

**"I believe that the Senators are entitled to know how you feel...."**

**Hearings on the Nomination of William J. Brennan, Jr., to Be an Associate Justice of the U.S. Supreme Court\***

In September 1956, during the middle of that year's presidential campaign, Justice Sherman Minton announced his retirement. As his successor, President Dwight D. Eisenhower chose William J. Brennan, Jr.; and because the Senate was not in session, the President, as the plain words of Article II, § 3 of the constitutional text authorize, gave Brennan a recess appointment that would expire at the close of the next session of Congress. He immediately took his place on the Court and began participating in decision making. As soon as Congress reconvened in January 1957, the President sent Brennan's nomination to the Senate for its advice and consent on his appointment during "good behavior." The Committee on the Judiciary then conducted its hearings.

**SENATOR JOSEPH McCARTHY OF WISCONSIN....** On the basis of that part of his record that I am familiar with, I believe that Justice Brennan has demonstrated an underlying hostility to congressional attempts to expose the Communist conspiracy.

I can only conclude that his decisions on the Supreme Court are likely to harm our efforts to fight communism. I shall, therefore, vote against his confirmation unless he is able to persuade me today that I am not in possession of the true facts with respect to his views.

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

I would like to ask Mr. Brennan a few questions if I may.... Do you approve of congressional investigations and exposure of the Communist conspiracy set up?

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

**SENATOR McCARTHY.** You, of course, I assume, will agree with me—and a number of the members of the committee—that communism is not merely a political way of life, it is a conspiracy designed to overthrow the United States Government.

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\**Hearings before the Committee on the Judiciary, U.S. Senate, on the Nomination of William J. Brennan, Jr., to be an Associate Justice of the U.S. Supreme Court, 85th Cong. 1st Sess., pp. 5, 17–22, 34.*

**MR. BRENNAN.** Will you forgive me an embarrassment, Senator. You appreciate that I am a sitting Justice of the Court. There are presently pending before the Court some cases in which I believe will have to be decided the question what is communism, at least in the frame of reference in which those particular cases have come before the Court. I know, too, that you appreciate that having taken an oath of office it is my obligation not to discuss any of those pending matters. With that qualification, whether under the label communism or any other label, any conspiracy to overthrow the Government of the United States is a conspiracy that I not only would do anything appropriate to aid suppressing, but a conspiracy which, of course, like every American, I abhor.

**SENATOR MCCARTHY.** Mr. Brennan, I don't want to press you unnecessarily, but the question was simple. You have not been confirmed yet as a member of the Supreme Court. There will come before that Court a number of questions involving the all-important issue of whether or not communism is merely a political party or whether it represents a conspiracy to overthrow this Government.

I believe that the Senators are entitled to know how you feel about that and you won't be prejudicing then any cases by answering that question.

**MR. BRENNAN.** Well, let me answer it, try to answer it, this way, Senator. Of course, my nomination is now before the Senate for consideration, nevertheless since October 16 I have in fact been sitting as a member of the Court. The oath I took, I took as unreservedly as I know you took your own, and as I know every Senator took his. And I know, too, that your oath imposes upon you the obligation to ask just such questions as these. But I am in the position of having an oath of my own by which I have to guide my conduct and that oath obligates me not to discuss any matter presently pending before the Court....

**SENATOR MCCARTHY.** Mr. Brennan, we are asked to either vote to confirm or reject you. One of the things I have maintained is that you have adopted the gobbledegook that communism is merely a political party, it is not a conspiracy. The Supreme Court has held that it is a conspiracy to overthrow the Government of this country. I am merely asking you a very simple question. It doesn't relate to any lawsuit pending before the Supreme Court. Let me repeat it. Do you consider communism merely as a political party or do you consider it as a conspiracy to overthrow this country?

**MR. BRENNAN.** I can only answer, Senator, that believe me there are cases now pending in which the contention is made, at least in the frame of reference in which the case comes to the Court, that the definitions which have been given by the Congress to communism do not fit the particular circumstances....

**SENATOR MCCARTHY.** You know that the Congress has defined communism as a conspiracy. You are aware of that, aren't you?

**MR. BRENNAN.** I know the Congress has enacted a definition, yes, sir.

**SENATOR McCARTHY.** And I think it is important before we vote on your confirmation that we know whether you agree with that?

**MR. BRENNAN.** You see, Senator, that is my difficulty, that I can't very well say more to you than that there are contending positions taken in given cases before us....

**SENATOR McCARTHY.** ... This is all important, I would like to know whether or not the young man who is proposed for the Supreme Court feels that communism is a conspiracy or merely a political party. Now just so you won't be in the dark about my reason for asking that, the *Daily Worker*, all of the Communist-lip papers, and the Communist witnesses who have appeared before my committee, I assume the same is true of Senator Eastland's committee, have taken the position that it is merely a political party. I want to know whether you agree with that. That will affect your decision. It will affect my decision on how to vote on your confirmation. I hope it will affect the decision of other Senators.

**MR. BRENNAN.** Senator, believe me I appreciate that what to one man is the path of duty may to another man be the path of folly, but I simply cannot venture any comment whatever that touches upon any matter pending before the Court.

**SENATOR McCARTHY.** Mr. Brennan, I am not asking you to touch upon anything pending before the Court. I am asking you the general question: Do you consider communism merely as a political party or do you consider it as a conspiracy to overthrow this country? ...

**MR. BRENNAN.** Senator, I cannot answer, I am sorry to say, beyond what I have....

**SENATOR O'MAHONEY.** Just let me clarify this. The Senator from Wisconsin has made it perfectly clear, as I understand it, that he is not asking the Justice to make any statement with respect to a pending case. Therefore, the oath of office that the Justice may have taken is not involved.

**SENATOR McCARTHY.** Right.

**SENATOR O'MAHONEY.** There is now pending before the Senate a resolution, sent here by the executive branch of the Government, by the President of the United States, who appeared before us in a joint session of Congress in which he asked Congress to pass a resolution authorizing him to employ the Armed Forces of the United States in the defense of any nation in the Middle East, undescribed though the Middle East was in the resolution, at the request of any nation there, which was being attacked by international communism. Now the question I think that is in the mind of the Senator from Wisconsin is the question which I think has already been settled and on which you must have clear views. Do you believe that international communism is a conspiracy against the United States as well as against all other free nations?

**MR. BRENNAN.** Yes, that question I answer definitely and affirmatively. I did not understand that was the question the Senator was asking me....

**SENATOR JENNER.** May I interrupt right there? Does the Senator from Wyoming and does the Senator from Wisconsin draw a distinction between international communism and communism?

**SENATOR O'MAHONEY.** I don't.

**SENATOR MCCARTHY.** I don't draw a distinction.

**SENATOR JENNER.** I would like to know Mr. Justice Brennan's answer to that. Do you draw a distinction between international communism and communism?

**MR. BRENNAN.** Let me put it this way, Senator. This is the difficulty. There are cases where, as I recall it, the particular issue is whether membership, what is membership, and whether if there is membership, does that come within the purview of the congressional statutes aimed at the conspiracy? I can't necessarily comment on those aspects because they are actual issues before the Court under the congressional legislation.

**SENATOR JENNER.** That is why it raises a question in my mind. In other words, if we have a Communist Party in the United States and the congressional committee has ascertained that it is hooked up with international communism, yet the domestic party might contend they are just national Communists, would that influence your thinking?

**MR. BRENNAN.** Nothing would influence my thinking. All I am trying to get across is that I do have an obligation not to discuss any issues that are touched upon in cases before the Court.

**SENATOR JENNER.** I think in the question that Senator O'Mahoney placed—read the question, will you, please, Mr. Reporter, and the answer?

(Question and answer read.)

**SENATOR JENNER.** Delete the word "international" and just leave in the word "communism," what would be your answer?

**MR. BRENNAN.** Of course, I accept the findings as they have been made by the Congress. The only thing I am trying to do, Senator, is to make certain that nothing I say touches upon the actual issues before us growing out of that legislation as applied in particular cases....

**SENATOR JENNER.** My question, Mr. Chairman, was not based on cases pending. My question was in a similar vein. In view of that would you answer the question?

**MR. BRENNAN.** The answer is "Yes." I'm sorry to have confused the gentlemen.

**THE CHAIRMAN.** Senator McCarthy, you may proceed.

**SENATOR MCCARTHY.** Let's see if we finally have the answer to this, Mr. Justice. You

do agree that communism, striking the word "international" from it, communism does constitute a conspiracy against the United States—I am not talking about any case pending.

**MR. BRENNAN.** Yes.

**SENATOR MCCARTHY.** Thank you....

**SENATOR O'MAHOONEY.** Mr. Chairman, let me address the question to the nominee, Associate Justice Brennan. I read it again from the statement filed with this committee under date of February 26, 1957, by Mr. Charles Smith.

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?

**MR. BRENNAN.** 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 take 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 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 or 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....

### **Editors' Notes**

(1) Soon after confirmation, Brennan joined in several rulings, most notably *Watkins v. United States* (1957), restricting the power of Congress to investigate, and others, especially *Yates v. United States* (1957; available at [www.princeton.edu/aci](http://www.princeton.edu/aci)), curtailing congressional efforts to outlaw domestic communism.

(2) **Query:** To fulfill their constitutional duty to "advise and consent" (or not consent) to presidential nominations, senators must have authority to elicit enough information from a judicial nominee to make a judgment about his or her fitness for office. On the other hand, for a judicial nominee to explain how he or she would vote in a particular case would undermine the integrity of the judiciary. What, if any, are the *constitutional* limits on the sorts of questions that senators may ask a nominee? Are senators *constitutionally* restricted to asking questions about personal integrity and professional competence, or do judgments about "fitness" for the bench necessarily include matters of general jurisprudential orientation? How does one draw a line

between philosophic and jurisprudential matters and how a judge might vote in a particular case? If a nominee says that abortion is murder and that judges should defer to legislatures in controversial cases, is she or he indicating how she or he is likely to vote in most abortion cases?

(3) The hearings in 1987 on the nomination of Judge Robert H. Bork to be an associate justice of the Supreme Court dramatized the issues as much as any case in U.S. history. The Judge took on his senatorial interrogators in lengthy intellectual debates about constitutional interpretation. Outside the committee room, the White House staff lobbied busily, if ineffectively, to win support for the Judge, while interest groups associated with liberal causes were lobbying far more effectively to ruin his chances—thereby creating a new synonym for "to destroy": To Bork. In the end, by a vote of 58–42, the Senate declined to consent. The 6,511 pages of testimony and documents are collected in: *Hearings: Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States*, 100th Cong., 1st sess. (1987). For Bork's bitter comments on his fate, see his *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990), espec. Part III. For sympathetic accounts of the campaign "to Bork" Bork, see Michael Pertschuk and Wendy Schaetzel, *The People Rising: The Campaign Against the Bork Nomination* (New York: Thunder Mouth's Press, 1989). For an effort to present a more even-handed assessment, see Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* (New York: Norton, 1989).

(4) **Query:** Since Bork's defeat, the hearings on nominees for the Supreme Court have been less contentious, though the charges of sexual harassment leveled against Clarence Thomas in 1991 added an element not previously present. For a general lament about the process, see Stephen L. Carter, *The Confirmation Mess: Cleaning Up the Federal Appointments Process* (New York: Basic Books, 1994).