunday Bulletin, September 30, 1956, 1, 2.

55. *Choice Of Brennan Hinged On Investigation By Segal*, Sunday Bulletin, September 30, 1956, 2.

Brownell and Brennan went up to the Supreme Court, where they met Chief Justice Earl Warren and went out with him for lunch, and then Brennan boarded the Congressional at Union Station at about 3 p.m. for the train ride to Newark, where he arrived at about 7:30 p.m. and was met by his two sons and a host of newspaper reporters and photographers. In his haste all afternoon, he had neglected to call his mother and his wife back to tell them that the news was public, and when he did finally reach them, they were already overrun with reporters.

Since the nomination was a recess appointment, Brennan was sworn in and took his place on the Supreme Court bench on October 16, 1956. His confirmation hearings were not held until some months later in February, 1957.[56]

IV

One of the interesting questions about the nomination is the role played by Arthur Vanderbilt, who was a giant in the law and Brennan's mentor. One popular myth recounts how Vanderbilt privately was distraught at Eisenhower's selection of Brennan and was overheard to comment, "He has done it again."[57] It is always difficult to prove a negative—that something did not happen. However, the verbal and documentary record is filled with evidence to the contrary and strongly suggests that Brennan had Vanderbilt's support.

Theories abound that Vanderbilt had been considered for, or even promised a seat on the Supreme Court by Eisenhower before Earl Warren was named Chief Justice in 1953. According to these stories, Vanderbilt wanted to be Chief Justice but would not consider a position as an Associate Justice, and declined to be in the running for the seat that went to John Harlan in 1954, or Brennan in 1956. His preference not to be considered in 1954 or 1956 is documented in one biography.[58] The fact that Eisenhower considered him as a possible Chief Justice when he chose Warren is also documented in some accounts.[59]

It seems highly unlikely that Eisenhower would have actively considered Vanderbilt in 1956. Born on July 7, 1888, he was 68 years old by the time Minton retired. It is still possible,

56. *Nomination of William Joseph Brennan Jr.: Hearings Before the Committee on the Judiciary, United States Senate*, 85th Cong., 1st Sess. (1957).

57. For a version of this story, see Kim Isaac Eisler, *A Justice For All: William J. Brennan, Jr. and the Decisions that Transformed America* 92 (Simon & Schuster, 1993).

58. Arthur T. Vanderbilt II, *Changing Law: A Biography of Arthur T. Vanderbilt* 215 (Rutgers U. Press, 1976).

59. See Ewald, *Eisenhower The President* at 80 (cited in note 29).

nevertheless, that Eisenhower was disappointed when he realized in 1956 that he would not have the chance to name Vanderbilt. It is equally possible that Vanderbilt recognized in 1956 that he would never get the chance to go on the high court. All of this is speculative and does not support the undocumented story that Vanderbilt was displeased with Brennan's appointment.

The story of Vanderbilt's alleged disappointment seems to carry with it a more substantive quality which bears refuting to the extent it is possible. Implicit in the tale, it seems, is the idea that Vanderbilt knew that Brennan was too liberal and was not an appropriate appointee for Eisenhower's views. This, too, can be refuted from documentary evidence available.[60]

But what was Vanderbilt's role? In his memoir, Eisenhower said that Vanderbilt had written him that Brennan was "the finest 'judicial mind' that he had known. . ."[61] No record has been found of any such letter from Vanderbilt, either in Eisenhower's files at the Eisenhower Library, or in Vanderbilt's collection at the Wesleyan University Library. The Eisenhower Library can find no supporting evidence for the statement in the working papers for the memoir. Neither of the two writers who assisted with the memoir has any recollection of supporting materials for the passage.[62]

It seems apparent from the records and memories that do exist that Vanderbilt did not call the White House or the Justice Department and initiate consideration of Brennan's name. What is more likely, and readily supported with documentation, is that he strongly recommended Brennan when he was asked about him.

George H. Williams, later director of the American Judicature Society, was an assistant dean of New York University Law School when Vanderbilt was dean. When Vanderbilt became New Jersey chief justice, Williams stayed on as assistant dean and continued to work closely with Vanderbilt who remained deeply involved in the law school. Williams remembered being in Vanderbilt's home study in Essex Fels, New Jersey, when Brownell called Vanderbilt three times within an hour to ask questions about Brennan.[63] Vanderbilt's answers, Williams said, were filled with the highest regard and praise for Brennan. That comports

60. See text accompanying notes 66-70, infra.

61. Dwight D. Eisenhower, *Mandate For Change 1953-1956* 230 (Doubleday, 1963).

62. Letter from President's son, John Eisenhower, May 18, 1993. Telephone conversation with Dr. William Ewald, June 2, 1993.

63. Notes on interview with the author at American Bar Association meeting in Denver, February 4, 1989.

with Brownell's memory as well.[64] The most plausible explanation for Eisenhower's statement is that Brownell passed on Vanderbilt's telephone advice, and it stuck in Eisenhower's memory. This view, that the White House received positive support for Brennan from Vanderbilt, is contemporaneously reenforced by a briefing paper for Eisenhower for an early October press conference in 1956, soon after Brennan was selected. The briefing paper, which summarizes the matters discussed with Eisenhower in preparation for the news conference says:

> Justice Brennan. Had followed out what he said was being done, this man had an excellent record, Judge Vanderbilt for whom the President has the highest opinion and greatest respect, recommended him highly, and he was thoroughly and unqualifiedly accepted by the American Bar Association.[65]

There is much additional evidence on Vanderbilt's attitude about Brennan's selection. The most significant contemporaneous evaluation came from Bernard Segal, who checked Brennan out for the ABA. His report was telephoned to Rogers on September 29. The written version, stamped "Confidential" and dated October 1, 1956, said:

> I spent many hours contacting everyone whose opinion I thought might be worth while on the subject. First I reached Chief Justice Vanderbilt. He could not have been more enthusiastic. He said that he considered Justice Brennan ideally suited for the appointment and that his only regret was that Justice Brennan's appointment would deprive Chief Justice Vanderbilt of the comfort of knowing that upon his resignation next year as Chief Justice of New Jersey, Justice Brennan would be available as his successor.[66]

Other documentary evidence exists as well. Vanderbilt wrote letters to numerous friends and associates in October 1956, all uniformly reflecting his support for Brennan. To Robert S. Snively, president of the New Jersey Bar Association, he wrote on October 3, 1956, "I am very happy to have had some small part in telling the AG just what I think about my colleague."[67] To Frank Morley, a Minneapolis lawyer, Vanderbilt wrote on October 5, 1956, "I regard him as an extraordinarily able judge. The

64. Herbert Brownell with John P. Burke, *Advising Ike: The Memoirs of Attorney General Herbert Brownell* 180 (U. Press of Kan., 1993).

65. Obtained from Eisenhower Library.

66. A copy of this report was provided by Mr. Segal during an interview in Philadelphia.

67. Arthur Vanderbilt files, Wesleyan University Library.

President did not consult me, but the AG did and I gave my colleague the highest kind of recommendation."[68] To Victor L. Butterfield, president of Wesleyan, Vanderbilt wrote on Nov. 21, 1956:

> The first thing that strikes you about Bill Brennan is his youth. He is 50 years *young*. The next thing is his fondness for people which is very real. The third thing is his industry and knowledge and wisdom; he is constantly growing and the fact that he should have 20 years on the bench is full of meaning. Finally, however, his crowning trait is his courage and forthrightness.[69]

Finally, and perhaps most persuasively, is Vanderbilt's own continued correspondence with Brennan days after his nomination was announced. On October 5, 1956, Vanderbilt wrote a page-and-a-half single-spaced letter to Brennan, which stated:

> Let me start the morning by telling you . . . my sense of personal gratitude for the active support which you have given me in my efforts to build up our judicial establishment from an administrative standpoint during your entire period of service on the Court. It was truly magnificent and far beyond the call of duty; without it I hesitate to think where we might be . . . While I know that all of your votes on appeals were dictated by conscience and intelligence alone, I cannot refrain from at least telling you how much the working of your conscience and intelligence has meant to me in our years of association.[70]

Vanderbilt then suggested that if Brennan ever felt frustrated by the Supreme Court, he might return to New Jersey to take over the state supreme court. "I think it is no secret that I had hoped that you would be the next Chief Justice of New Jersey," Vanderbilt wrote in the October 5 letter.[71]

There is additional evidence as well, but perhaps the point is sufficiently established. Although they had their jurisprudential differences and ideological disagreements, the documentary record hardly seems to suggest thoughts of one who was angry, upset, bitter or disappointed about Brennan's nomination. Moreover, this substantial evidence to refute the myth stands in

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68. Id.

69. Id.

70. This letter is in a correspondence file in Brennan's office. This correspondence will eventually become part of Brennan's papers at the Library of Congress, but is among several file cabinets of material that have not yet been turned over to the Manuscript Division.

71. Id.

marked contrast to the absence of any direct evidence to support it.

V

The speculation about Vanderbilt's relationship to Brennan's nomination is in a sense directly related to the protracted debate over why Eisenhower chose Brennan and whether he was later disappointed by the choice. If there is any truth to the tales of disappointment, it may derive from a single motivation: surprise at Brennan's place as a leading liberal member of the Warren Court.

To examine this issue, it is necessary to examine a number of different questions: Why did Eisenhower choose Brennan? Did Eisenhower actually express his disappointment with Brennan? Did the process by which Brennan was selected provide Eisenhower with any basis to be disappointed later?

A

The first of these questions may be the most difficult to answer. The popular view is that Eisenhower and his aides were focused on the 1956 election, then less than six weeks away. The President comfortably defeated the Democratic ticket of Adlai Stevenson and Estes Kefauver, with a popular vote of 35,585,316 to 26,031,322 in 1956, a better margin than in 1952. Six weeks before the election, however, with the campaign just underway, Eisenhower and his staff were concerned about his image—he had suffered a heart attack one year earlier in September, 1955, and voter perception of his health and vigor was a wild card. At the same time, then Senator John F. Kennedy, a young, vigorous and attractive politician, was campaigning hard throughout the Catholic and Democratic northeast for the Democratic ticket.

It is difficult to know whether these electoral factors were the focus of Eisenhower and his staff. Aides to Eisenhower have denied in interviews that Eisenhower would have concerned himself with the impact of the nomination on the presidential race. "Eisenhower wouldn't do things like that, he was basically antipolitical," said aide Bernard Shanley.[72] Brownell said the demographics had more to do with Eisenhower's belief that "he wanted to appoint people to the Supreme Court who would have the confidence of not only the legal profession but of the public generally. . . He thought that one way to do it (was) to see to it

72. Transcript of Shanley interview with author, June 11, 1987.

that the Court was not made up exclusively of either of the major parties."[73]

There are occasional glimpses that suggest a contradictory view. In the Newark Evening News of Monday, October 1, 1956, an unsigned story from the paper's Washington Bureau quoted unnamed White House aides on the political motivation of the nomination. One White House official, the story said, explained that in addition to Brennan's abilities, "he and the others considered for the post were looked at from the political point of view as well."[74] The article quoted "another presidential aide," who said, " 'We felt that a Catholic of Irish background would be an offset to the appeal that young Sen. John Kennedy of Massachusetts is making on the Democratic voters who swung to Eisenhower four years ago.' "[75] The article continued, "Kennedy has been campaigning hard for Adlai Stevenson in Eastern areas where the so-called Catholic vote is important. White House sources said reports have been received at Republican National Committee headquarters that Kennedy has great popular appeal among Democrats who voted for Eisenhower in 1952 but might defect this year."[76]

No one seriously argues that the selection of Brennan actually made a demonstrable difference in the results of the 1956 election. It may be one of the factors that contributed to a continued pattern of voting among Catholic Democrats. Eisenhower carried New Jersey in both 1952 and 1956. He also carried Catholic strongholds like Rhode Island, Massachusetts and New York in 1952 and 1956. It would be silly to suggest that Brennan's nomination was the reason, but it is by no means implausible to think that Eisenhower's political staff considered the appointment of a Catholic Democrat a cementing or reenforcing step. Recall that one of the first conversations Eisenhower had about the vacancy, after Brownell, was with the chairman of the Republican National Committee, Leonard Hall, with whom he discussed looking for a Catholic and a Democrat.[77] There can be no suggestion that the conversation with Hall took place because Hall was a trusted adviser on legal affairs and judicial appointments, rather than on political matters.

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73. Transcript of author's interview with Brownell, February 10, 1988.

74. *Decision to Name Brennan to Top Court Was Sudden*, Newark Evening News, October 1, 1956, page number unavilable, copy of article included in Vanderbilt papers at Wesleyan University Library.

75. Id.

76. Id.

77. See text accompanying note 32, supra.

Although there may have been some electoral motivation for the appointment, this does not negate the other distributive values and factors outlined by Brownell that worked in Brennan's favor: age and likely length of Supreme Court tenure; a Catholic seat; a Democrat, to preserve the nonpartisan nature of the Supreme Court;[78] and a state court judge, to satisfy the constituency of state chief justices who were virtually at war with the federal courts over habeas corpus and other federalism issues. The political and distributive attributes of Brennan's nomination, taken together, made him a strong candidate indeed.

B

The most frequently cited comment about Brennan's nomination is undoubtedly the observation attributed to Eisenhower that "my two worst mistakes are both sitting on the Supreme Court." When this quote is used, one searches in vain for any citation to when or where Eisenhower is supposed to have said this.

It is probable, if not certain, that Eisenhower never spoke these precise words, even in private conversation about Chief Justice Warren and Justice Brennan, although they have been attributed to him thousands of times. The Eisenhower Library has searched for these words and has never found them. None of the individuals interviewed in my research who worked for Eisenhower ever heard him say it: not Shanley, Brownell, or Rogers. There is no record of the quote in the Sherman Adams papers at Dartmouth College.

One source for the dissemination of the quote may well have been the eminent University of Virginia government professor, Henry Abraham. His widely-read, multiple-editions book, *Justices and Presidents*,[79] erroneously appropriated a quotation from an Eisenhower biography by Elmo Richardson. Richardson, in his 1979 work,[80] borrowed from an oral history interview by Ralph Cake, an Oregon Republican leader.[81]

78. The balance of the Supreme Court before Minton retired was six Democratic Justices (Black, Douglas, Frankfurter, Clark, Reed and Minton) and three Republicans (Warren, Harlan and Burton). Eisenhower's two previous appointments, Earl Warren and John Harlan, were both Republicans and he later explained that he was looking for balance in his own appointments, not just balance on the Court.

79. Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (Oxford U. Press, 3d ed. 1992).

80. Elmo R. Richardson, *The Presidency of Dwight D. Eisenhower* (Regents Press of Kan., 1979).

81. Ralph Cake, oral history transcript prepared by Columbia University Oral History Project, OH 111, Part 2, p. 39. Transcript excerpt obtained from Eisenhower Library.

Cake, in the interview, described meeting with Eisenhower and having the President explain that Warren was appointed Chief Justice because he had been promised the spot by an Eisenhower aide. Cake recounted that Eisenhower said, " '. . . while I had not made the promise, I just felt that I could not turn him down. That was the sole reason that appointment was made, and it's one of the two biggest mistakes I made in my administration.' " The Cake transcript continues, " 'Well,' I said, 'Mr. President, what was the other big mistake?' He said, 'None of your business.' "[82]

Richardson's biography repeated Cake's account of Eisenhower's comment up to " 'it's one of the two biggest mistakes I made in my administration,' " properly attributing the statement to Cake's oral history interview.[83] Richardson then added, "The latter phrase echoed a remark ascribed to several other presidents. Asked if they had made any mistakes during their tenure, the joke ran, they had replied: 'Yes, and both of them are sitting on the Supreme Court.' "[84]

In the 3rd edition of Abraham's book, *Justices and Presidents*, the author recounts, "When Eisenhower was asked later if he had made any mistakes while he had been president, he replied: 'Yes, two, and they are both sitting on the Supreme Court.' 'Both' referred to Warren and Brennan."[85] As authority, Abraham cites, "Quoted by Elmo Richardson, *The Presidency of Dwight D. Eisenhower* (Lawrence: Regents Press of Kansas, 1979), p. 108."[86] Of course, there is no such statement attributed to Eisenhower at that spot in Richardson's work or anywhere else in the book. Indeed, the story was deleted from a later edition of Richardson's work and substituted with the observation, "Years later Eisenhower considered Warren's appointment 'the biggest damfool mistake I ever made . . .' "[87]

None of this is the real point, however. Professor Abraham got it right in substance, if not in fact. There are at least three independent sources who say they heard Eisenhower express thoughts similar to the famous, never-uttered quotation. The diary of Justice Harold Burton reflects that on July 17, 1958, when he went to the White House to tell Eisenhower that he planned

82. Id.
83. Richardson, *The Presidency of Dwight D. Eisenhower* at 108 (cited in note 80).
84. Id.
85. Abraham, *Justices and Presidents* at 266 (cited in note 79).
86. Id. at 395, note 41.
87. Chester J. Pach Jr. and Elmo Richardson, *The Presidency of Dwight D. Eisenhower*, Revised Edition, 141 (U. Press of Kan., 1991).

to retire, the President "expressed disappointment at the trend of decisions of Chief justice and Justice Brennan. He asked the Atty. Gen. to be most careful in the choice of my successor."[88]

Eminent New York Times newspaper columnist Arthur Krock heard similar views on April 6, 1960, when he was summoned to the White House for a 90-minute chat with Eisenhower. Krock wrote himself a seven-page memorandum summarizing the conversation the next afternoon.[89] His memorandum states, "It was clear that the President has been disappointed in the far Leftist trend of Chief Justice Warren, and has been equally astounded at the conformity to this of Justice Brennan. He said that Chief Judge Arthur Vanderbilt of New Jersey had assured him Brennan had an 'ideal judicial concept', and that, when he looked over Brennan before appointing him, the Justice's general comments had given him the same impression."

Yet another source, who made no contemporaneous record of the encounter but recalled it years later, was Fred Friendly.[90] He said that he and Walter Cronkite visited Eisenhower to prepare for a series of interviews in May, 1961, when Eisenhower had left office and returned to Gettysburg, Pennsylvania. Friendly said he tried to make lunch conversation by noting that Eisenhower's administration would be remembered for putting Earl Warren on the Supreme Court. According to Friendly, Eisenhower replied, " 'I'm surprised to hear you say that Fred. That was the worst mistake I ever made.' " Friendly said he then asked, "Are you saying that's one of the mistakes you made as President?" Eisenhower, Friendly said, "put 2 fingers up: 'two and they're both sitting on the Supreme Court—Earl Warren and William Brennan.' He said, 'Brennan's just as bad. Those are two very important jobs, and I didn't do a very good job with them.' " While the recollection is revealing, neither Friendly nor Cronkite thought to ask Eisenhower to repeat the comments after lunch when they were taping the interviews.

VI

There remains the question of whether Eisenhower's disappointment, however it was expressed, was justified. Because the nomination process focused so heavily on the political and demo-

88. Burton's diaries are on microfilm in the Manuscript Division of the Library of Congress.

89. The memorandum is in the Arthur Krock papers at the Seeley Mudd Library at Princeton University.

90. Telephone interview with the author, May 4, 1990.

graphic attributes of Justice Brennan, it is difficult to accept Eisenhower's disaffection with the liberal direction of his nominee. Numerous friends and associates of Brennan in 1950's New Jersey recall him as a liberal person who left little doubt about his views. Those who followed his legal career knew that he was unmistakably a sometime liberal thorn in Vanderbilt's side when it came to the merits of New Jersey Supreme Court decisions. It is difficult to see how the men around President Eisenhower could have missed Brennan's liberalism. Indeed, Brownell prefers to remember that they were aware of Brennan's views and were not troubled by them.[91]

The explanation is that they were focused, first, on political demographics, and then, even as to substance, on court reform and judicial administration, more than on substantive constitutional or jurisprudential outcomes. The inescapable conclusion is that Eisenhower got precisely the political result for which he was searching in the nomination process of William J. Brennan, Jr.

91. See text accompanying note 48 supra.