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Daniel M. Berman

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# MR. JUSTICE BRENNAN: A PRELIMINARY APPRAISAL

by

DANIEL M. BERMAN\*

William J. Brennan's first year as an Associate Justice of the United States Supreme Court coincided with what may have been as significant a turning point in the Supreme Court's history as the 1936-1937 term, when the Court ceased its obstruction of the New Deal and recognized that the twentieth century was here to stay.<sup>1</sup> In 1937 the Hughes Court proclaimed the beginning of an era; in 1957 the Warren Court announced the end of one. A momentous series of decisions seemed to be serving notice that the days were over when the Court would almost automatically sustain, the Bill of Rights to the contrary notwithstanding, whatever the executive and legislative branches said was necessary for successful prosecution of the cold war.

Among the Justices who had given constitutional sanction to the cold war repression, none was more consistent or more predictable than Mr. Justice Sherman Minton, who had been placed on the Court in 1949 by President Truman. With his retirement in October, 1956, the Court's conservatives lost a tower of strength. If they were expecting that a Republican President would appoint a kindred spirit in his stead, they must be sadly disappointed as they contemplate the record of the man President Eisenhower did select. For, on the basis of his freshman year as a Supreme Court Justice, it appears that William J. Brennan possesses a political philosophy with roots sunk deep in the soil of judicial liberalism. It is difficult to imagine that in an atmosphere so conducive to its growth this philosophy can fail to come to mature fruition with the passing years.

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Probably the most significant opinion which Brennan wrote during the 1956-1957 term was in *Jencks v. United States*.<sup>2</sup> The case concerned Clinton E. Jencks, a New Mexico labor leader, who had been convicted of filing a false non-Communist affidavit under the Taft-Hartley Act. Key government witnesses against Jencks were Harvey Matusow and J. W. Ford, former Communists and paid informers of the Federal Bureau of

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\* Daniel M. Berman, Acting Professor of Political Science, State University of New York at Fredonia.

<sup>1</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>2</sup> 353 U.S. 657 (1957).

Investigation. The two witnesses, who testified in court that they had known the defendant as a Communist Party official, had previously made oral and written reports to the FBI about Communist activities allegedly carried on by Jencks.<sup>3</sup> The defense moved that the trial judge, Robert E. Thomason, direct the government to produce these reports for use in cross-examining the two informers. The judge's denial of this motion was upheld by the Court of Appeals on the ground that the defense had not laid a preliminary foundation of inconsistency between the contents of the reports and the testimony of Matusow and Ford.<sup>4</sup>

The Supreme Court, in a 7-to-1 decision, reversed the conviction. In his opinion for the majority, Brennan held that a sufficient foundation for production of the documents had been established ". . . by the testimony of Matusow and Ford that their reports were of the events and activities related in their testimony." Matusow's confession that "I don't recall what I put in my reports two or three years ago" made it clear to Brennan that the documents could be highly valuable to the defense.

Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of a witness recording the events before time dulls treacherous memory [he declared]. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.<sup>5</sup>

Brennan ruled that Jencks should have been given access to all reports pertaining to the events and activities about which Matusow and Ford had testified at the trial. It would not be enough to have the trial judge sift the reports in an attempt to select those which were relevant and material, for ". . . only the defense is adequately equipped to determine the effective use [of the documents] for purpose of discrediting the Government's witness and thereby furthering the accused's defense. . . ." Consequently, concluded Brennan, ". . . the defense must initially be entitled to see them to determine what use may be made of them."<sup>6</sup>

There was, of course, no way to compel the government to produce reports which, it said, had to remain confidential for the sake of the national security or public interest. But, ruled Brennan, the government

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<sup>3</sup> Matusow later recanted his trial testimony as deliberately false. *Id.* at 665.

<sup>4</sup> The Court of Appeals admitted that ". . . upon a proper showing that the Government has possession of such inconsistent statements and the presence of the other requisite conditions, a person charged with crime would be permitted to examine and use them." 226 F.2d 552 (5th Cir. 1955).

<sup>5</sup> *Jencks v. United States*, 353 U.S. 657, 667 (1957).

<sup>6</sup> *Id.* at 668, 669.

could withhold the reports only at the price of seeing the defendant go free. It would be unconscionable to permit the government to prosecute an accused while denying him material essential to his defense.<sup>7</sup> In each case the government would have to decide “. . . whether the public prejudice of allowing a crime to go unpunished is greater than that attendant upon possible disclosure of state secrets and other confidential information in the government’s possession.”<sup>8</sup>

The concern which Brennan exhibited for the rights of the accused was in sharp contrast to the position taken by Justice Tom Clark in his violent dissent. The former Attorney General warned:

Unless the Congress changes the rule announced by the 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. . . . [I]t opens up a veritable Pandora’s box of troubles.<sup>9</sup>

The Eisenhower Administration, too, was somewhat nonplussed by the Jencks decision, but the Department of Justice apparently felt that Justice Clark’s fears were more rhetorical than real. According to the *New York Times*,<sup>10</sup> “. . . there were guarded acknowledgments that the situation might not be too bad. There were no indications that the FBI [and] other investigative agencies of the government were planning to ‘close up shop.’” The government was sufficiently upset, however, to back a bill<sup>11</sup> designed to nullify some of the effects of the rule of law enunciated in the case.”

A storm of criticism broke over the Supreme Court because of the Jencks decision.<sup>12</sup> It was as though Brennan had enunciated a new and

<sup>7</sup> *Id.* at 671.

<sup>8</sup> *Id.* at 672.

<sup>9</sup> *Id.* at 681, 682.

<sup>10</sup> June 5, 1957.

<sup>11</sup> The measure, rushed through Congress in the closing days of the 1957 session and signed by the President, provides that the trial judge, after hearing the testimony of prosecution witnesses who had given statements to the FBI, should screen the documents and turn over relevant ones to the defense. In two other respects, the measure modifies *Jencks*: (1) if the government refuses to turn over the reports, the judge can strike the testimony or order a mistrial instead of dismissing the case; (2) the defense can demand only statements signed or otherwise approved by the witness or recorded stenographically or electronically. The text of the law was published in the *New York Times*, August 30, 1957.

<sup>12</sup> Not atypical was a cartoon by Reg Manning, distributed nationally by the McNaught Syndicate, Inc. It depicted “traitorous Reds”, “kidnappers”, and “other criminals” racing to open “Secret FBI Files” with keys fashioned in the “Supreme Court Key Shop.” Herbert R. O’Conor, former Maryland governor and United States Senator, told the House of Delegates of the American Bar Association that the *Jencks* decision would permit “. . . one accused of subversion against this nation and its people . . . to rummage at will through government documents containing confidential information important to the national security and of no relevance whatever to the defense of the accused.” *New York Times*, July 26, 1957.

outlandish rule of law instead of merely reaffirming the salutary principle that each side in a case should have access to relevant information in the possession of the other.

Three years before his elevation to the United States Supreme Court, Brennan had argued eloquently for extension of the discovery principle to criminal cases. As a member of the New Jersey Supreme Court, he dissented vigorously from a 4-to-2 decision by the late Chief Justice Arthur J. Vanderbilt in *New Jersey v. Tune*.<sup>13</sup> The Vanderbilt majority had denied to a defendant in a murder case the right to inspect his own confession. Vanderbilt's fear was that a criminal who knows the details of the state's case against him will manage to obtain perjured testimony in order to erect a false defense. Brennan considered the argument devoid of merit. He wrote:

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 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.<sup>14</sup>

In his dissent, Brennan wanted to know why the majority judges were making a different rule for criminal cases than for civil cases. Were they depending on "some visceral augury" in manufacturing the distinction? As he saw it, the discovery principle was *especially* desirable in criminal cases, where even a human life might be at stake. He pleaded with the court not to reject ". . . a tool so useful in guarding against the chance that a trial will be a lottery or a mere game of wits and the result at the mercy of the mischiefs of surprise."<sup>15</sup> Brennan exhorted the majority to remember that ". . . society's interest is equally that the innocent shall not suffer and not alone that the guilty shall not escape."<sup>16</sup> In *Jencks* he called attention to a related truth: the interest of the United States in a criminal prosecution is not that it shall win a case, but that justice shall be done.<sup>17</sup>

On the basis of *Jencks* and *Tune*, it is clear that Brennan is appalled by the notion that a defendant may be deprived of access to information

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<sup>13</sup> 13 N.J. 203, 98 A.2d 881 (1953).

<sup>14</sup> *Id.* at 227.

<sup>15</sup> *Ibid.* Brennan amplified this idea in an address he delivered a few weeks after his appointment to the Supreme Court. The public, he said, has ". . . reason to complain of the fact that all too often a trial becomes a battle between opposing counsel rather than an orderly, rational search for the truth in the merits of the controversy. . . . Pretrial discovery and pretrial conference procedures can truly be employed as a scalpel to lay bare the true factual controversy." Howard Crawley Memorial Lecture, Wharton School of Finance and Commerce, University of Pennsylvania, November 20, 1956 (unpublished).

<sup>16</sup> *New Jersey v. Tune*, 13 N.J. 203, 227, 98 A.2d 881, 894 (1953).

<sup>17</sup> *Jencks v. United States*, 353 U.S. 657, 668 (1957).

vital to his case merely because the authorities, for whatever reason, refuse to divulge it. It may be only a matter of time before Brennan will try to persuade his colleagues to extend the spirit of the Jencks decision to the innumerable cases in which secret FBI information is used, *inter alia*, to justify "loyalty" dismissals of Federal workers.

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The flood of criticism against the Supreme Court for its decision in the Jencks case seemed like a harmless trickle by comparison with the torrent of abuse unleashed against it two weeks later for its disposition of a case involving the House Committee on Un-American Activities.<sup>18</sup> The opinion in this case was not written by Brennan, but the new Justice subscribed to it.

The case concerned John T. Watkins, a labor leader, who had been summoned to testify before a subcommittee of the House Un-American Activities Committee. Watkins testified freely about his own political past, but he declined to tell the committee whether he had known certain other persons to have been members of the Communist Party. His claim that he was not given enough information to know whether these questions were within the scope of the Committee's proper activities was upheld by the Supreme Court in an opinion by Chief Justice Earl Warren. The six Justices who composed the majority<sup>19</sup> held that Watkins had not been granted a fair opportunity to determine whether he was within his rights in refusing to answer. His contempt conviction, therefore, was invalid under the due process clause of the Fifth Amendment.

In his opinion, the Chief Justice made fairly obvious his distaste for the heresy hunts which had become the hallmark of the Un-American Activities Committee. He declared:

The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when these forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous. This effect is even more harsh when it is past beliefs, expressions or associations that are disclosed and judged by current standards rather than those contemporary with the matters exposed.<sup>20</sup>

Warren did not attempt to conceal his opinion of the Committee. "Who can define the meaning of 'un-American'?" he asked. The Committee had given the broadest possible definition to the term. It had ". . . conceived

<sup>18</sup> *Watkins v. United States*, 354 U.S. 178 (1957).

<sup>19</sup> Justice Clark dissented, and Justices Burton and Whittaker took no part.

<sup>20</sup> *Watkins v. United States*, 354 U.S. 178, 197 (1957).

of its task in the grand view of its name."<sup>21</sup> In Warren's judgment, there was no congressional power to expose for the sake of exposure.<sup>22</sup>

When Brennan endorsed Warren's strong words about the Un-American Activities Committee, he was merely adhering to the views about congressional investigations which he had expressed two years earlier. Speaking to the Monmouth Rotary Club in Red Bank, New Jersey shortly after an investigation conducted by Senator Joseph R. McCarthy into subversion at nearby Fort Monmouth, Brennan had assailed the abuses committed by some committees—the ". . . distorted version of the happenings at secret hearings released to the press, the shouted epithet at the hapless and helpless witness." These practices, he warned, were bringing the nation ". . . perilously close to destroying liberty in liberty's name." He hailed the new day which he saw dawning:

[T]here are hopeful signs in recent events that we have set things aright and have become ashamed of our toleration of the barbarism which marked the procedures at some of these hearings. It is indeed reason for pure joy and relief that at long last our collective conscience has sickened of the excesses and is demanding the adoption of permanent and lasting reforms to curb investigatory abuses.<sup>23</sup>

There can be no doubt of the contempt reflected in this address toward bodies like the House Committee on Un-American Activities and Senator McCarthy's Permanent Investigating Subcommittee. But when Brennan testified before the Senate Judiciary Committee, which was considering his nomination to the Supreme Court, he softpedaled the sentiments he expressed at Red Bank. After answering a question by McCarthy, Brennan volunteered to his tormentor: "[P]ersonally 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."<sup>24</sup> And when he was challenged to give "one example" of epithets hurled at a "hapless and helpless witness," he backed down.

[T]hese, Senator [he said], were honestly illustrations, a little artist's license, if you please, of what it was I was getting at. I can't tell you exactly now what it is I had in mind, but I know that there was certainly an impression abroad—and, believe me, I think actually the appearance is as bad as or almost as bad as the actuality—that witnesses in some of these instances were not treated as I am presently being treated, for example.<sup>25</sup>

<sup>21</sup> *Id.* at 202, 203.

<sup>22</sup> *Id.* at 200.

<sup>23</sup> Committee on the Judiciary, Senate, 85th Congress, 1st Session, Hearings, "Nomination of William Joseph Brennan, Jr.," starting February 26, 1957, p. 16.

<sup>24</sup> *Id.* at 17.

<sup>25</sup> *Id.* at 27.

In downgrading his bill of particulars against witch-hunting committees to "illustrations" and "a little artist's license," Brennan was influenced by the fact that, having received a recess appointment, he was a sitting Justice and had no desire to embarrass the Supreme Court by "going to the mat" with McCarthy.<sup>26</sup> There was no intention to recant what he had said to the Red Bank Rotarians.

In the Rotary Club speech, Brennan had offered an eloquent defense of the Fifth Amendment's privilege against self-incrimination. "[I]t is the innocent that need protection," he reminded his listeners. "The true reason and necessity for the privilege is that any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence and to be satisfied with an incomplete investigation of the other sources."<sup>27</sup> Brennan does not believe that any inference of guilt can validly be drawn from a witness' resort to the Fifth Amendment. With this in mind, he endorsed a concurrence which Justice Hugo Black wrote in a notable case decided a few weeks before *Watkins*. Black declared in *Grunewald v. United States*: "I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional principles is largely destroyed if persons can be penalized for relying on them."<sup>28</sup> Some weeks earlier, Brennan had joined a significant Black dissent on the subject of self incrimination.<sup>29</sup> But it remains to be seen whether he subscribes to Black's theory that the Fifth Amendment—and all the other Articles of the Bill of Rights—are applied to the States by the Fourteenth Amendment.<sup>30</sup> In his New Jersey Supreme Court days, he specifically rejected this view. The Fifth Amendment, he said, in *In re Pillo*, ". . . does not apply to the several states."<sup>31</sup> In the case at issue, Brennan gave a narrow construction to New Jersey's self-incrimination statute. As he saw it, a witness who was immune to prosecution because the statute of limitations had run out could not claim the protection of New Jersey's "Little Fifth Amendment." He denied that a witness' declaration that an answer might tend to incrimi-

<sup>26</sup> Conversation with the writer, April 17, 1957. Brennan's reluctance to dignify McCarthy by engaging in combat with him was similar to President Eisenhower's attitude in 1953. "I will not get in the gutter with *that* guy," the President said. DONOVAN, EISENHOWER: THE INSIDE STORY, at 249 (N.Y. 1956). McCarthy, incidentally, cast the only vote against Brennan's confirmation. *New York Times*, March 20, 1957.

<sup>27</sup> Committee on the Judiciary, Hearings, *op. cit. supra* note 23, at 15.

<sup>28</sup> 353 U.S. 391, 425 (1957).

<sup>29</sup> *In re Groban*, 352 U.S. 330, 337 (1957).

<sup>30</sup> *Adamson v. California*, 332 U.S. 46, 68 (1947) (dissent).

<sup>31</sup> 11 N.J. 17, 93 A.2d 176 (1952).

nate him had to be accepted by the judge. In each case, he insisted, the judge must determine whether the privilege was being validly invoked.<sup>32</sup>

It seems accurate to say, on the basis of *Grunewald*, that Brennan is coming to embrace a more liberal interpretation of the self-incrimination privilege. At the time that *Pillo* was decided, however, his emphasis was on the protection that the privilege does *not* afford. He admitted that the Fifth Amendment “. . . protects from disclosure not alone answers which, unconnected with other testimony, suffice to convict the witness of a crime [but] any ‘link’ in the ‘chain’ which is necessary to convict . . . cannot be compelled.” He was, however, only leading up to a qualification: “It will not do, however,” he said, “to permit a witness to escape his obligation to provide his testimony for the State upon extremely remote and speculative possibilities of danger.” According to Brennan, the privilege against self incrimination should be interpreted liberally “. . . in light of its wholesome service to the cause of personal freedom,” but not without regard to the public interest.<sup>33</sup>

It is possible that, in the course of time, Brennan will come to adopt Black's broad view of the effect of the Fourteenth Amendment on the Bill of Rights. Up to now, however, he has inclined to Cardozo's belief that the Fourteenth Amendment applies to the States only those Bill of Rights guaranties which “. . . have been found to be implicit in the concept of ordered liberty” and those rights whose abolition would violate a “. . . principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>34</sup> The necessity to choose between “fundamental” and “non-fundamental” principles of justice can compel the drawing of some fairly fine lines. In his 1955 Red Bank speech, for example, Brennan praised the Supreme Court for reversing on Fifth Amendment grounds a narcotics conviction obtained with evidence extracted from the defendant by means of a stomach pump.<sup>35</sup> To Brennan this practice was reminiscent of “[t]he British police official who frankly admitted that his lot was nicer in India than at home, because ‘[i]t is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence against him.’”<sup>36</sup> When he was on the Supreme Court, however, the Justice voted to sustain an involuntary-manslaughter conviction which rested on a medical report of the alcoholic content of the defendant's

<sup>32</sup> See discussion in Berman, *Mr. Justice Brennan*, *Nation*, at 299, October 13, 1956.

<sup>33</sup> *In re Pillo*, 11 N.J. 17, 18, 19, 93 A.2d 176, 181 (1952).

<sup>34</sup> *Palko v. Connecticut*, 302 U.S. 319 (1937).

<sup>35</sup> *Rochin v. California*, 342 U.S. 165 (1952).

<sup>36</sup> Committee on the Judiciary, *Hearings*, *op. cit. supra* note 23, at 15.

blood, a sample of which had been taken from him as he lay unconscious in a hospital emergency room.<sup>37</sup>

The Cardozo rule permits judges to decide which Bill of Rights guaranties shall bind the States. It remains to be seen whether Brennan will be willing to permit these guaranties to rest on so shifting and unreliable a base.

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When Brennan was named to the Supreme Court by President Eisenhower, the Henry Luce newsmagazine, *Time*, was enthusiastic. Reviewing the new Justice's state court record, the publication reported: "His opinions are clear, thoughtful, moderate; his mind is quick and sharp."<sup>38</sup> Before Brennan's first year was over, however, *Time's* sister publication, *Fortune*, indicated that the initial estimate had to be revised. Now Brennan was guilty of "... cavalier treatment of factual details. . . ." He had written a "... sweeping majority opinion [which] ignored forty years of precedent and administrative experience. . . ."<sup>39</sup> The opinion which caused such disenchantment was the one Brennan wrote in *United States v. E. I. du Pont*.<sup>40</sup> It was announced on the same day as the Jencks decision and caused as much of a furor.

The issue before the Court was whether du Pont was in violation of the anti-trust laws by holding 23 percent of the stock of General Motors. A majority of the Justices who participated<sup>41</sup> held against du Pont. They decided the case under Section 7 of the Clayton Act,<sup>42</sup> which provides that no corporation may acquire stock "... where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." The Court ruled that the 1914 Clayton Act was meant to apply to "vertical" mergers—in which a corporation gets control of a potential customer or supplier—as well as to "horizontal" mergers, in which a corporation swallows up a competitor.<sup>43</sup> Brennan's ruling was far reaching.

<sup>37</sup> *Breithaupt v. Abram*, 352 U.S. 432 (1957).

<sup>38</sup> October 8, 1956, p. 25.

<sup>39</sup> July, 1957, pp. 91, 92.

<sup>40</sup> 353 U.S. 586 (1957).

<sup>41</sup> Only six Justices took part in the case. Justice Clark, who had been Attorney General when the suit was begun, disqualified himself, as did Justice Harlan, who had been counsel to du Pont. Justice Whittaker was not yet on the Court when the case was argued.

<sup>42</sup> 38 STAT. 731, 15 U.S.C. § 18 (1946 ed.).

<sup>43</sup> *United States v. du Pont*, 353 U.S. 586, 590-592 (1957).

We hold [it said] that any acquisition by one corporation of any part of the stock of another corporation, competitor or not, is within the reach of the section whenever the reasonable likelihood appears that the acquisition will result in a restraint or in the creation of a monopoly of any line of commerce.

The "whenever" was the key word. It meant that the Government did not have to prove that the stock acquisition tended to monopoly at the time it was made; it would suffice to show that, at the time of the suit, such a likelihood of monopoly existed. On this basis, Brennan ruled that in 1949, when the Government instituted its suit, there was a probable restraint or monopoly as a result of du Pont's acquisition of General Motors stock thirty years earlier.<sup>44</sup>

It was of course necessary for the Court to determine the relevant market, control of which would constitute monopoly within the meaning of the Act. If the market was defined broadly—to include all industrial finishes and fabrics—there would be no violation of the law; if, however, the market was defined narrowly—to include only *automotive* finishes and fabrics—du Pont would lose the case. A year earlier, the Justices had given a very broad definition to the "relevant market" in another case involving du Pont. At that time, the "relevant market" over which monopolistic control had to be proved was held, in a 4-to-3 decision, to include all flexible packaging materials, not merely cellophane.<sup>45</sup> In the current *du Pont* case, precisely the same type of question was involved. Presumably the same type of answer would have been given, if the personnel of the Court had not changed in the intervening months. But Justices Minton and Stanley Reed, who had voted for du Pont, had retired, so the restrictive interpretation of the Clayton Act was upheld by only two Justices—Harold H. Burton and Felix Frankfurter; and Chief Justice Warren and Justices Black and William O. Douglas, who had wanted to condemn du Pont in 1956, had found their strength augmented by the appointment of Brennan. Those intent on trying to prove that ours is a government of laws and not of men would find scant support in a comparison of these two cases. The anti-trust laws are clearly what the judges say they are at the time they say it.

What the judges in the 1957 *du Pont* case said these laws were was not calculated to bring joy to the big business community. For the first time, the original Clayton Act was held to apply to vertical combinations,

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<sup>44</sup> *Id.* at 607. On October 25, 1957, the Government proposed that du Pont be forced to distribute its 63 million shares of General Motors' stock to its common stockholders over a ten-year period. The proposed order was published in the *New York Times*, October 26, 1957.

<sup>45</sup> *United States v. du Pont*, 351 U.S. 377 (1956). See discussion of this case in Berman, *Cellophane is Sacred to du Pont*, *Progressive*, August, 1956, at 21, 22.

and the government was given the power to examine the effects of corporate acquisitions even many years after the event. As Justice Burton put it in his picturesque dissent: "Every corporation which has acquired a stock interest in another corporation after the enactment of the Clayton Act in 1914, and which has had business dealings with that corporation is exposed, retroactively, to the bite of the newly discovered teeth of § 7."<sup>46</sup> *Fortune* magazine recorded the fears of the business community:

Justice William Brennan's sweeping majority opinion ignored forty years of precedent and administrative experience, enunciated radical new concepts of antitrust theory—and did almost nothing to clarify the existing ambiguities in the law. On the contrary, Justice Brennan's opinion introduced new uncertainties into the law and placed virtually every large company under a cloud of suspicion.<sup>47</sup>

There is anxiety among the editors of *Fortune* that "[t]he Brennan 'law' is basically an anti-bigness law . . . [and that] we are back to equating bigness with badness."<sup>48</sup> Laying aside the question of whether such a revival of the spirit of Brandeis would be so horrendous, one can certainly agree on the basis of his opinion in *du Pont* that Brennan's enthusiasm for bigness is not of the unrestrained variety. On the issue of monopoly as on issues stemming from the Bill of Rights, Brennan has joined the liberals on the Warren Court.

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Justice Brennan is the first Roman Catholic to be appointed to the Supreme Court since Justice Frank Murphy, who died in 1949. It was only to be expected that his selection would call forth opposition from those who, whenever a Catholic wins public office, see visions of the Pope preparing to move into the White House. Already upset by abusive mail from anti-Catholic bigots, Brennan found himself compelled to "reveal" to the Senate Judiciary Committee whether his primary loyalty was to the Church or the Constitution.

The question he was asked to answer at the hearing on his confirmation was worded in the following way:

You are bound by your religion to follow the pronouncements of the Pope on all matters of faith and morals. There may be some controversies which involve matters of faith and morals and also matters of law and justice. But in matters of law and justice you are bound by your oath to follow not papal decrees and doctrines, but the laws and precedents of this nation. If you should be faced with such a mixed issue, would you be able to follow the requirements of your oath or would you be bound by your religious obligations?<sup>49</sup>

<sup>46</sup> *United States v. du Pont*, 353 U.S. 586, 611 (1957).

<sup>47</sup> July, 1957, p. 91.

<sup>48</sup> *Id.* at 91, 92.

<sup>49</sup> Committee on the Judiciary, Hearings, *op. cit. supra* note 23, at 32.

It was Senator Joseph C. O'Mahoney who asked Brennan to answer the question, which was submitted by Charles Smith, of the National Liberty League.<sup>50</sup> O'Mahoney, who himself is a Catholic, admitted that in putting the question to Brennan he was bending over backward to avoid the appearance of favoritism to a co-religionist. He asserted: ". . . I feel as a Catholic that it would be improper for me to bring in a report holding this desire to propound a question to the Justice one that was irrelevant to the issue, and I am sure that the Justice will be very happy to answer the question, and, therefore, Mr. Chairman, on my own authority, I would desire the opportunity of asking the question myself."<sup>51</sup> Brennan replied to the question in these words:

Senator, I think the oath that I took is the same one that you and all of the Congress, every member of the executive department up and down all levels of government took to support the Constitution and laws of the United States. I took that oath just as unreservedly as I know you did, and every member and everyone else of our faith in whatever office elected or appointive he may hold. And I say not that I recognize that there is any obligation of our faith superior to that, rather that there isn't any obligation of our faith superior to that. And my answer to the question is categorically that in everything I have ever done, in every office I have held in my life and that I shall ever do in the future, what shall control me is the oath that I took to support the Constitution and laws of the United States and so act upon the cases that come before me for decision that it is that oath and that alone which governs.<sup>52</sup>

This answer provoked more attacks on Brennan, this time from Catholics who felt—probably on the basis of sketchy newspaper reports of the testimony—that he had professed insufficient loyalty to the Church.<sup>53</sup> In the opinion of an influential Catholic journal, the "confused and negative discussions" which followed Brennan's testimony could have been prevented if the Justice had clarified the "distinctions and assumptions" upon which his statement was based.<sup>54</sup> The "distinctions and assumptions" are clear enough to Brennan, himself. As he sees it, there is simply no conflict between the obligations imposed by his judicial oath and the obligations enjoined by his faith. His task is to interpret the Constitution as he understands it. To probe into the question of whether and to what degree the way he understands the Constitution is a product of

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<sup>50</sup> The strength of Smith's commitment to democratic principles of religious toleration can be observed in his statement accompanying his organization's question to Justice Brennan: "We do not contend that confirmation of the appointment of Judge Brennan to the Supreme Court is illegal; we oppose it on the same ground that a Catholic in a predominantly Catholic country would oppose the nomination of a Protestant. This is a predominantly Protestant country. In Catholic nations, we believe, Protestants are not appointed to the highest court." *Id.* at 32.

<sup>51</sup> *Id.* at 32, 33.

<sup>52</sup> *Id.* at 34.

<sup>53</sup> Conversation with the writer, April 17, 1957.

<sup>54</sup> *Commonweal*, April 5, 1957, p. 5.

his theological beliefs is to experiment dangerously with a type of political psychoanalysis not easily distinguishable from religious bigotry.

In any event, it is certain that Brennan was conscious of no conflict between his conception of the Constitution and his personal religious code in the "obscenity cases," which were decided during his first year as a Supreme Court Justice.<sup>55</sup> At issue was the constitutionality of a Federal law making punishable the mailing of "obscene, lewd, lascivious, or filthy" material<sup>56</sup> and a California law barring the sale or advertisement of similar material.<sup>57</sup> Brennan wrote the opinion for the Court's majority, which sustained both statutes.

In his opinion, Brennan rejected the absolutist interpretation which Justice Black places on the First Amendment. He denied that obscenity is protected by the Constitution. "[I]t is apparent," he said, "that the unconditional phrasing of the First Amendment was not intended to protect every utterance." Essentially Brennan's argument was that the constitutional safeguards of speech and press were fashioned to assure "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."<sup>58</sup> Obscenity, in this view, is not privileged, because it is "utterly without redeeming social importance."<sup>59</sup> The framers of the First Amendment, said Brennan, did not intend to give obscenity constitutional sanction any more than they meant to insulate libel from legal attack.<sup>60</sup> In a 1952 New Jersey Supreme Court case, Brennan had upheld the same position. The First Amendment, he said, does not extend its protection to "speech which is outrightly lewd and indecent." But in this case he voted to deny a municipality the right to refuse a license to a theatre specializing in "girlie" exhibitions since, he said, there was no certainty that the proprietors of the theatre would set up a burlesque show.<sup>61</sup>

In *Roth*, the Justice strove valiantly to prevent his ruling from becoming another precedent, however oblique, for the abridgment of the freedom to speak and write on public questions. "All ideas having even the slightest redeeming social importance," he said, "—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties [of the First Amendment],

<sup>55</sup> *Roth v. United States, Alberts v. California*, 354 U.S. 476 (1957).

<sup>56</sup> 18 U.S.C. § 1461.

<sup>57</sup> WEST'S CALIFORNIA PENAL CODE ANN., § 311 (1955).

<sup>58</sup> *Roth v. United States*, 354 U.S. 476, 484 (1957).

<sup>59</sup> *Id.* at 484.

<sup>60</sup> *Id.* at 482-483.

<sup>61</sup> *Adams Theatre v. Keenan*, 12 N.J. 267, 96 A.2d 519 (1952).

unless excludable because they encroach upon the limited area of more important interests."<sup>62</sup>

The "unless" clause seemed to indicate that, even within the limited range of ideas possessing "social importance," Brennan is unwilling to accept the categorical wording of the First Amendment literally. "Congress shall make no law . . . abridging the freedom of speech, or of the press" is apparently to be qualified by an "if" clause—"if there is not a more important interest that is encroached upon." Although the "door barring federal and state intrusion into this area [of speech and press freedom] cannot be left ajar; it must be kept tightly closed . . .," it can be opened "the slightest crack necessary to prevent encroachment upon more important interests."<sup>63</sup> It would thus appear that Brennan does not share the faith of some<sup>64</sup> that society can have no more important interest than the preservation of the right to speak and write freely. But it is probably accurate to say that he will not give easy approval to every incursion on First Amendment territory that purports to be essential to "more important interests" of society. The door will not be opened wide *by him*; the only difficulty is that there are always others able and anxious to expand the "slightest crack" in the First Amendment into a gaping hole.

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It is always difficult and often foolish to attempt to label a Justice in terms of his judicial and political philosophy. Especially when there is only a year's work to generalize from is any attempt at more than a tentative and preliminary appraisal hazardous. There are, however, certain tendencies to which Justice Brennan, in his state court and Supreme Court opinions, seems to have committed himself.

For one thing, Brennan has a passionate concern with the rights of persons accused of crimes. This concern makes him capable of great indignation when he feels that the police have cut corners.<sup>65</sup> For him the possibility of convicting an innocent man is far more frightening than

<sup>62</sup> *Roth v. United States*, 354 U.S. 476, 484 (1957).

<sup>63</sup> *Id.* at 488.

<sup>64</sup> *E.g.*, Justice Black, who has expressed the belief that ". . . the Nation's security lies in the undiluted right of individuals to exercise their First Amendment Freedoms." Address, Swarthmore College, June 6, 1955 (unpublished).

<sup>65</sup> In the *Tune* case, for example, these are the words in which he described the taking of a confession from a man accused of murder: "The accused was without counsel, denied even the comfort of a friendly face, in conversations in the small hours of the morning with a sizeable group of police officers. . . . Under these circumstances the State could and did, at its leisure and without hindrance or interruption, since none was there in the interest of the accused, persist until there was drained from him everything necessary to support the charge against him." The Justice added biting: "[T]hat the State prizes the result [a confession] is manifest from the tenacity with which defense counsels' effort to see it is resisted." 13 N.J. 203, 235, 98A.2d 881, 896 (1953). See also *Fikes v. Alabama*, 353 U.S. 191, 198 (1957); *Mallory v. United States*, 354 U.S. 449 (1957).

the chance that a scrupulous regard for the constitutional rights of defendants may result in allowing some criminals to escape punishment.

Another generalization which seems warranted on the basis of Brennan's first year is that he shows no inclination to subordinate the individual's right to speak freely on public questions to society's right to protect itself from "dangerous ideas." A significant case in point is *Yates v. United States*,<sup>66</sup> in which Brennan supported Justice John Marshall Harlan's majority view that the Smith Act does not prohibit the teaching and advocacy of forcible overthrow of the government as an abstract principle.

In cases involving economic issues, Brennan does not appear to be awed by big business enterprise, as noted in the discussion of *du Pont*, *supra*. His coolness toward big business is matched by an apparent sympathy for the laboring man—a sympathy especially evident in Federal Employers' Liability Act cases, in which workers demand compensation from employers for injuries sustained on the job.<sup>67</sup>

On all these subjects, Justice Brennan has lined up increasingly with the Court's most liberal Justices—Warren, Black, and Douglas. One senses that his agreements with this triumvirate are basic, while his differences are less significant and far more likely to undergo modification. The amazing fact that emerges is that a Republican President has given Black and Douglas, the Court's most extreme libertarians, two fairly consistent allies in Chief Justice Warren and now in Mr. Justice Brennan.

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<sup>66</sup> 354 U.S. 298 (1957).

<sup>67</sup> See especially *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957).