Chapter IV

DWIGHT D. EISENHOWER, EARL WARREN, AND WILLIAM J. BRENNAN

Setting

As 1952 began President Harry S. Truman found himself confronted with a host of problems. While the nation sorely needed respite from twenty years of depression and war, the Korean War had ground to a bloody stalemate, with peace talks making little progress. The American people found themselves preoccupied with the Cold War, causing divisiveness at home over fear of communist subversion. The country also had to contend with the conflict-ridden issue of civil rights. The people longed for reassuring leadership, and many thought Dwight Eisenhower was the person who could provide it.

Republicans saw a chance to break the twenty-year Democrat hold on the White House by choosing popular World War II hero Dwight Eisenhower as their candidate. The General’s popularity was such that he probably could have run as a Democrat or a Republican, having been pursued by members of both parties. Clare Boothe Luce, a Connecticut Congresswoman (former playwright and journalist and later Eisenhower’s Ambassador to Italy), was lobbying him as early as 1949 to run as
a Republican. Governor Thomas Dewey of New York visited Eisenhower in July of 1949, telling him he was a public possession—something of a trust use in the service of all the people. Dewey told Eisenhower that he was worried about the country’s future and that Eisenhower was the only person who could do anything about it. Senator Henry Cabot Lodge, Jr. of Massachusetts, delegated by a number of Republicans from the progressive wing of the party, sent Eisenhower (what, in his diary, he stated to be a comforting) a letter, in December of 1951 in which he attempted to convince the General to seek the presidential nomination.

The Democrats, holding their convention in Chicago, nominated Illinois Governor Adlai E. Stevenson and Alabama Senator John J. Sparkman as their presidential and vice presidential candidates. The Republicans nominated the man they had been recruiting for the last five or more years—Dwight Eisenhower. To placate hard-line anticommunist wing of the party, the convention selected California Senator Richard M. Nixon as Eisenhower’s running mate.

The election was never close, with the Republican ticket garnering 33.9 million votes to the Democrats’ 27.3 million. In the Electoral College it was even more lopsided, with Eisenhower winning 442 votes to Stevenson’s 89.

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2 Ibid., 161.

3 Ibid., 206.


popularity was so great that it generated coattails great enough to help the Republicans win a majority in both houses of Congress for the first time in more than twenty years.

The 1956 presidential election was a replay of 1952, pitting Eisenhower against Stevenson with the outcome even more lopsided in the Republicans’ favor. Democrats were hard pressed to find an issue with which to attack Eisenhower in such a time of prosperity and peace. This time, though, there were no coattails, the first time since Zachary Taylor’s election in 1848 that an incoming President had failed to help his party in at least one house of Congress. More than the exception, this outcome appears to be more the norm in the modern presidency.

**President Eisenhower’s Views**

President Eisenhower entered the White House pledging his administration to a philosophy of “dynamic conservatism.” Translated, this meant: “...in all those things which deal with people, be liberal, be human; when it comes to the people’s money, or their economy, or their form of government, be conservative.” Eisenhower believed that this balanced middle-of-the-road approach fit the mood of the times. By the time of his second administration, one had the feeling from reading his diaries that he believed he had established a centrist position for the country as a whole.

Fiscally, Eisenhower was conservative. He strove to balance the budget each of his eight years, although he was only successful three times due to funding

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demands for social programs, defense, and other government obligations. He was opposed to tax cuts, much to the dismay of many Republicans. He felt the budget should be balanced. He wished to put the brakes on Truman’s enormous military build-up, although defense spending still consumed ten percent of the Gross National Product.\(^8\) He pledged to cut the bureaucracy in order to curb what he called the creeping socialism of the New Deal—although he left most New Deal programs untouched. During his administration social security and unemployment benefits expanded and the minimum wage increased.

Eisenhower, in his memoirs, *The White House Years: Mandate for Change, 1953-1956,* summed up his economic philosophy:

> The Eisenhower conservative wants to conserve the system of free markets and private initiative as the best means yet devised to plan and organize the production that people want. We are opposed to the idea that government price fixing, wage control, rationing, production planning and materials allocation can do the job better than the free market system—except in times of war.

> The Eisenhower conservative intends to preserve our tradition of incentive and reward. We have a deep conviction that in the economic race every man should have an equal place at the starting line.

> The Eisenhower conservative rejects inflation as an instrument of national policy.

> The Eisenhower conservative seeks to conserve the market mechanism when the government must act to avert a depression or inflation. Implicit in this principle is the belief that government must not follow a laissez-faire, eyes-upward policy in the midst of human poverty. But it affirms that whenever the government intervenes in the economy, its goal must always be maximum economic freedom for the individual.

> Last, the Eisenhower conservative seeks to conserve and strengthen economic ties among free nations. Such things as unemployment insurance and social security reduce the human costs of

freedom, while a sound federal budget policy helps to keep our economy growing and stable.\textsuperscript{9}

In his diary entry for March 17, 1958, President Eisenhower wrote about the philosophy under which the administration was pushing ahead with its effort to stimulate the economy:

We are basically conservative. We believe, for example, that frantic efforts now to put the federal government into a large scale building program will have most unfortunate financial consequences….We believe in a private enterprise rather than a government campaign to provide the main strength of recovery forces. We want to avoid a succession of budget deficits because of the inflationary effect. We want to do everything that has a stimulating effect on the economy, but so far as expenditure programs are concerned, we prefer to limit those to projects that are useful and needed….We want to do everything that is feasible and practical to stimulate recovery, and at the same time keep our own financial house in order.\textsuperscript{10}

President Eisenhower was opposed to the government intervening in the economy unless absolutely necessary. He held that groundwork for economic recovery must be laid by the government; recovery itself was the work of the American people.\textsuperscript{11} He refused to urge a massive program of federal intervention in the economy before his administration had compelling evidence that it would do more good than harm. He was not, however, opposed to attempting to manipulate the economy. In April of 1954 he asked Secretary of the Treasury George M. Humphrey to place serious pressure on


\textsuperscript{10} Ferrell, ed., \textit{The Eisenhower Diaries}, 352.

\textsuperscript{11} Eisenhower, \textit{The White House Years: Mandate for Change, 1953-1956}, 305.
the Federal Reserve Board to continue to loosen credit further, inasmuch as he believed the economy needed stimulating.\textsuperscript{12}

Reducing taxes, although not at any cost, was one of President Eisenhower’s major goals. He believed timing was of paramount importance and he would not agree to tax cuts until the budget was balanced. In a 1952 campaign speech in Peoria, Illinois he stated his goal was to cut federal spending to about $60 billion within four years. This was with the assumption that the Cold War did not get worse, which would require more defense spending.\textsuperscript{13} One way to achieve the target was reducing expenditures across the board while making adequate provision for the nation’s security—always a concern of Eisenhower.

In his mind, opposing his philosophy were liberal Democrats in the Congress who had to be combated at every turn to prevent their deficit-producing, inflation-inviting, irresponsible-spending proposals from becoming law.

His fiscal stinginess did not reach completely across the board. There were areas in which he was not only willing to continue, but actually wished to increase public spending. Social Security (seven months into his administration he sent to Congress a program for the expansion of this system) and education (which he claimed was the most important thing in the American society) are examples of areas in which he was willing to increase expenditures.\textsuperscript{14} His primary reason for the

\textsuperscript{12} Ferrell, ed., \textit{The Eisenhower Diaries}, 278.

\textsuperscript{13} Eisenhower, \textit{The White House Years: Mandate for Change, 1953-1956}, 201.

education initiative was to acquire the scientists and technicians who could keep America ahead in the arms race. He asked Congress for an investment of a billion dollars in federal loans and grants to the states for the construction of schools, badly needed as a result of the postwar baby boom. The Old Guard Republicans were alarmed at the possible intrusion of the federal government into education, and Democrats wanted a much more expansive program.\(^{15}\) They wanted it to include not only school construction, but also federal assistance for teachers’ salaries and other educational expenses. Further complicating the proposed bill, of course, was the problem of desegregation.

In November of 1954 President Eisenhower convened a White House conference on education which adopted a report calling for federal funds for public schools, opposing funds for non-public schools, and proposing means to increase the number of competent teachers and otherwise stimulate public support of education.\(^{16}\) Although Eisenhower tried to get this legislation through Congress, he failed.

In most instances Eisenhower wanted to privatize or keep the federal government out of business regulation. His reasoning was that government involvement in wage issue would require it also to fix hours and work rules, moderate grievances, and then set prices.\(^{17}\)

\(^{15}\) Ibid., 251.


\(^{17}\) Ibid., 453.
He did support the transfer of control over offshore oil fields from the federal government to the states. Natural gas production and prices were areas he felt best supervised by the states. In his diary in February of 1956 he stated he had tried for some years to persuade Congress to enact legislation that would make clear the federal government did not attempt to assume authority to rule upon the prices that may be charged for natural gas at the wellhead. It was a state matter, he argued, and the producer of any such well should be enabled to charge whatever he can get by competitive bidding in his particular state.\(^\text{18}\)

When there was no direct Cold War connection on a domestic issue, President Eisenhower’s liberalism or moderate progressivism appeared to fade.\(^\text{19}\) An example would be the Tennessee Valley Authority (TVA). Liberals wanted to expand it and he wanted to sell it. He tried to curb TVA by encouraging a private power company to build a generating plant to compete with the massive public utility spawned by the New Deal. He once commented he would like to sell the whole thing, but guessed that his administration could not go that far.\(^\text{20}\) The Eisenhower Administration’s power policy as announced in August of 1953 included the assurance that the Department of the Interior would “not oppose the construction of facilities which with licenses or other controls of the Federal Power Commission or other appropriate regulatory bodies and which are consonant with the best development of the natural resources of

\(^{18}\) Ibid., 554.

\(^{19}\) Ambrose, *Eisenhower*, 116.

the area.”21 One instance in which Eisenhower was willing to intercede was helping the railroad industry. Included among his proposals were an elimination of a transportation tax and the repeal of restrictive and antiquated legislation preventing the railroad industry from being competitive with the other transportation systems in place in the late 1950s.22 In his mind, the project to help the railroad industry had to be undertaken because of its effect on the whole transportation industry and its significance for the nation’s defensive strength.23

In 1953 President Eisenhower pushed for prompt action in revising the Taft-Hartley Act.24 This act, passed in 1947 over President Truman’s veto, outlawed the “closed” or all-union shop, made unions liable for damages that resulted from jurisdictional disputes among themselves, and required union leaders to take a noncommunist oath. He thought the Act to be repressive to labor and disagreed with the oath union leaders had to take as well as the provision that employees who struck for economic reasons, rather than because of unfair practices, lost their right to vote for collective bargaining agents. Frequently, in labor situations, President Eisenhower took a hands-off approach. He refused to use presidential authority to attempt ending the Louisville & Nashville Railroad strike of 1954, the Southern Bell Strike of 1953,


22 Ferrell, ed., The Eisenhower Diaries, 353.

23 Ibid., 354.

and the United Auto Workers strike in 1955. He did, however, get involved in the Steelworkers strike in 1959. He initially took a hands-off approach to that strike and then, after almost three months, he invoked the Taft-Hartley Act provision allowing him to call for a three-member presidential fact finding board to investigate the circumstances. Then he ordered the steelworkers back to work.

The episode of the steelworker strike convinced President Eisenhower that in the long run the country would need better and stronger laws to protect the public interest in labor-management disputes that could seriously hurt the economy and national security. This undoubtedly was why Eisenhower intervened—not because he was sympathetic to the cause of labor. The steelworker strike impacted the entire country and government needed to define its role and fix its limits.

Two weeks before the Republican Convention of 1956 President Eisenhower told his secretary Ann Whitman that he felt civil rights was the most important domestic problem facing the government. President Eisenhower personally wished, and said so on several occasions in private, that the Supreme Court had upheld *Plessy v Ferguson*. He would have preferred for the Court to have ordered desegregation first in graduate schools, later in the colleges, then the high schools, and finally in the

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25 Ibid., 453.

26 Ibid., 458.


28 Ibid., 190.
grade schools.\textsuperscript{29} He believed that civil rights would not be achieved by law alone, but that leaders must be encouraged to appeal to the moral obligation of the people rather than depend on the law. He did not feel that desegregation could take place by edict of the Supreme Court, but only when people themselves changed their minds about racial matters could any progress be made.

It was not that he was prejudiced against the “Negro” but, like many other issues, he did not believe the federal government should be compelling state and local governments to a particular course of action. In a meeting with South Carolina Governor James F. Byrnes in the summer of 1953 he told the governor:

That improvement in race relations is one of those things that will be healthy and sound only if it starts locally. I do not believe that prejudices, even palpably unjustified prejudices, will succumb to compulsion. Consequently, I believe that federal law imposed upon our states in such a way as to bring about a conflict of the police powers of the states and of the nation, would set back the cause of progress in race relations for a long, long time.\textsuperscript{30}

Where he believed he had jurisdiction, he worked on the issue of desegregation. A core belief about the Office of President of the United States was that he was the President of all the people, including Black Americans.\textsuperscript{31} In his 1953 State of the Union Address he announced that he would use his full authority to end segregation in the District of Columbia and in the armed forces.\textsuperscript{32} He did move

\textsuperscript{29} Ibid., 327.

\textsuperscript{30} Ferrell, ed., \textit{The Eisenhower Diaries}, 246.

\textsuperscript{31} Ambrose, \textit{Eisenhower}, 125.

\textsuperscript{32} Ibid., 126.
aggressively to eliminate discrimination in those areas where his authority was clearly
established.

President Eisenhower was criticized during the 1952 campaign for refusing to
endorse the Fair Employment Practices Commission, for moving too slowly in the
desegregation area, and later for failing to praise the decision in *Brown v Board of
Education of Topeka* (1954). He felt vindicated for his “slow, but sure” approach by
the results of the 1956 election. Compared to the 1952 election, he had picked up
votes of blacks in the north and south, as well as the Republican ticket picking up
Kentucky, West Virginia, and Louisiana.\(^3^3\) He viewed this as evidence that his policy
of steady progress without rashness was winning support from people in the vital and
massive American center.

One of the two areas in which President Eisenhower did not continue the
policies of President Truman was agriculture–defense being the other. His goal was to
going the government out of the agriculture business. He wanted to end both parity and
the government controls that went with it. He and his Secretary of Agriculture, Ezra
Taft Benson, agreed that Democratic policies of the past twenty years had been a
disaster. Farm policy was the only area in which President Eisenhower called for a
repudiation of the basic New Deal economic structure. He wanted to get rid of the
surpluses in the country by giving them away through such programs as a free school
lunch, disaster relief, and emergency assistance to foreign countries. He aimed to

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\(^3^3\) Dwight David Eisenhower, *The White House Years: Waging Peace, 1956-1961* (New York:
lower governmental price supports gradually so prices would be more responsive to supply and demand. For the future he wanted to reduce price supports immediately by instituting a flexible system that would range from 75 percent to 90 percent of parity, with the aim of implementing a long term solution to the problem of overproduction by allowing a free market in farm products.34

One solution President Eisenhower had for resolving the problem of surpluses was his Soil Bank program. This was the concept of buying back homesteads on the Great Plains and returning them to grass.35 Acreage of certain crops then in serious surplus such as wheat, cotton, corn, and rice would be voluntarily plowed under by farmers under contract with the government, and the land would be allowed to revert to forage, trees, and water storage.36 The supply of certain crops would go down, the prices would go up, and abused land would be able to regenerate nutrients.

He kept silent regarding Senator Joseph R. McCarthy and the hearings and witch hunts he was leading. He did ask Congress to enact legislation providing that an American citizen convicted of conspiring to advocate the overthrow of the United States government by force or by violence be treated as one who had renounced his allegiance to the United States and had forfeited his citizenship. His senior White House staff was quite distressed at the President’s refusal to denounce McCarthy.37

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35 Ibid., 283.


During the mid-1950s the auto industry boomed. In 1955, close to eight million vehicles were sold.\(^{38}\) This was about a 25 percent increase over the previous year. The percentage of families owning automobiles increased from sixty percent in 1952 to seventy percent in 1955.\(^{39}\) The American people, including President Eisenhower, were finding the road system to be quite inadequate. President Eisenhower wanted highways built. Stephen Ambrose, in his biography of Eisenhower, wrote that the President thought the project was ideal for government:

First, the need was clear and inescapable. Second, a unified system could only be erected by the federal government. Third, it was a public-works program on a massive scale, indeed the largest public-works program in history, which meant that the government could put millions of men to work without subjecting itself to the criticism that this was “make-work” or the WPA of PWA variety. By tailoring expenditures for highways to the state of the economy, Eisenhower could use the program to flatten out the peaks and valleys in unemployment.\(^{40}\)

Another reason Eisenhower wanted the highways was as part of his overall Cold War program. In the event of a nuclear attack on the capital city and on other cities, four-lane highways leading out of the cities would make evacuation possible. They would also facilitate the movement of military traffic in the event of war.\(^{41}\) This project is further evidence of liberalism when having a Cold War connection.

\(^{38}\) Ibid., 250.

\(^{39}\) Ibid., 250.

\(^{40}\) Ibid., 250.

\(^{41}\) Ibid., 251.
During President Eisenhower’s eight years in office he had the opportunity to make five appointments to the Supreme Court of the United States. He was not happy with all his appointments. President Eisenhower after leaving office was once asked if he had made any mistakes while he had been president. His reply was: “Yes, and they are both sitting on the Supreme Court.”42 He was referring to Earl Warren and William J. Brennan, the focus of the remainder of this chapter. First, their backgrounds will be discussed; second, the circumstances surrounding their nominations and confirmations; third, their performances on the Supreme Court.

Background of Earl Warren

Earl Warren was born in Los Angeles and grew up in Bakersfield, California. The family moved to Bakersfield after his father, Matt, could not find work in Los Angeles and had to relocate to do so. His father was an employee of the Southern Pacific Railroad and part of the nationwide Pullman strike. Having joined the strike, Matt Warren was blacklisted and could not find work in the Los Angeles area.43

During the summers off from school Earl Warren worked for the Southern Pacific, which gave him knowledge of working people and their plight. Several themes or impressions from those summers stayed with Warren throughout his adult life. Among those matters were the vulnerability of people to large corporate

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enterprises, the tendency of such enterprises to become political as well as economic units, the Southern Pacific’s indifference to minorities and to the health of its employees, and the tendency of persons who work under conditions of economic dependence to squander their wages in pleasures and vices. Some years later reflecting on those years and their impact Warren stated:

I was dealing with people as they worked for a giant corporation that dominated the economic and political life of the community. I saw that power exercised and the hardships that followed in its wake. I saw people laid off from their jobs, minority groups brought into the country to work for cheap labor, and people working under harsh conditions. The things I learned about monopolistic power, political dominance, corruption in government, and their effect on the people of a community were valuable lessons that would tend to shape my career throughout life.\textsuperscript{44}

Earl Warren attended the University of California for both his undergraduate degree as well as his law degree. Following college and law school he served a brief stint in the Army during World War I and then returned to work for the Alameda County District Attorney’s Office. He thought upon starting with the District Attorney’s Office that he would be there just a short time, but he stayed eighteen years including several as the District Attorney. Both as an assistant and in the top position he was an effective, tough lawyer. Yet he was sensitive to the rights of the accused and personally fought to secure a public defender for indigents. A 1931 survey concluded that Earl Warren was the best district attorney in the United States.\textsuperscript{45}

\textsuperscript{44} Ibid., 12.

In 1938 Earl Warren was elected Attorney General of California, a post he held until 1942 when he was elected Governor. During the campaign for Attorney General there were questions from Democrats—he was running as a Republican—about his commitment to civil rights. In a letter written to an influential Democrat he stated:

I am unalterably opposed to majoritarian repression of minorities and that majorities should be willing to fight for the same rights for minorities no matter how violently they disagree with their views…. The American concept of civil rights should include not only an observance of our Constitutional Bill of Rights, but also the absence of arbitrary action by government in every field.46

In his one term as Attorney General he modernized the office, but he is primarily remembered for his role in demanding the evacuation of Japanese from the West Coast. At this stage in his life, the presence of Japanese in California, like the presence of Communists and the potential presence of organized crime, was a threat to law-abiding citizens. In making this judgment Warren was acting as a provincial law enforcement official. In evaluating Warren’s role in the Japanese relocation certain facts should be considered. First, Earl Warren was one of the individuals most responsible for bringing the relocation program into being. Second, among Warren’s motives for removing the Japanese from California was a provincial, xenophobic racism. Warren thought of Orientals in general and Japanese in particular, as foreign, not easily assailable, inscrutable, resourceful, and—especially after Pearl Harbor—treacherous.47


47 Ibid., 67.
Following his single term as attorney general he ran for, and was elected to, the office of Governor of California. He served three terms in this office. He came into office with the conventional idea that governments could be run like private businesses, but quickly learned otherwise. His early years as governor were marked by such policies as reducing taxes and establishing a “rainy day fund” by which the state avoided spending surplus in its treasury.\(^48\) Five years into Warren’s tenure as Governor he was identifying himself with “true Liberalism.”

During these early years as Governor, California underwent a massive influx of population and faced attendant “health, education, and welfare needs” as well as “new transportation problems.” In response to these changes Warren proposed programs that increased the size and the spending habits of state government. During his later years he was identified with prison reform, public health improvements, increased support for higher education, and compulsory health insurance.\(^49\) He also waged battles against big business, in particular lobbyists from oil and water interests.

Earl Warren is best characterized during the later period of his governorship as remaining within the framework of California progressivism. Progressivism, as practiced by its original adherents in California, emphasized honesty, openness in government, opposition to “special interests” in the name of “public interest,” and close attention to the “white light” of public opinion. It also emphasized, notably in racial and ethnic issues but also to some extent in issues involving organized labor, the


idea that California was a nativist paradise, an island to be preserved against alien persons and ideologies.\textsuperscript{50}

In 1948 Earl Warren was part of the Republican presidential ticket as Thomas Dewey’s vice-presidential running mate. Warren was deeply Californian. When he ran on Dewey’s ticket he had neither held a job outside the state nor traveled outside its borders for any extended period. All his previous campaigns had all been for statewide office, with the exception of the Alameda County attorney. Following Harry Truman’s victory in 1948, Earl Warren left the campaign trail and continued as California’s governor until 1953 when he would leave Sacramento for Washington, D.C.—not for the White House, but for the Supreme Court.

**William Brennan Background**

William Brennan was the second of eight children of parents who immigrated to the United States from Ireland in the 1890s. He grew up and lived in Newark, New Jersey where is father—whom he called the most influential person in his life—worked shoveling coal in a local brewery, later becoming a prominent labor leader and municipal reformer. He passed on his activist social philosophy to his son. This son grew up in a struggling middle-class family, then, witnessing around him the suffering and social unrest in Newark.

Brennan once told an interviewer:

> What got me interested in people’s rights and liberties was the kind of neighborhood I was brought up in. I saw all kinds of suffering—people had to struggle. I saw the suffering of my mother, even though we

\textsuperscript{50} Ibid., 101.
were never without. We always had something to wear. But others in the neighborhood had a harder time.\textsuperscript{51}

William Brennan did his undergraduate work at the Wharton School at the University of Pennsylvania and then entered Harvard Law School. Years later Brennan, when asked why he went into law answered:

My dad had a number of very close friends who were lawyers and he was so taken with this whole bunch of Irish lawyers. They were the leaders of the bar and they were close friends of my father’s, and my dad encouraged me to do it [study law] and got them to encourage me.\textsuperscript{52}

While at Harvard he worked at the Legal Aid Society, which gave him—according to a classmate and friend, who later served on the New Jersey State Supreme Court with him—“some taste of the real world and a chance to deal with people’s problems first hand.”\textsuperscript{53}

Prior to his last year of law school his father died leaving him on his own to finance the last year of school. He received a scholarship from the Harvard Alumni Foundation and waited tables at a fraternity house to pay for his final year.\textsuperscript{54}

Even with a law degree in hand, William Brennan experienced discrimination first hand in his attempt to obtain a position with the elite corporate law firms that were bastions of WASP power. By 1931 they were not so bold and tactless as to


\textsuperscript{52} Ibid., 20.

\textsuperscript{53} Ibid., 24.

\textsuperscript{54} Ibid., 25.
announce that Irish need not apply, but the discrimination was there. He finally found a job at the top firm in Newark.\textsuperscript{55}

The passage by Congress of the Wagner Act in 1935—which set up the National Labor Relations Board and established the rights of unions to organize and bargain collectively—provided a field of expertise for William Brennan. He proved to be particularly adept at dealing with people at point-blank range in labor negotiations.

He entered the Army in July of 1942 after being asked to enlist by a client of his law firm with whom he had worked extensively. Robert Wood Johnson—whose father had founded Johnson and Johnson and as chairman of the company’s board of directors, was one of Brennan’s clients. He enlisted, out of a sense of patriotism, in the Army’s Ordnance Department. Brennan and Johnson had worked closely together to fashion an innovative package of workers’ benefits for the employees of Johnson & Johnson as the 1930s had drawn to a close. Johnson had not wanted to ignore the conditions of the many underpaid people in his company, which, he thought would be as foolish as ignoring public health, crime, and the need for an education.\textsuperscript{56} Brennan was commissioned a Major and joined Johnson’s government operation in Washington, D.C. where his knowledge and experience in labor law proved to be of great help. By 1943 Brennan was working with Undersecretary of War Robert P. Patterson as a labor troubleshooter. After leaving the army he continued in labor law and brought in much business for his firm.

\textsuperscript{55} Ibid., 26.

\textsuperscript{56} Ibid., 29.
During the late and mid-1940s Brennan became well known and gained respect in the legal community for his efforts in the area of judicial reform. It was during this period he worked, for the first time, with Arthur T. Vanderbilt. Eventually Vanderbilt would recommend Brennan to President Eisenhower as having “as fine a legal mind as I have ever known.”

On April 1, 1946 William Brennan gave a speech to the Essex County (NJ) Bar, which enhanced ever more his reputation and name recognition. In it, he made an impassioned plea for organized labor to reform itself. The speech was entitled *Formulae for the Settlement of Labor Disputes*. In the speech he claimed to be impartial. He stated that not all strikes were bad, that the alternative to a strike was a solution by government fiat. He criticized labor’s tendency toward abusive power, urging unions to use self-restraint. Brennan concluded with a call to outlaw as unfair labor practices the coercion and intimidation of individuals to become and remain union members, as well as racial discrimination in union representation or membership, which was common.

In January of 1949 he accepted a judgeship on the New Jersey Superior Court, a court of general jurisdiction. He sat primarily in Hudson County where he dealt often with the government corruption involved with the political machine of perennial Mayor Frank Hague of Jersey City.

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59 Ibid., 50.
After twenty-one months on the Superior Court, he was elevated to the appellate division of the Superior Courts, which had jurisdiction over all appeals from the trial courts and was a step below the New Jersey Supreme Court. He started his appellate career slowly and conservatively and was known as a stickler for rules, holding both judges and defendants to the strict letter and detail of the law. The judicial liberalism for which he would become famous had yet to manifest itself.60

William Brennan was elevated to the New Jersey Supreme Court after two years in the appellate division. Brennan became known as one of the liberal members of the Court, primarily because of his known and demonstrated commitment to judicial reform. It was during this tenure that he began to express the liberal views with which he would forever be identified, especially his views on free speech and the rights of criminal defendants.61

Writing for a court majority in Adams Theatre Co. v Keenan 96 A.2d 519, 521 (1953), in overturning the denial of a permit to a prospective burlesque theater operator in Newark, he stated “There are narrowly limited classes of speech which are not given the protection of the First Amendment.” Frequently during the first two years on the State Supreme Court he broke ranks with Chief Justice Arthur Vanderbilt over the scope of a criminal defendant’s right to pretrial discovery, favoring the defendant. In State v Fary 117 A.2d 499 (1955) he began stressing something he would stress during his years on the United States Supreme Court, i.e., the overall importance

60 Ibid., 52.

61 Ibid., 54.
of the privilege against self-incrimination as provided in the Fifth Amendment. The following year, a presidential election year, President Eisenhower would give William Brennan a recess appointment to the United States Supreme Court and then send his nomination to the United States Senate.

**Eisenhower on Nominations to the Judiciary**

Upon entering office President Eisenhower was determined to distinguish his administration’s method of judicial selection from that of his two Democratic predecessors. He had been critical of what he viewed as the Democrats’ unfortunate policy of awarding judgeships on the basis of patronage and partisanship. The new president wanted to appoint only individuals of the highest possible standing. Furthermore, he wanted candidates for the bench who shared his own middle-of-the-road philosophy of government.63

Henry Abraham in *Justices, Presidents, and Senators* describes the criteria set forth by President Eisenhower when considering whom to nominate for a position on the United States Supreme Court: One, they should have character and ability that could command the “respect, pride, and confidence of the populace.” Two, they should have a basic philosophy of moderate progressivism, common sense, high ideals, and the absence of extreme views. Three, prior judicial service was desired. This would provide an inkling of his philosophy (this coming after Chief Justice

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62 Ibid., 56.

Warren’s appointment). Four, geographic balance was preferred on the Court. Five, religious balance was also preferred on the Court. Six, because he feared he might be succeeded in 1956 or 1960 by a New Deal president he felt that age was a compelling issue.\textsuperscript{64} He set an upper age limit of sixty-two for his judicial candidates, unless other qualifications were unusually impressive. Seven, a thorough check of the candidate by the Federal Bureau of Investigation would be completed. (Up to this point in the history of nominations this had not been done.) Eight, Attorney General Herbert Brownell and the Justice Department became the first to regularly consult with the American Bar Association’s Standing Committee on the Federal Judiciary.

President Eisenhower had developed an unbounded admiration for Herb Brownell who was integral in the selection of the men whom Eisenhower would nominate to the federal judiciary. Eisenhower thought Brownell was a man of consummate honesty, incapable of an unethical practice, a lawyer of the first rank, and an outstanding leader.\textsuperscript{65}

President Eisenhower, reflecting on his Supreme Court appointments in his \textit{Memoirs}, said”

During the eight years in the Presidency I was called upon to make five selections for the Supreme Court….In each case I went to great lengths to satisfy myself that the appointments were given to the best-qualified men on the basis of the criteria laid down early in 1953….Brennan, for instance, a Democrat, was suggested by New Jersey Chief Justice Arthur Vanderbilt, a Republican. Vanderbilt, one of the most highly respected and best-known figures in American jurisprudence said that, “in his opinion, Brennan possessed the finest ‘judicial mind’ that he

\textsuperscript{64} Ibid., 43.

\textsuperscript{65} Ambrose, \textit{Eisenhower}, 124.
had known in a long experience, and was of the highest character. Early in my administration I added another item to the criteria I had initially established for the appointment of men to our higher courts, particularly to the Supreme Court. I told the Attorney General that I would not thereafter appoint anyone who had not served on a lower federal court or on a state supreme court. My thought was that this criterion would insure that there would then be available to us a record of the decisions for which the prospective appointee had been responsible. These would provide an inkling of his philosophy. 66

When the time came for President Eisenhower to nominate men to the Supreme Court, he used a procedure that had lain dormant for 150 years for two of his first three appointments, i.e., the recess appointment. This form of appointment was something that had fallen into disuse after President Washington’s ill-fated attempt to use it in the appointment of his friend John Rutledge in 1795. Eisenhower gave both Earl Warren (1953) and William Brennan (1956) recess appointments.

The Nomination of Earl Warren

Governor Earl Warren had been helpful to Dwight Eisenhower during the 1952 campaign for president, particularly at the Republican convention. President-elect Eisenhower concluded that he would not be able to offer Earl Warren a position of appropriate stature in his new administration. In an interview in February of 1996 Attorney General Herb Brownell recalled:

Ike was worried that Warren might feel sort of hurt or left out….He said “we want to keep him enthusiastic for the Eisenhower administration and if we go ahead and announce the whole Cabinet without any mention of Warren, I’m afraid he will misunderstand and feel he wasn’t a top-ranking Republican.” He told me that he wanted to

call Warren up on the phone, and offer him the first available vacancy on the Supreme Court.\textsuperscript{67}

In December of 1952 President-elect Eisenhower did just that. He called Governor Warren and made the promise.\textsuperscript{68} This caused a problem, when much to Eisenhower’s surprise, the first vacancy was that of the Chief Justice of the United States.

During the summer of 1953 rumors were such that Justice Felix Frankfurter was being asked to step aside so President Eisenhower could appoint Governor Earl Warren. Justice Frankfurter’s reply was: “When a man retires he lets the President know first. Then President issues the necessary documents. Then the world and the newspapers know.”\textsuperscript{69}

On September 8, 1953 when Chief Justice Fred Vinson died from a heart attack, both President Eisenhower and Attorney General Brownell were stunned. They had not imagined, when talking to Governor Warren about the first Supreme Court vacancy, that it would be the center seat. Eisenhower’s first thought was to try to find a way out of the obligation. He sent Brownell to California to see if Warren intended to hold Eisenhower to his promise even though the vacancy was that of Chief Justice.

\textsuperscript{67} Yalof, The Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees, 44.

\textsuperscript{68} Ibid., 46.

In a meeting on September 27, 1953 in California Warren told Brownell: “If there’s any hesitation on the president’s part, he can appoint someone from the Court to the Chief Justiceship and me to the new vacancy.” It was clear to Brownell that Warren would think the president was breaking his word if he [Warren] was not named to the Court immediately.

Writing in his memoirs President Eisenhower stated: “A Chief Justice should in addition to meeting all the criteria I had established for the selection of other judges, be a man of national stature, who had such recognized administrative ability as to promise an efficient conduct of the affairs of the Court.”

President Eisenhower’s list of successors to Chief Justice Vinson was short: Judge John J. Parker of the Fourth Circuit Court of Appeals; Chief Justice Arthur Vanderbilt of the New Jersey Supreme Court; John W. Davis, a highly respected lawyer and a former presidential nominee of the Democratic Party; and Governor Warren. According to Eisenhower, disabling factors among other prospects began to narrow further consideration to members of the Supreme Court and Governor Warren. On the Supreme Court, two or three were failing in health, another was well over the age limit Eisenhower had set, and two others represented what he thought to be extreme views.

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72 Ibid., 228.
A September 30, 1953 *New York Times* article stated, “every well informed source in Washington said the choice [to succeed Chief Justice Vinson] was Earl Warren of California, but the White House declined to confirm or deny widely published stories of his selection.” 73 The same article also stated that Earl Warren had been the front-runner for the first Supreme Court vacancy in the Administration long before Chief Justice Vinson died on September 8. So while President Eisenhower in his memoirs may have stated he was considering others, and indeed he may have been, he did not give serious consideration to the others on his “short list.” In making his announcement of Governor Warren’s nomination, the President told his news conference he had looked for a man of honesty, integrity, experience, objectivity, and moderate philosophy. President Eisenhower added, “He will make a ‘great’ Chief Justice.” 74

President Eisenhower, Attorney General Brownell, and the *New York Times* all agreed on one key item regarding Earl Warren. President Eisenhower and Attorney General Brownell agreed that Warren’s experience, leadership qualities, and administrative expertise constituted precisely the kind of medicine that the badly faction-rent Vinson Court needed. 75 The *New York Times* in an October 4, 1953 editorial stated, “Most Americans, regardless of party, look to Earl Warren for the

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highest quality of leadership in a position and at a time when such leadership is urgently needed.”76

Confirmation of Earl Warren

Earl Warren served as Chief Justice for five months prior to the Senate’s formal consideration of his nomination. On February 2, 1954 a subcommittee of the Senate Committee on the Judiciary held a hearing to consider the Warren nomination.

Three witnesses testified, one in favor and two against the nomination. George MacLain, chairman of the California National Institute for Social Welfare read a statement opposing the nomination 77 as did Roderick Wilson of California—who was arrested at the request of the San Francisco Police Chief as he left the hearing room as a fugitive.78 Also opposing the nomination—or at least delaying it—was William Langer, the Committee Chairman, of North Dakota (this because a North Dakotan had never been appointed to the Supreme Court) and a few conservative Southern Democrats, who joined in an attack on what they called Warren’s left wing, ultraliberal views. Between Senator Langer and the southern senators, they managed to delay the nomination for two months, once it had been sent to the senate.79

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Supporting Earl Warren’s nomination to be Chief Justice of the United States were California’s two Republican senators, William Knowland and Thomas H. Kuchel, the American Bar Association, and the State Bar of California.  

Once the nomination made it to the Senate floor, it was unanimously approved by a voice vote on March 1, 1954. The debate and voting on the nomination lasted but eight minutes. The nomination was never in serious trouble, even though it took two months for Warren to be confirmed.

Earl Warren’s record as a prosecutor showed some tough law and order crusading; what is more, he was the man who had so strongly and successfully urged evacuation of the Japanese Americans from their California homes and land in 1942. According to biographer and former Warren law clerk G. Edward White: “[N]either Eisenhower nor Brownell sensed his [Warren’s] instinctive Progressivism. Warren was appointed as something he was not: an Eisenhower Republican.”

Nomination of William Brennan

By early 1955 President Eisenhower was already giving thought to how he might strategically fill the next Supreme Court vacancy. He had an interest in reinstating the Roman Catholic seat on the Court, particularly because the Catholic

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80 “Senators Consider Warren Nomination.”

81 “Senate Confirms Warren by Voice.”

82 White, Earl Warren: A Public Life, 55.
vote was becoming a critically important target of his 1956 reelection campaign. He decided early his next appointee would be a Catholic.83

On September 7, 1956 Justice Sherman Minton wrote the president of his plans to retire effective October 15 of that year. Ann Whitman, the president’s secretary, took these notes while listening on the phone to a conversation between Attorney General Brownell and President Eisenhower:

The President suggests that the Attorney General start thinking again about a very good Catholic, even a conservative Democrat – he thinks we really would be better off to appoint a Democrat to show that we mean our declaration that the Court should be nonpartisan (in spite of the 6:3 Democrat to Republican split now). Some discussion took place about Judge Danaher….President Eisenhower asked the Attorney General to canvass the field to try to find an outstanding man with court experience, regardless of his political affiliation.84

As President Eisenhower’s campaign for reelection began to gain steam, he hoped to distinguish himself further from the Democrats by demonstrating that his judicial appointments, even to the Supreme Court, were nonpartisan. The criterion that the president gave the attorney general for the next nomination was quite limiting. In addition to the criteria mentioned earlier he also had to look for someone who was also a Democrat, a Catholic, and a judge–preferably one with state experience.

Three weeks before Justice Minton’s retirement, Francis Cardinal Spellman had met with Eisenhower to talk about the lack of a Catholic voice on the Court. He told the President, “Mr. President, it isn’t that I want a Catholic on the Supreme Court,


84 Ibid., 57.
but I want someone who will represent the interests and views of the Catholic Church."^85 He had also had been getting pressure from the Association of State Court Judges to select a nominee from their ranks.^86

William Brennan had given a speech, while filling in for Arthur Vanderbilt, at the Attorney General’s “Conference on Court Congestion and Delay in Litigation” and impressed Herbert Brownell, the Attorney General, and William P. Rogers, the Deputy Attorney General.\(^87\)

There were several political advantages to nominating William Brennan. One, he was a Democrat. Two, he was a Catholic. Three, he was an easterner. Four, he was a State Court Judge. Attorney General Brownell did not want to wait to appoint Brennan. Why waste an opportunity to use the appointment for political gain, he asked Eisenhower. Here was a chance to make inroads with Catholic, eastern voters, the very people with whom Eisenhower was weakest.\(^88\) What is more, Democrat presidential nominee Adlai Stevenson was scheduled to make a campaign trip to New Jersey in the near future, and naming Brennan at that time would “steal the thunder” from Stevenson’s trip.

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^86 Ibid., 89.


President Eisenhower had instinctively liked Brennan, surprising even his press secretary, James C. Hagerty, with how quickly the decision was made to nominate Brennan. Not knowing the gist of Brennan’s views in criminal cases was just the tip of the iceberg of ignorance within the administration when it came to knowing about Brennan. Brownell claimed to have read all of William Brennan’s opinions written for the State Supreme Court.\(^89\) Most likely Brownell read most of those opinions for their clarity and intellect.

William Brennan did not give even his colleagues a clue as to the candidate he was supporting in the presidential election of 1956. Since the death of his father, Brennan had avoided politics. Writing at the time of Brennan’s appointment in the *New Jersey Law Journal*, New Jersey lawyer J. L. Berstein, proved that it was not impossible to predict that Brennan would ultimately be more in tune with Earl Warren than with Felix Frankfurter:

Predicting in print is a preoccupation of the foolhardy. But we have a notion that Justice Brennan, son of a former labor leader, will become a valuable assistant to Chief Justice Warren, son of a former railroad mechanic. As Warren seems to have inherited the practical bent of mind that goes with the use of the hands, so has Brennan. Such a man is apt to exalt form over substance. Judged by ability and industry and by the qualitative and quantitative estimate of his work in New Jersey, Brennan seems destined to join the libertarian group on the United States Supreme Court of Warren, Black, and Douglas.\(^90\)

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The media generally had very good things to say in support of William Brennan’s nomination. Arthur Krock of the New York Times called Brennan’s appointment “inspiring.” It is an important proof of democracy when a Supreme Court justice is representative of what an American can, with honor and industry, achieve without the birthright of social and economic privilege, thought Krock. A New York Times profile identified Brennan as a moderate liberal and defender of civil rights. “He is regarded as a strict judge in insisting that lawyers be prepared, but is well liked.” The Washington Post editorial writers also were pleased with the nomination. They called it a fine example of a great tradition of a qualified and independent judiciary. The William Brennan nomination also had the support of the American Bar Association, the New Jersey Bar, the American Judicature Society, Cardinal Spellman, and numerous Roman Catholic organizations.

William Brennan and the Senate

Two times in the history of the United States an opposition Senate confirmed a President’s Supreme Court nominee in a presidential election year. Each time the President’s nominee was from the party that controlled the Senate. In 1888 Democrat Grover Cleveland presented Republican Melville Fuller to a Republican Senate, and in 1956 Republican President Eisenhower nominated Democrat William Brennan who was confirmed by a Democrat Senate (though the actual hearings took place after the

91 Ibid., 95.

92 Ibid., 95.
election). History suggests if Eisenhower had nominated a Republican for the Supreme Court, he would not have been confirmed.

The senate confirmation hearings of William Brennan were dominated by Senator Joseph McCarthy of Wisconsin, questioning Brennan as to whether Communism was a political party or an international conspiracy. McCarthy was not a member of the Senate Committee on the Judiciary but had received permission from the Committee’s Chairman, James O. Eastland of Mississippi, to take part in the hearings. In response to McCarthy’s questions, Brennan told the committee he approved congressional investigation and exposure of Communism. William Brennan had been openly critical of McCarthy in the past in speeches and this was McCarthy’s chance to wreak havoc on Brennan and his confirmation.

There were senators from the south who were concerned about Brennan’s integrationist tendencies and his Catholicism. On March 4, 1957 the Committee on the Judiciary nevertheless voted 11-0 in favor of William Brennan’s confirmation. The full United States Senate voted by voice with the only negative vote being Senator McCarthy, who shouted “No!”

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94 Ibid.
The outcome of two companion cases in the October 1953 Term of the Supreme Court, Chief Justice Warren’s first, were disappointments to President Eisenhower. Brown v Board of Education of Topeka and Bolling v Sharpe were cases in which the Court declared the “Separate but Equal” Doctrine to be unconstitutional. This ignited a legal and social revolution in race relations and constitutionalism. The Court that first heard Brown in 1952, was deeply divided, and ordered the case reargued. The second time the Court heard Brown, Earl Warren occupied the center seat. While the first time the Court was divided, this time Chief Justice Warren achieved unanimity. He had to convince Justice Robert Jackson to suppress a concurrence and Justice Stanley Reed a dissent, but he wrote for a nine to zero Court overturning Plessy v Ferguson. In Brown, handed down May 17, 1954, the Court used the Due Process Clause of the Fourteenth Amendment as its basis for the decision. Bolling came from the District of Columbia, so the Court used the Due Process Clause of the Fifth Amendment as the basis for that decision.

Many of the cases coming to the Supreme Court in the 1950s pertained to the anti-Communist feelings in the United States and the legislation that those feelings ultimately produced. In Pennsylvania v Nelson, decided in April 1956, the Supreme Court started to withdraw from its previous Cold War practice of sustaining state and

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97 Ambrose, Eisenhower, 190.


federal anti-communist legislation. In this case the Court affirmed a judgment of the Pennsylvania Supreme Court that had reversed the conviction of Steve Nelson, a Communist Party leader, under the state’s anti-sedition law. Chief Justice Warren, writing for a six-member majority stated that “federal legislation had occupied the field of preventing the overthrow of the national government. Thus state laws on this subject were excluded.”

Another Cold War case before the Supreme Court, this during its October 1956 Term, was Watkins v United States. Watkins, a labor union officer, appeared as a witness before a subcommittee of the Un-American Activities Committee of the House. He was found to be in contempt of Congress for refusing to answer questions about other people who in the past may have been, but were no longer, members of the party. The Supreme Court in a six-to-one decision, with Warren writing for the Court and Brennan also in the majority, set aside the contempt of Congress charge.

This case was important for its articulation of broad constitutional principles that place limits on the congressional power of investigation. The power of inquiry is not unlimited and may not be an end in itself. It must be in furtherance of a legitimate task of Congress.

The same day the Court handed down its decision in Watkins it also handed down its decision in Yates v United States. This case had been argued prior to Watkins


102 Ibid., 187
and William Brennan was not yet on the Court. In *Yates*, fourteen Communist party leaders had been convicted under the conspiracy provisions of the Smith Act. In this case the Court reversed the convictions of all defendants. One charge was that the defendants had conspired to organize the Communist Party to advocate and teach the duty and necessity of overthrowing the government of the United States by force and violence as speedily as circumstances would permit. Although the American Communist Party was first organized in 1919, the conspiracy was alleged to have originated in 1940 when the Smith Act was passed and continued down to the date of the indictment in 1951. The Court, conceding that the term “organize” was ambiguous, held that the statute was defective for lack of precision in its definition of a crime. It held that the term “organize” as used in the Smith Act referred only to acts involving the creation of a new organization and did not connote a continuing process. The opinion for the Court, written by Justice John Harlan, clarified the distinction between advocacy of action and advocacy of belief—a distinction, the Court said, that can be found in the free speech and free press cases of the 1920s. As a more practical matter, this decision rendered the Smith Act’s conspiracy provisions virtually unusable, and no further prosecutions were ever brought under them.

In the same term as *Yates*, a unanimous Supreme Court in *Mallory v United States* (1957) ruled that incriminating statements obtained from a suspect during his

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104 Ibid., 318.
illegal detention must be excluded in a federal trial whether or not the statements were made voluntarily. Justice Felix Frankfurter writing for the Court emphasized that the police must have probable cause prior to making an arrest. He continued that it is not their function to arrest people at large and question them later to determine whom they should charge. In this case, Chief Justice Earl Warren and Justice William Brennan, along with the other brethren, held for the defendant and not the police power of the state.

Justice Brennan wrote the opinion for the Court in a First Amendment case in which he stated “although the First Amendment protects all ideas with even the slightest social importance no matter how hateful they may be, it does not even cover obscenity because obscenity is utterly without redeeming social importance.” The Court made clear in Roth v United States (1957) that the test for obscenity would have to be tailored to First Amendment concerns in order to ensure that material that did have First Amendment value would not be subject to restriction.

In Trop v Dulles (1958) the Supreme Court held Congress did not have the power to withdraw an individual’s citizenship for wartime desertion from the military. Chief Justice Warren, writing for a plurality, concluded that depriving one of his citizenship would violate the cruel and unusual punishment provision of the Eighth Amendment. The Eighth Amendment argument Chief Justice Warren used was not embraced by a majority of the Court. Justice William Brennan writing a concurring

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opinion concluded that expatriation for wartime desertion was not a rational exercise of war power.\textsuperscript{107} Three other cases of note from the October 1957 Term of the Court found Warren and Brennan on the same side.

In \textit{Kent v Dulles} (1958), a five-to-four decision, the Court, with Justice William Douglas writing for the majority, acknowledged that the right to travel was a liberty protected by the Due Process Clause of the Fifth Amendment. The opinion stated that Congress had not given the Secretary of State the authority to withhold passports of citizens because of their beliefs or associations.\textsuperscript{108} The immediate impact was that questions about Communist Party membership were dropped from the passport application.

A case involving executive power found a nine-to-zero Court endorsing both the philosophy and the holding of \textit{Humphrey’s Executor v United States}, 295 U.S. 602 (1935) where the court had held that a president may remove a commissioner only for cause and that an unqualified removal power violated the separation of powers. In \textit{Wiener v United States} (1958) the Court ruled for War Claims Commissioner Wiener who had been removed from the Board by President Dwight Eisenhower after being appointed by President Harry Truman. Under the War Claims Act, commissioners were to serve for the life of the commission and there was no provision made for removal. The War Claims Commission, like the Federal Trade Commission in

\textsuperscript{107} \textit{Trop v Dulles}, 356 US 86 (1958).

Humphrey’s, was a quasi-judicial body whose officials were protected from removal by the president without good cause.\textsuperscript{109}

The 1950s and 1960s saw many cases come before the Supreme Court resulting from the ruling in \textit{Brown v Board of Education of Topeka}. \textit{Cooper v Aaron} (1958) was one such case. At the end of the 1957 school year, in order to end the tension, Little Rock school district officials asked for and received from the federal district court a two-and-a-half-year delay in implementing desegregation. The National Association for the Advancement of Color People (NAACP) appealed the case to the Supreme Court.

In the unprecedented action of all nine members of the Supreme Court signing an opinion written by Chief Justice Earl Warren, the Court held that even postponing plans for desegregation due to anticipated racial unrest would violate the black student’s equal protection rights under the Fourteenth Amendment. Thus, no delay was allowed. Furthermore, the Court held governors and state legislatures were bound under the Supremacy Clause of the Constitution to uphold decisions of the Supreme Court just as they were bound by oath to uphold the Constitution itself. Chief Justice Warren wrote, “No state legislative, executive, or judicial officer can wage war against the Constitution without violating his undertaking to support it.”\textsuperscript{110} Short-term, this decision fostered, rather than discouraged, southern resistance and faced stiff resistance until passage of the Civil Rights Act of 1964.


\textsuperscript{110} \textit{Cooper v Aaron}, 358 US 1, 18 (1958).
In *Watkins v United States* the Court had placed limits on the ability of congressional committees to inquire into political beliefs and associations of individuals. In a five-to-four decision seeming to back away from *Watkins*, the Court with Justice John Harlan writing the opinion, upheld the conviction for contempt of Congress of a witness who had refused to testify before the House Committee on Un-American Activities about his beliefs and membership in a communist club at the University of Michigan. In *Barenblatt v United States*, 360 U.S. 109 (1959) Chief Justice Warren and Justice Brennan dissented along with Justices Black and Douglas in wanting to keep the limits set in *Watkins*.

The October 1960 Term of the Supreme Court had two more “Cold War” cases—*Communist Party of the United States v Subversive Activities Control Board*, 367 U.S. 1 (1961) and *Scales v United States*, 367 U.S. 203 (1961). The Internal Security Act, passed over President Truman’s veto in 1950, more commonly known as the McCarran Act, sought to expose the Communist party in the United States by the device of compulsory registration. As discussed in *Albertson* the statute ordered communist organizations to register with the attorney general. The Subversive Activities Control Board which, was created to administer this process, ordered the Communist Party of the United States to register, and it refused. The Supreme Court in a five-to-four decision—with Frankfurter writing for the Court and Warren, Brennan, Black, and Douglas in dissent—upheld the registration provisions of the Act but postponed any decision on the constitutionality of the statutory sanctions until they
were actually enforced.¹¹¹ Later, when passports were subsequently denied to party members, this action was held to be an unconstitutional violation of the right to travel. *Scales*—which was argued the day before *Communist Party* and handed down on the same day—also was a five-to-four decision with the same four justices dissenting. This case dealt with the Smith Act’s membership clause. The Court upheld Scale’s conviction by interpreting the membership clause as requiring proof of active membership, as distinguished from merely nominal or passive membership in the Communist Party.¹¹² Justice John Harlan wrote for the Court in *Scales* that the language of the Smith Act’s membership clause was clear in warranting not only knowing membership, but active and purposive membership, purposive that is as to the organization’s criminal ends.¹¹³ Since the Communist Party was considered to be an organization that engaged in criminal activity, the Court saw no constitutional obstacle to the prosecution of a person who actively and knowingly works in its ranks with the intent to contribute to the success of its illegal objectives.

The first of many Supreme Court cases in the 1960s to be discussed dealing with criminal procedure is *Mapp v Ohio*. *Mapp* finalized incorporation of the Fourth Amendment protections into the Due Process Clause of the Fourteenth Amendment.¹¹⁴


¹¹³ Ibid., 209.

The decision, with Justice Tom Clark writing the opinion (Justice Brennan in the majority), reversed the lower courts, and required state officers to comply with Fourth Amendment standards when making searches and also extended the Fourth Amendment’s exclusionary rule to prosecutions in state courts. Seven police officers had broken into and searched Dolly Mapp’s home in Cleveland. The police claimed they had a warrant, but never produced it. They said an informant had told them that a person wanted for a recent bombing was hiding in Mapp’s home and also that gambling paraphernalia was being hidden there. In fact, the police found neither during an extensive search. Instead, they found several allegedly obscene books and pictures; Mapp was convicted by a jury of possession of obscene literature and imprisoned.

Gwendolyn Hoyt killed her husband with a baseball bat during a marital dispute over his adultery. She had offered to forgive him and take him back, but his refusal provoked the homicide. She pleaded temporary insanity and was convicted of second degree murder. Florida law provided that no female could serve on a jury unless she had specifically requested to be put on the jury list. Of the ten thousand names on the jury list for her trial, only ten were those of women. Hoyt claimed that this statute denied her equal protection of the law because women jurors would have been more empathetic than men in assessing her defense of temporary insanity. A unanimous Court rejected her claim on the grounds that Florida’s exemption of
women from jury duty was not arbitrary. Rather, it was a reasonable accommodation of community beliefs that women’s social role was to serve family life in the home.  

Justice William Brennan may well be best remembered for his opinion for a six-to-two Court in *Baker v Carr* (1962). Brennan, joined by Justices Warren, Black, Douglas, Clark, and Steward, held that aggrieved individuals had a constitutional right to come to the courts to challenge discriminatory legislative apportionment by the states. 

In 1959 citizens of Tennessee brought suit against Joseph Cordell Carr, the Tennessee Secretary of State. The Tennessee Constitution required the General Assembly to apportion the members of the Assembly among the state’s ninety-five counties after each decennial census. This had not been done since 1901. The plaintiffs pointed out that the federal courts were the only forum that offered any promise of relief. Justice Brennan writing for the Court concluded that the subject of malapportionment was within the jurisdiction of the federal courts. *Baker* inaugurated a decade of lawsuits, at the end of which the political map of the nation would be redrawn. 

*Engel v Vitale* in 1962 dealt with a state-authored prayer in New York. The prayer “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and out Country” was challenged by the

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American Civil Liberties Union (ACLU) and parents of ten students as an unconstitutional establishment of religion. Justice Hugo Black wrote for a seven-to-one Court agreeing with the position of the separationists, held that use of public schools to encourage prayer was “a practice wholly inconsistent with the Establishment Clause.”\textsuperscript{118} Chief Justice Earl Warren and Justice William Brennan were in the majority.

One of the last cases to be argued in the October 1961 Term of the Supreme Court was \textit{Robinson v California}, \textit{370 U.S.} 660 (1962). The Supreme Court held seven-to-two, with Warren and Brennan in the majority, that a California statute making it a crime to be a drug addict was unconstitutional. Furthermore, the Court held that addiction is an illness rather than a crime and, therefore, a ninety-day sentence for being ill constituted cruel and unusual punishment, in violation of the Eighth Amendment.

Two cases from the October 1962 Term of the Court worthy of consideration are \textit{National Association for the Advancement of Colored People v Button} and \textit{Gideon v Wainwright}. Virginia had a barratry statute, a statute forbidding groundless lawsuits, that challenged civil rights groups, such as the NAACP and their attorneys who utilized the courts to combat racial discrimination through sponsored litigation. Under the statute, attorneys who represented organizations having no “pecuniary interest” in such litigation were subject to disbarment. Justice Brennan wrote for a five-to-one to-three Court that the NAACP could assert the rights of its members in defending

\textsuperscript{118} \textit{Engel v Vitale}, \textit{370 US} 421, 424 (1962).
against the claim that they had engaged in barratry. Furthermore, the NAACP’s efforts to provide attorneys in suits challenging racial discrimination was protected by the First and Fourteenth Amendments.\textsuperscript{119}

Justice Hugo Black wrote for a unanimous Court in ordering a retrial for Clarence Gideon, overturning \textit{Betts v Brady} (1942), and holding that the Sixth Amendment, as applied to the states by the Fourteenth Amendment, required that counsel be appointed to represent indigent defendants charged with serious offenses in state criminal trials.\textsuperscript{120}

Coming as a result of the decision in \textit{Baker v Carr} were two cases in the Court’s October 1963 Term. One dealt with the apportionment of state legislative districts and the other with the apportionment of congressional districts. \textit{Wesberry v Sanders} involved congressional districts in Georgia. Voters in the Fifth Congressional District of Georgia challenged the apportionment of their district as it was two to three times larger than that of other congressional districts in the state. They claimed that their vote had been debased by the legislature’s failure to realign congressional districts on a population basis. Justice Hugo Black writing for a seven-to-two Court held that the voters of the district were correct. Justice Black in his opinion, joined by Warren and Brennan, stated “the right to vote is too important in our free society to be stripped of judicial protection.”\textsuperscript{121} He continued that “the Constitution’s plain

\textsuperscript{119} National Association for the Advancement of Colored People V Button, 371 US 415, 444 (1963).

\textsuperscript{120} Gideon v Wainwright, 372 US 335 (1963).

\textsuperscript{121} Wesberry v Sanders, 376 US 1, 7 (1964).
objective is that equal representation for equal numbers of people is a fundamental goal for the House of Representatives.”122

*Reynolds v Sims* was one of a group of cases handed down in June of 1964 known collectively as the Reapportionment Cases. The controlling idea for all of these decisions is expressed in *Reynolds*. The opinion for an eight-to-one Court–written by Chief Justice Warren with Justice Brennan in the majority–held that the Fourteenth Amendment’s Equal Protection Clause guarantees to each citizen an equal weight in the election of state legislators. “Legislators represent people, not trees of acres. Legislators are elected by voters, not farms or cities or economic interests.”123 The opinion went on to reason that any substantial disparity in the populations of legislative districts has the same effect as allotting a different number of votes to different individuals.124

The March 29, 1960 edition of the *New York Times* ran an advertisement to publicize the struggle for civil rights and to raise money for the cause. L. B. Sullivan, an elected commissioner of the city of Montgomery, Alabama took offense at the ad. It did not mention his name, but it gave an account of a racial incident that occurred in Montgomery. The ad suggested that the police, of whom Sullivan was in charge, had participated in some wrongdoing. Sullivan brought a libel action against the paper, alleging that the ad contained falsehoods, which, in fact, it did. For example, it

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122 Ibid., 18.


124 Ibid., 565-566
claimed that demonstrating students sang “My Country, ‘Tis of Thee,” when they actually sang the “Star-Spangled Banner.” In his charge to the jury, the judge said that the ad was libelous per se, meaning that because it contained lies, it was unprotected speech, and, that if the jury found that the statements were made “of and concerning” Sullivan, it could hold the Times liable. Taking these words to heart, the jury awarded Sullivan $500,000 in damages.125 In this case, the Supreme Court for the first time considered the extent to which the constitutional guarantee of freedom of speech and the press limits the award of damages in the libel action brought by public officials against critics of their official conduct. In a unanimous decision with Justice William Brennan writing for the Court, the Supreme Court of Alabama was reversed. Justice Brennan wrote:

We consider this case against the background of a profound national commitment to the principle that debate on public issue should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.126

Justice William Brennan wrote for the Supreme Court in a five-to-four decision that incorporated the Fourteenth Amendment into the self-incrimination clause of the Fifth Amendment.127 Mr. Malloy had pleaded guilty to taking part in an unlawful gambling operation. Connecticut’s Superior Court sentenced him to a year


in jail, but after ninety days his prison term was suspended and he was placed on probation for two years. While on probation he was called to testify in a state inquiry into gambling and other crimes. He refused to answer questions relating to his earlier arrest and conviction, citing his Fifth Amendment rights. He was found to be in contempt and imprisoned until he was willing to answer. The Supreme Court agreed to review the case after state courts had denied the defendant’s application for a writ of habeas corpus on federal constitutional grounds. The Supreme Court reversed the judgment affirming the denial of petitioner's application for a writ of habeas corpus.\(^{128}\)

Danny Escobedo, a murder suspect, was taken to the police station and put in an interrogation room. He repeatedly asked to speak to the lawyer he had retained. His lawyer arrived at the station house soon after Escobedo and repeatedly asked to see his client. Despite the persistent efforts of both Escobedo and his lawyer, the police prevented them from meeting. The police also failed to advise Escobedo of his right to remain silent. In response to accusations that he had fired the fatal shot, he made some incriminating remarks and then confessed to the crime. The Supreme Court, with Chief Justice Warren and Justice Brennan in the majority, threw out his confession because his attorney had not been allowed to be present. *Escobedo v Illinois*, 378 U.S. 478 was significant for just two years when *Miranda v Arizona* gave a much more specific explanation to when the “right to counsel” begins.

The Civil Rights Act of 1964 was the basis for *Heart of Atlanta Motel, Inc. v United States*, 379 U.S. 241. A motel owner in Atlanta, whose motel served mostly

transient interstate travelers, refused to serve blacks as required by the Civil Rights Act of 1964. He claimed that Congress had exceeded its Commerce Clause authority to regulate private businesses and also that the Act was invalid under the Fifth Amendment’s Due Process Clause and the Thirteenth Amendment.\(^{129}\) This case was a major constitutional test of the public accommodations provisions (Title II) of the Civil Rights Act as well as an important case regarding the power of Congress under the Commerce Clause. A unanimous Supreme Court, with Justice Tom Clark writing for the Court, ruled that the motel could not legally discriminate on account of race.\(^{130}\)

The Sixth Amendment’s provision for the right of the accused to be confronted by witnesses was incorporated into the Due Process Clause of the Fourteenth Amendment in \textit{Pointer v Texas}, 380 U.S. 400 (1965).\(^{131}\) \textit{Pointer} developed when the defendant’s attorney objected to the introduction of a transcript of testimony of a robbery victim who had moved out of state between the time he had testified at a preliminary hearing and the trial. In this transcribed testimony the victim identified Pointer as the offender, and Pointer was convicted largely upon the basis of this testimony. In overturning his conviction Justice Hugo Black, writing for a unanimous Supreme Court, held that introduction of such testimony, which had been taken at a proceeding at which Pointer had been present but unrepresented by counsel,

\(^{129}\textit{Heart of Atlanta Motel, Inc. v United States}, 379 US 241 (1964).\)

\(^{130}\textit{Ibid.}, 261.\)

\(^{131}\textit{Lee Epstein, Jeffrey Segal, and Harold Spaeth, The Supreme Court Compendium: Dates, Decisions, and Developments} (Washington, D.C: Congressional Quarterly, 1996), 143.\)
constituted a denial of his Sixth Amendment rights to confront witnesses and to cross examine them by counsel.132

The right to privacy was established in Griswold v Connecticut, 381 U.S. 479 (1965) by a seven-to-two Supreme Court, with Chief Justice Warren and Justice Brennan in the majority.133 The Court majority determined that the Connecticut statute–making it a crime for any person to use any drug, article, or instrument to prevent conception–was invalid because it infringed upon the constitutionally protected right to privacy of married persons.

In the last “Cold War” case to be discussed, Albertson v Subversive Activities Control Board, Mr. Albertson and others had claimed that registration, with consequent penalties, amounted to self-incrimination in violation of the Fifth Amendment. The Supreme Court, with Justice Brennan writing for a unanimous eight-member Court held that requiring individuals to register as required by the Internal Security Act of 1950, with consequent penalties, amounted to self-incrimination in violation of the Fifth Amendment.134

Sustaining the Voting Rights Act of 1965 was South Carolina v Katzenbach. In an original jurisdiction suit, South Carolina challenged the Voting Rights Act’s coverage formula, the suspension of voting requirements, the requirement of federal


134 Albertson v Subversives Control Board, 382 US 70 (1965), 79-80.
review of new voting requirements, and the authorization of appointment of federal voting examiners. Chief Justice Earl Warren, for an eight-to-one Court with Justice Black dissenting in part, established Congress’s power to proscribe a class of suspect practices without finding that in every instance the practices would be held by the courts to be unconstitutional. This decision contributed to the enfranchisement of millions of non-white Americans.\textsuperscript{135}

One of the high points, if not the high point, of the Warren Court’s revolution in American criminal procedure was \textit{Miranda v Arizona}, 384 U.S. 436 (1966). Ernesto Miranda, an indigent twenty-three year old who had not completed the ninth grade was arrested at his home and taken directly to a Phoenix, Arizona police station. There, after being identified by the victim of a rape-kidnapping, he was taken to an interrogation room where he was questioned about the crimes. At first Miranda maintained his innocence, but after two hours of questioning the police emerged from the room with a signed written confession of guilt. At his trial the written confession was admitted into evidence and Miranda was found guilty of kidnapping and rape.\textsuperscript{136}

A five-to-four Court with Chief Justice Earl Warren writing for the Court–Justices Clark, Harlan, White, and Stewart in dissent–held that prosecution may not use statements from custodial interrogation of a defendant unless it shows procedural safeguards secured the privilege against self-incrimination. The defendant must be


warned he has the right to remain silent and that anything he says may be used against him. He must be clearly informed he has the right to consult with a lawyer and to have the lawyer with him during interrogation.\textsuperscript{137}

Fifteen-year-old Gerald Gault was committed to the Arizona State Industrial School until age of majority or a maximum of six years. He was convicted as a juvenile for making an obscene phone call to a neighbor while on probation for another juvenile offense. If Gault had been tried as an adult, his maximum punishment would have been a fifty-dollar fine or two months in jail. The issue making Gault’s case noteworthy was not the severity of his punishment, but the lack of due process afforded him. He was not given official notice of his hearing, notification that counsel could be present at the hearings, no opportunity to confront or cross examine the woman who complained about the phone call, and no protection against self-incrimination.\textsuperscript{138} Justice Abe Fortas, writing for an eight-to-one Court (Stewart in dissent), extended many, but not all, of the rights of adult criminal defendants, under the Due Process Clause of the Fourteenth Amendment, to those juveniles subject to a deprivation of liberty upon adjudication of delinquency.\textsuperscript{139} Justice Abe Fortas argued that the extension of these protections would not interfere

\textsuperscript{137} Miranda v Arizona, 384 US 436, 457 (1966).


\textsuperscript{139} In Re Gault, 387 US 1, 17 (1967).
fundamentally with the distinctive informality and flexibility of juvenile adjudication.\(^\text{140}\)

*Katz v United States*, 389 U.S. 347 (1967), heard early in the Supreme Court’s October 1966 Term, altered significantly the approach that courts use in determining, under the Fourth Amendment, whether certain police conduct constitutes a search that is subject to the Amendment’s warrant and probable cause limitations. Mr. Katz was tried for transmitting wagering information by phone. The government introduced over Katz’ objection, evidence of his end or portion of telephone conversations, overheard by federal agents who had attached an electronic listening/recording device to the exterior of a public phone booth habitually used by Katz. The lower court concluded there was no search because the wall of the booth had not been physically penetrated. The Supreme Court reversed the lower court holding that the government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied. The seven-to-one decision found both Chief Justice Warren and Justice Brennan in the majority increasing the standard in reasonable expectations of privacy.

Another criminal procedure case in the same term was *Terry v Ohio*. This case was the first in a now substantial line of Supreme Court cases recognizing “stop and frisk” as a valid practice of law enforcement. In *Terry*, the police became suspicious of the actions of two men whom they concluded were casing a place for an armed robbery. The officer asked their names, patted them down, and in the process

\(^{140}\) Ibid., 24.
discovered pistols on Terry and his companion. In affirming Terry’s conviction for
carrying a concealed weapon, Chief Justice Earl Warren, writing for an eight-to-one
Court with Justice Douglas in dissent, concluded:

…where a police officer observes unusual conduct which leads him
reasonably to conclude in light of his experience that criminal activity
may be afoot and that the persons with whom he is dealing may be
armed and presently dangerous, where in the course of investigating
this behavior he identifies himself as a policeman and makes
reasonable inquiries, and where nothing in the initial stages of the
encounter serves to dispel his reasonable fear for his own or others'
safety, he is entitled for the protection of himself and others in the area
to conduct a carefully limited search of the outer clothing of such
persons in an attempt to discover weapons which might be used to
assault him.141

Chief Justice Warren also concluded the “stop and frisk” did not require probable
cause. Because the policeman had acted without a warrant, his conduct was not to be
judged by the Fourth Amendment’s Warrant Clause but rather by the Fourth
Amendment’s general proscription against unreasonable searches and seizures.142

The last case to be discussed from the 1967 Term established Congress’s
power under the Thirteenth Amendment to legislate against private racial
discrimination. Mr. Jones alleged that defendants refused to sell him a home because
he was black. He brought an action under a remnant of the Civil Rights Act of 1866
that grants all citizens the same right to purchase property. The Act was superceded
by Title 42, section 1982 of the United States Code. Justice Potter Stewart, writing for
a seven to two Court with Justices Harlan and White in dissent, held that section 1982

141 Terry v Ohio, 392 US 1, 30 (1968).
142 Ibid., 20.
reaches private behavior. This holding, with Congress’s new found power, supplied a new basis for federal race discrimination legislation.

The last voting rights case to be discussed with both William Brennan and Earl Warren on the Court is *Kirkpatrick v Preisler*, 394 U.S. 526 (1969). Justice Brennan, writing for the Court, affirmed a federal district court’s rejection of Missouri’s 1967 Congressional Redistricting Act. The significance of the *Kirkpatrick* case was that it greatly narrowed the range of permissible population deviations among district permitted by the 1964 reapportionment. The Court was moving closer to a literal “one-man, one-vote” standard.

Vivian Thompson, at the age of nineteen, was a single mother of one child and was pregnant with another. She moved from her residence in Massachusetts to Connecticut to be with her mother. She applied for, but was denied, welfare because she had not lived in Connecticut for one year prior to her application. A three-judge federal district court struck down the requirement as an unconstitutional burden on the right to travel and a violation of the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court agreed with the lower court’s decision. Justice Brennan, writing for a six-to-three Court with Chief Justice Warren and Justices Black and Harlan in dissent, emphasized that among fundamental personal liberties is the

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freedom to travel “throughout the length and breadth of our land uninhibited by
statutes, rules, or regulations which unreasonably burden or restrict this movement.” ¹⁴⁴

Because of allegations about improper use of congressional funds, the House of Representatives refused to permit Adam Clayton Powell, a Democrat from New York City, to take the seat he had held since 1942. Powell’s supporters contended he was about to become Chairman of the House Labor and Education Committee, and being a maverick, the House leadership did not want him in this position; this was the leadership’s way of preventing him from taking the chairmanship. Powell v McCormack, 395 U.S. 486 (1969) held that the House of Representatives could not refuse to seat a person who had been duly elected and who met the constitutional standards for membership. Chief Justice Warren writing for the Court, with only Justice Potter Stewart dissenting, held “Congress is limited to the standing qualifications prescribed in the Constitution.” ¹⁴⁵

In Benton v Maryland, 396 U.S. 784 (1969) the Court, in part, overruled Palko v Connecticut, holding that double jeopardy applies to the states through the Fourteenth Amendment. ¹⁴⁶ The most significant portion of this decision by a seven-member majority, which included Chief Justice Warren and Justice Brennan, was the Court’s rejection of the Palko notion that states can deny rights to criminal defendants as long as the denial is not shocking to a universal sense of justice. Instead, the Court


¹⁴⁶ Epstein, Segal, and Spaeth, The Supreme Court Compendium: Dates, Decisions, and Developments, 143.
ruled that states must extend those guarantees in the Bill of Rights that are fundamental to the American scheme of justice.\textsuperscript{147}

In June 1968, Earl Warren went to the White House to inform the president that he intended to retire, but left the date open until the confirmation of his successor. President Lyndon Johnson nominated Abe Fortas. The Republicans, thinking they had a good chance to win the White House in November, became determined to deny Johnson the chance to appoint the next Chief Justice of the United States. The Fortas nomination ran into many problems, his nomination was withdrawn, and Earl Warren agreed to stay on until the next president could name his successor. A week after \textit{Powell v McCormack} was announced, Chief Justice Warren ended his sixteen terms on the Supreme Court of the United States.

\textbf{William Brennan 1969-1990}

In 1970 Congress passed amendments to the 1965 Voting Rights Act that extended provisions of the original act for another five years. The amendments also standardized residency requirements for participation in national elections and dramatically lowered the voting age to eighteen years for national, state, and local elections. Congress based its action on the enforcement language of the Fifteenth Amendment.\textsuperscript{148} This legislation raised the issue of federalism anew, because national

\begin{itemize}
\item \textsuperscript{147} \textit{Benton v Maryland}, 396 US 784 (1969).
\item \textsuperscript{148} \textit{Oregon v Mitchell}, 400 US 112 (1970).
\end{itemize}
legislators were attempting to regulate the time and manner of conducting state and local elections–traditionally a prerogative of the states.

When the issue came to the Supreme Court, the major question was whether Congress had the constitutional authority to lower the national minimum voting age. In *Oregon v Mitchell* (1970), the Court–with Justice Hugo Black writing the opinion and Justice Brennan concurring in part–held that Congress did not have the power so to act with respect to state elections. It did, however, have the authority to set the voting age at eighteen in federal elections for Congress and the presidency. 149

Mr. Harris was indicted in a California court for violation of the state’s criminal syndicalism act. The Court had held the act constitutional in *Whitney v California* (1927), but an identical statute had been found to be unconstitutional in Ohio. Harris sought an injunction in the federal courts to prohibit his prosecution under an act almost certain to be found unconstitutional. In *Younger v Harris*, 401 U.S. 37 (1971) the court reversed the finding of unconstitutionality by the trial court, because plaintiffs lacked standing, the action was pending in state court, and the threat to First Amendment Freedom of Speech rights was not great enough to warrant a racial challenge to the statute. 150 But, the Supreme Court reversed the lower court and lifted the federal injunction.

In the same term as *Younger* the Supreme Court ruled unanimously in *Swann v Charlotte-Mecklenburg Board of Education* (1971). *Swann* is perhaps best known for

149 Ibid.

its approval of busing as a tool to achieve desegregation. The school district was operating under a district court ordered desegregation plan that focused on geographic zoning and free transfers. In upholding the trial court’s order, the Supreme Court observed that the constitutional command to desegregate schools did not mean that every school in every community must always reflect the racial composition of the school system as a whole.\(^\text{151}\)

Another school case that term, this time an establishment clause case, was *Lemon v Kurtzman*, 403 U.S. 602 (1971). In this case the Court considered the constitutionality of the Rhode Island Supplement Act of 1969 and the Pennsylvania Non-Public Elementary and Secondary Education Act of 1968. Both laws allowed the states to support directly salaries of teachers of secular subjects in parochial and other non-public schools.

The issue was whether these laws violated the First Amendment religion clauses, which prohibit laws that respect the establishment of religion or limit its free exercise. Chief Justice Warren Burger wrote for the Court and developed what has become known as the “Lemon Test.” Burger used cumulative criteria developed by the Court over many years to consider the constitutionality of statutes under the establishment clause. The “Lemon Test” added a new excessive entanglement prong to the existing requirements that such laws be for a secular legislative purpose and that their primary effect neither advance nor inhibit religion.\(^\text{152}\)

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\(^{152}\) *Lemon v Kurtzman*, 403 US 602, 642 (1971).
The Supreme Court held that both statutes violated the excessive entanglement strand of the new test. The Court was particularly concerned that teachers in a parochial school setting, unlike the mere provision of secular books, may improperly intrude faith and morals in the teaching of secular subjects.

“The Pentagon Papers” were published, in part, on June 13, 1971, by the New York Times. The Papers were a classified, seven thousand-page document commissioned by President Johnson’s Secretary of Defense Robert McNamara. Other newspapers quickly serialized the documents, led by Daniel Ellsburg, a dissident former bureaucrat in the national security area.

The Nixon Administration sought, and received, a temporary restraining order on the release of the remainder of the document, citing national security concerns. With Justices William Douglas, Potter Stewart, Hugo Black, Thurgood Marshall, and William Brennan all writing separately in New York Times v United States (1971), the Court denied the government’s request for a permanent order. “It was the obligation of the government to prove that actual harm to the nation’s security would be caused by the publication.”153

The first decision in a century of Fourteenth Amendment litigation to rule that statutory gender discrimination violated the Equal Protection Clause was Reed v Reed, 404 U.S. 71 (1971). The law in question had distinguished categories of preference for selecting administration of the estates of people deceased intestate. The Reeds were the separated parents of a deceased son. Sally, challenging the statutory gender

preference, sued Cecil for the right to administer an estate valued at less than one thousand dollars. After striking down this law in *Reed*, the Court often used the *Reed* precedent during the following decade to strike down many other statutes that discriminated on the basis of gender. The opinion was written by Chief Justice Burger, was unanimous, and did not have future justices Rehnquist or Powell participating.

*Gideon* was extended in *Argersinger v Hamlin* (1972) as the Court—with Justice Douglas writing for the Court and Brennan concurring—held that “absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.” Mr. Argersinger was charged with carrying a concealed weapon, an offense punishable by imprisonment up to six months, a thousand dollar fine, or both. Indigent, he was tried without counsel by a judge, found guilty, and sentenced to ninety days in jail. Argersinger then filed a habeas corpus action in the Florida Supreme Court alleging that he was deprived of his Sixth Amendment right to counsel. The Florida court rejected his claim and was reversed by the United States Supreme Court.

*Furman v Georgia* (1972) raised the question of racial imbalances in the use of death sentences by state courts. Furman had been convicted and sentenced in Georgia

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to death. In deciding to overturn existing state death-penalty laws, the Court noted that there was an “apparent arbitrariness of the use of the sentence....”\textsuperscript{155}

On October 11, 1972 the Supreme Court heard oral arguments for a case, the outcome of which, has become one of the most, if not the most, controversial decisions ever—Roe v Wade, 410 U.S. 113 (1973). A Texas woman challenged a state law forbidding the artificial termination of a pregnancy, saying that she had a fundamental right to privacy. The Supreme Court in a seven-to-two decision with Justice Harry Blackmun writing for the Court—Justices White and Rehnquist in dissent—upheld a woman’s right to choose in this case, noting that the state’s “important and legitimate interest in protecting the potentiality of human life” became compelling at the end of the first trimester, and that before then “…the attending physician, in consultation with the patient, is free to determine, without regulation by the State, that…the patient’s pregnancy should be terminated.”\textsuperscript{156}

Mahan v Howell, 410 U.S. 315 (1973) was a voting rights case, the first of four in 1973 that clarified the permissible range of population equality in designing state legislative and congressional districts. Mahan involved a challenge to a 1971 Virginia statute apportioning the lower house of one hundred delegates into a combination of single-member, multi-member, and floater-districts. A three-judge district court panel found the plan unconstitutional because district population deviations ranged from

\textsuperscript{155} Furman v Georgia, 408 US 238 (1972).

\textsuperscript{156} Roe v Wade, 410 US 313, 163-164 (1973).
+9.6 percent to 6.8 percent. Virginia defended these variances as resulting from a consistently applied state policy of following county and city boundaries, excepting only populous Fairfax County.\textsuperscript{157}

The Supreme Court—\textit{in a five-to-three decision with Justice Rehnquist for the Court and Justices Brennan, Douglas, and Marshall in dissent—reversed the lower court. The opinion repeatedly emphasized the reasoning in Reynolds v Sims, which had recognized greater population flexibility for state legislative than for congressional districts.}\textsuperscript{158}


In 1968, Demetrio Rodrigquez and other parents residing in Texas’ property-poor Edgewood school district filed a class action suit in federal district court contending that their state’s school finance law violated the Equal Protection Clause of the Fourteenth Amendment. In 1971 the federal district court found that the Texas statute operated for property-poor school districts as a spend-less, tax-more system of school finance, but for rich ones as a spend-more, tax-less system. Education, the three-judge panel held unanimously, was a fundamental constitutional right. Justice Lewis Powell wrote the opinion for a five-to-four Court that found Justices Marshall,

\textsuperscript{157} \textit{Mahan v Howell}, 410 US 315 (1973).

\textsuperscript{158} Ibid.
Douglas, Brennan, and White in dissent. Justice Powell’s decision reversed the lower court decision and sustained the school finance policy operating in Texas and, in effect, forty-eight other states. Justice Powell’s opinion held that education was not a fundamental right, since it was guaranteed neither explicitly nor implicitly in the Constitution. Texas did not, in any case, deprive any class or anyone of an education, but rather assured that each child in the state received a free minimum education.  

*Keyes* was the first non-southern school desegregation case to receive plenary consideration. Justice William Brennan writing for a seven-to-one Court, Justice Rehnquist in dissent, held that a school district that racially or ethnically segregated one part of a large urban district created an arguably rebuttable presumption that similar segregation throughout the district was not “adventitious” and implied that wholesale, district-wide relief under *Swann* was not appropriate.  

Justice Brennan’s opinion in *Keyes* was widely viewed as a green light for district-wide desegregation of northern school districts.

The last case to be discussed for the 1972 Term is *Miller v California*, 413 U.S. 14 (1973). In *Miller*, the Court, with Chief Justice Burger writing for a five-to-four Court, upheld a stringent application of a California obscenity law by Newport Beach, California, and attempted to define what is obscene. The “Miller Rule” included three criteria: 1) That the average person would, applying contemporary community standards, find that the work appealed to the prurient interest; 2) that the

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work depicts or describes, in an offensive way, sexual conduct defined by state law; and 3) that “the work, taken as a whole, lacks serious literary, artistic, political or scientific value…” Justice Brennan, in dissenting, maintained that the Court’s inability since 1957 in Roth to come up with a workable test for obscenity made the whole enterprise impermissibly vague, especially inasmuch as that vagueness inhibited the availability of non-obscene materials clearly protected by the First Amendment.162

United States v Nixon, 418 U.S. 683 (1974) centered on President Richard Nixon claiming executive privilege and refusing to turn tapes over to the Special Prosecutor during the Watergate cover-up investigation. A unanimous Court with Chief Justice Burger writing the opinion ordered the President to surrender the tapes, thereby limiting executive privilege. The Court found the President’s generalized interest in confidentiality was subordinate to the fundamental demands of due process of law in the fair administration of criminal justice.163

The Detroit school district, then the fifth largest in the nation, covered 140 square miles; at the time of the suit in 1970, its school population of almost 290,000 was 75 percent black and 35 percent white. A substantial recent growth in black population resulted from white flight to nearby suburbs. Within the metropolitan area, the proportion of black-to-white student population was 19 to 81 percent. The district

162 Ibid., 47-48.
court found that the Detroit school district had engaged in “segregative” practices and concluded that the only way to achieve established mandates was to order busing that included some of the surrounding suburban districts. ¹⁶⁴

Chief Justice Warren Burger wrote for a five to four Court affirming the lower courts on the basis of the fit between constitutional violation and corresponding remedy. The Court further ruled that segregation practices in one district did not warrant relief that included another non-segregating district. Justices White, Douglas, Marshall, and Brennan dissented presenting the arguments of the lower courts and sharing the same concerns.

Mr. Taylor was charged with rape and unsuccessfully argued in the Louisiana courts that its “volunteers only” jury service provision violated his Sixth Amendment right to a jury drawn from a representative cross-section of the community. In Taylor v Louisiana, 419 U.S. 522 (1975), with Justice White writing the opinion of the Court, Justice Rehnquist dissenting, Hoyt was effectively overruled. Justice White held that the systematic exclusion of women from jury panels violated any defendant’s fundamental right to a jury trial drawn from a representative cross-section of the community and, second, that women as a class cannot be excluded from jury service or given automatic exemptions if the result is that panels are almost all-male. ¹⁶⁵


In February 1971 the *Virginia Weekly* of Charlottesville published an advertisement for the Women’s Pavilion, a New York for-profit organization that assisted women in obtaining abortions. The *Weekly*’s editor, Jeffrey Bigelow, was prosecuted for violating a Virginia statute that made it a misdemeanor to publish or encourage or prompt the procuring of abortion. Bigelow argued that the statute was unconstitutionally because it was overly broad and also that it was a violation of his free press rights under the First Amendment. But the Virginia courts declared the statute a proper consumer protection measure and, relying on United States Supreme Court precedent, held that Bigelow lacked standing to raise the overly broad issue because the commercial nature of the advertisement rendered it unprotected by the First Amendment. The Supreme Court has developed a separate level of First Amendment protections for commercial advertising. Under the commercial speech doctrine, as it has evolved over the last half-century, commercial speech receives a lesser degree of protection than does noncommercial speech.  

The Supreme Court, with Justice Blackmun writing for a seven-to-two court and Justices Rehnquist and White in dissent, ruled that the *Weekly*’s advertisement merited First Amendment protection because it conveyed truthful information about a matter of significant public interest.

During the following term the Court heard arguments in another First Amendment case, *Buckley v Valeo*, 424 U.S. 1 (1976). The Supreme Court invalidated

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a provision of the law that permitted Congress to choose a majority of voting members of the Federal Election Commission, created to administer and enforce the Federal Election Campaign Act (FECA). The Court also ruled on the First Amendment challenges to the FECA’s restriction of contributions and expenditures. In an unsigned opinion, the Court upheld the several contribution limits—for example, the thousand dollar maximum each individual can contribute to a congressional or presidential candidate in each election campaign—on the ground that they are appropriate legislative weapons against improper influence stemming from the dependence of candidates on large contributions. In this case the Court equated the right to donate money to a candidate of one’s choice with Freedom of Expression.

In March 1976 the Supreme Court struck down a 1974 federal statute that extended the maximum hours and minimum wage provisions of the Fair Labor Standards Act to most state and municipal employees. Justice Rehnquist wrote the five-to-four opinion that found Justices Brennan, White, Marshall, and Stevens in dissent. The Court held that it was a matter of settled law that the provisions were constitutional as they applied to the employees of private corporations. But, as they applied to the states, “the provisions were an unconstitutional interference with an essential attribute of sovereignty attaching to every state government.” The importance of the decision did not lie in the impact regarding the provisions, but it was a significant decision in favor of federalism. Justice Brennan in his dissent in National League of Cities v Usery, 426 U.S. 833 (1976) pointed out the Court’s longstanding

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deference to congressional regulation in the commerce area and cited its previous holdings that the “sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.”

Justice Brennan continued to accuse the majority of creating an “ill-conceived abstraction…as a transparent cover for invalidating a congressional judgment with which they disagree and of violating the principles of judicial restraint and deference to the political branches.”

Two significant Eighth Amendment cases came before the Court in the October 1975 Term—Gregg v Georgia, 428 U.S. 153 (1976) and Woodson v North Carolina, 428 U.S. 280 (1976)–and were handed down on the same day.

Mr. Gregg had been convicted of two counts of armed robbery and two counts of murder. The Georgia death penalty statute provided guidelines for the jury to follow in the sentencing stage of a bifurcated, or two-part, trial. The statute required the jury to find beyond a reasonable doubt and to specify in writing that at least one of ten specified aggravating circumstances existed before it could impose the death penalty. With Justice Brennan and Marshall dissenting, Justice Stewart wrote for a seven-to-two Court in upholding the Georgia death sentence, finding that it did not violate the cruel and unusual punishment clause of the Eighth Amendment.

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168 Ibid., 859.

169 Ibid., 867.

In *Woodson* the Supreme Court reversed the lower court’s approval of mandatory sentencing on Eighth Amendment grounds. Mr. Woodson was an accomplice in a robbery and murder and had been convicted of first degree murder. Under North Carolina law, he received a mandatory death sentence. Following *Furman*, North Carolina had replaced its discretionary sentencing system with a mandatory death sentence for first degree murder. Justice Stewart, writing for the Court also in *Woodson*, held that the constitutional proscription of cruel and unusual punishments required the state to exercise its power to punish within the limits of civilized standards. Justice Brennan, concurring with Stewart’s opinion, reitered his view that the death penalty violated the Eight Amendment per se.\(^{171}\)

The following term yet another Eighth Amendment case came before the Supreme Court. In *Coker v Georgia*, 433 U.S. 584 (1977) Justice White writing for a seven to two Court, with Justices Marshall and Brennan concurring, held that the death penalty was considered cruel and unusual for anything other than first degree murder. White’s opinion, reversing the Georgia Supreme Court, held that the Eighth Amendment’s proscription of cruel and unusual punishments prohibited punishments that were grossly disproportionate to the crime.\(^{172}\)

Mr. Coker had escaped from a Georgia prison while serving a sentence for murder, rape, kidnapping, and aggravated assault. During his escape he committed armed robbery and raped a woman. He was convicted of these crimes and received

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the death sentence for rape. He received the death penalty because the jury, under Georgia’s trial procedure and following the statutory guidelines, found that two aggravating circumstances existed: the petitioner had prior capital convictions, and the rape was committed in the course of committing another capital felony, armed robbery.\footnote{Ibid.}

Oklahoma had a law allowing females aged eighteen to twenty to purchase beer of 3.2 percent. Males could not purchase the same beer until age twenty-one. The law was challenged by two underage men, Mark Walker and Curtis Craig and also by a female beer vendor. Justice Brennan announced the decision for a seven-to-two Court. Brennan held that while enhancing traffic safety did demonstrate an important government interest, the statistical evidence offered by Oklahoma did not meet the other half of the test: the gender line drawn by the state did not substantially further the government’s goal. Also, explaining that the Twenty-first Amendment did not alter otherwise applicable equal protection standards, he rejected the state’s argument that the extra legislative power secured by that amendment should cause this statute to be sustained. This was the first time that the sex-based classifications were subjected to stricter scrutiny under the Equal Protection Clause of the Fourteenth Amendment than was provided by the rational basis or ordinary scrutiny test. Justice Brennan wrote: “the constitutional standard that would have to be met for a statute classifying
by gender is that it must serve an important governmental objective and must be substantially related to those objectives.\textsuperscript{174}

The Metropolitan Housing Development Corporation (MHDC), a non-profit developer, attempted to build racially integrated low- and moderate-income housing in the Chicago suburb of Arlington Heights. The Village Board denied MHDC’s rezoning petition, thus preventing it from building. MHDC brought suit in federal district court alleging that the denial was racially discriminatory in violation of both the Fourteenth Amendment and federal law. The district court upheld the village’s decision but was reversed by the United States Court of Appeals for the Seventh Circuit. The critical issue before the Supreme Court was the standard for proving, under the Fourteenth Amendment, racial discrimination. The Court in a seven-to-one decision with Justice Powell writing for the Court—with Brennan concurring in part and dissenting in part—rejected a showing only of racially disproportionate impact. They held that the proof of racially discriminatory intent or purpose was necessary to make out a constitutional violation.\textsuperscript{175}

Allan Bakke was one of 2,664 applicants for 100 entering positions at the University of California at Davis Medical School in 1972. Eighty-four of the slots were filled through the regular admission program; sixteen were filled through a special admissions program—a distinct and separate process established in 1970 to address the faculty’s concern over the lack of minority students. Bakke, who had

\textsuperscript{174} Craig v Boren, 429 US 190, 197 (1976).

been denied admission two consecutive years, instituted an action for declaratory and injunctive relief against the Regents of the University. He alleged that the Davis program violated Title VI of the Civil Rights Act of 1964, forbidding racial or ethnic preferences in programs supported by federal funds. He further claimed that the university’s practice of setting aside positions for minorities denied him equal protection of the law under the Fourteenth Amendment. Justice Powell delivered the opinion for a sharply divided Court in *Regents of the University of California v Bakke* (1978) that issued six separate opinions. Powell concluded that a university may consider racial criteria as part of a competitive admissions process so long as fixed quotas were not used.\(^{176}\)

Justice Brennan wrote”

So long as the state can demonstrate an important purpose and the means do not unduly burden those least well represented in the political process race-conscious remedies to help members of groups that had suffered racially motivated injuries were constitutional.\(^{177}\)

Government immunity was at issue in *Butz v Economou*, 438 U.S. 478 (1978). After having successfully defeated a complaint against him filed by the Secretary of Agriculture, Mr. Economou, a commodities dealer, sued the Secretary for $32 million clamming the Department had acted against him because he was a critic of Agriculture Department policies. The government sought to dismiss the suit, claiming absolute immunity was given to them by

\(^{176}\) *Regents of the University of California v Bakke*, 438 US 265 (1978).

\(^{177}\) Ibid., 361-362.
two different Supreme Court cases—*Spaulding v Vilas* (1896)\textsuperscript{178} and *Barr v Matteo* (1959).\textsuperscript{179} Justice White writing for a five-to-four Court, with Justice Brennan in the majority, denied absolute immunity and asserted that neither case cited granted such immunity where a claim of violation of constitutional rights was involved.\textsuperscript{180}

In the October 1978 Term of the Court arguments were heard focusing on the “Golden Fleece Award” given by Senator William Proxmire (D) of Wisconsin to federal agencies he judged guilty of wasteful spending. An award was given to several agencies funding the research of Dr. Ronald Hutchinson, a psychologist developing an objective measure of aggression through experimentation on monkeys. Proxmire announced the award on the floor of the Senate, while noting it in a press release, his newsletter, media interviews, and other settings. Claiming emotional anguish, Hutchinson sued Proxmire for defamation, asserting that his reputation had been damaged, his contractual relations interfered with, and his privacy invaded. At issue was the scope of protection afforded members of Congress by the Constitution’s Speech and Debate Clause found in Article 1, section 6. Further, the Court considered the question of who was a public figure when determining the

\textsuperscript{178} *Spaulding v Vilas*, 161 U.S. 483 (1896).

\textsuperscript{179} *Barr v Matteo*, 360 U.S. 564 (1959).

\textsuperscript{180} *Butz v Economou*, 438 US 478 (1978).
standard of proof in libel claims. Chief Justice Burger wrote the opinion for a seven-to-one to one Court, with Justice Brennan in dissent. The majority narrowly viewed legislative acts as protected under the Speech and Debate Clause. Immunity did not extend to newsletters, press releases, and activities not essential to the Senate’s deliberations. Justice Brennan in his dissent concluded that a legislator’s criticism of governmental expenditures, whatever its form, was protected by the Speech and Debate Clause.

Richmond Newspapers, Inc. v Virginia, 448 U.S. 555 (1980) centered on the access to criminal trial proceedings for the press and the public. Out of concern for pretrial publicity and relying on a Virginia statute, a trial court granted a defendant’s motion to exclude the press. The Richmond newspapers challenged the order and sued for access to the trial. A seven-to-one Court with Chief Justice Burger writing for the Court held that the newspapers and public had a First Amendment right of access to the trial. In a separate opinion, Justice Brennan developed a different First Amendment theory to balance the important right of public access with opposing interests. He proposed two principles to determine the right of access: the history and tradition of openness of a given proceeding, and the specific structural value or function of the proceeding. Brennan, applying those two principles to the


\[182\] Ibid., 113.
criminal trial in question, found the Virginia statute to be in violation of both
the First and Fourteenth Amendments.\textsuperscript{183}

Jagdish Chadha was born in Kenya to Indian parents and held a British
passport. He had come to the United States to study in the mid-1960s and
upon expiration of his student visa found that neither Kenya nor Britain would
let him return. Chadha then applied for permanent residency in the United
States. After a lengthy hearing process, his application to stay was approved
by the Immigration and Naturalization Service (INS). Two years later, and
using the legislative veto, the House of Representatives voted to “veto” the
INS decision and Chadha faced deportation. This “legislative veto” was first
used in the 1930s as a way to retain some control over power delegated to the
president to reorganize executive branch agencies. During post-Vietnam and
Watergate it became an especially useful weapon in the legislative versus
executive branch battles. Chief Justice Warren Burger writing for a seven-to-
two Court–Justice Brennan in the majority–ruled the legislative veto
unconstitutional. Burger’s opinion concluded that the Constitution provided “a
single, finely wrought and exhaustively considered procedure for the exercise
of the legislative power of the federal government.”\textsuperscript{184}

An establishment clause cases in the October 1983 Term of the Court
found the Court denying that a city displaying a crèche, or nativity scene, was

\textsuperscript{183} Ibid., 136.

attempting to affiliate the city with the Christian beliefs associated with Christmas. A five-member majority, with Justice Brennan in the minority, held that the crèche served the legitimate secular purpose of symbolically depicting the historical origins of the Christmas holiday. Justice Sandra Day O’Connor supplied the crucial fifth vote and wrote a concurring opinion rejecting the traditional Establishment Clause analysis. Her opinion put forth the question: “Did the government intend to or was the government perceived to endorse religion?” She found the answer to be no.185

In *United States v Leon*, 468 U.S. 897 the Court heard arguments regarding the broadening of the exception to the Fourth Amendment’s exclusionary rule for good-faith police mistakes. The idea for a good faith exception comes from critics of the exclusionary rule, who asserted that many unconstitutional searches were made simply because the police made honest mistakes about confusing search rules.

The court, in a six-to-three decision with Justice White writing for the Court, reversed the appeals court and held that the exclusionary rule should be modified to allow the admission of evidence seized in reasonable, good-faith reliance on a search warrant, even if said warrant was subsequently found to be defective. Justice William Brennan in dissent rejected the entire approach of the majority opinion. He argued that suppression of unconstitutionally seized

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evidence is constitutionally required without regard to its deterrent effect. Thus, the reasons the violation occurred should be legally irrelevant.

A five-to-four Court reversed its National League of Cities v Usery decision in Garcia v San Antonio Transit Authority, 469 U.S. 528 (1985). The Usery decision had restricted Congress’s power to regulate the states “as states;” Garcia removed virtually all federalism-based constitutional limitations on congressional power under the Commerce Clause. Garcia involved the application of the maximum hours and minimum wages provisions of the Fair Labor Standards Act to a city-owned and operated public transportation system. Under the rule established in Usery the economic activities of the states or of their political subdivisions could be regulated by Congress only if four tests were met.

Writing the opinion of a five-to-four Court, joined by Justice Brennan, Justice Blackmun held that the protection of the states’ interest in the federal system was left not to the courts but to the other institutions of government, particularly Congress. “The structure of the federal government itself was relied on to insulate the interests of the states.”186 He further stated: “The Framers chose to rely on a federal system in which special restraints on federal power over the states inerred principally in the workings of the national

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government itself, rather than in discrete limitations on the objects of federal authority."

In 1978 the Alabama legislature authorized schools to provide for a minute of silence for meditation. A 1981 amendment provided a similar period for meditation or voluntary prayer, and then, in 1982, the law was changed to allow teachers to lead willing students in a specified prayer to Almighty God.188

Ishmael Jaffree and various separatist groups challenged the law. A federal district court held that Engel v Vitale and Abington School District v Schemp were wrong; states did have the authority to establish religion. A court of appeals reversed the district court decision and the Supreme Court granted certiorari to decide the constitutionality of only the 1981 amendment. Justice Stevens writing for a six-to-three Court, with Justice Brennan in the majority, affirmed the appellate court decision striking down the law.

The Supreme Court refused to extend the constitutional right of privacy to protect acts of consensual homosexual sodomy performed in the privacy of one’s own home. The case evolved out of the arrest of Michael Hardwick, a gay Atlanta bartender, for performing oral sex on another man in his own bedroom. They were discovered by a police officer who had come to serve a

187 Ibid., 552.

warrant on Hardwick for not paying a fine for drinking in public. The officer was given permission to enter the house by another tenant who did not know whether Hardwick was home. Under Georgia law sodomy was a felony that could bring up to twenty years in prison.  

Justice White wrote the decision for a five-to-four Court, Justice Brennan in the minority, upholding the lower court’s decision. The Court held that this case was different from earlier right-to-privacy cases inasmuch as they were limited to circumstances involving family, marriage, or procreation—things that bore no connection to homosexual activity.

In July of 1986 the Supreme Court struck down a key provision of the Balanced Budget and Emergency Deficit Control Act of 1985. The statute provided that there should be progressive annual cuts in the federal budget deficit. The contested provision stated that the cuts would be specified by the comptroller general if Congress could not agree on them. The issue or challenge was that the comptroller general is regarded as a legislative branch officer who is removable only by joint resolution of both houses of congress.

Chief Justice Burger issued the opinion of the Court with Justice Brennan in the seven-member majority. The Court concluded that the specification of budget cuts was an executive function and that to vest such a

\[^{189}\text{Bowers v. Hardwick, 478 US 186 (1986).}\]

\[^{190}\text{Ibid.}\]
function in a legislative branch officer violated the principle of separation of powers.\textsuperscript{191}

Warren McKeskey was a black man convicted and sentenced to death for the 1978 murder of a white Atlanta police officer. On appeal, attorneys for the Legal Defense Fund argued that the Georgia death penalty statute was being implemented in a racially discriminatory fashion in violation of the Fourteenth Amendment. The claim was based on studies that showed the odds of a death sentence for those accused of killing whites were 4.3 times higher than the odds of a death sentence for those charge with killing blacks.\textsuperscript{192} Justice Lewis Powell writing for a five-to-four Court rejected McCleskey’s claim. He suggested that the study should be presented to legislative bodies rather than courts.\textsuperscript{193} Justice William Brennan in a dissent joined by Justices Thurgood Marshall, Harry Blackmun, and John Paul Stevens argued that demonstration of a significant risk of discrimination, rather than definitive proof of its existence, is all that is needed to show a constitutional violation.\textsuperscript{194}

The Federal Railroad Administration promulgated regulations requiring blood and urine tests of railroad employees involved in certain major train accidents or incidents and permitting breath and urine tests when employees

\textsuperscript{191} Bowsher v Synar, 478 US 714 (1986).


\textsuperscript{193} McCleskey v Kemp, 481 US 279 (1987).

\textsuperscript{194} Ibid.
violated certain safety rules. Railroad unions challenged the regulations, arguing that they violated the Fourth Amendment’s prohibition of unreasonable searches and seizures. Justice Anthony Kennedy writing for a seven to two Court, with Justice Brennan dissenting, held that although the covered workers were employed by private companies, the level of government involvement was such, and the program was intrusive enough, to invoke the Fourth Amendment. The Court held that the government’s interest in ensuring safety presented a special need that made the program reasonable.\footnote{Skinner v Railway Labor Executives’ Association, 489 US 602 (1989).} Justice Brennan in his dissent joined by Justice Marshall warned that the Court had allowed basic constitutional protections to wither because of hysteria over drugs. The majority’s special needs approach was unprincipled and dangerous, with a resulting cavalier disregard for the constitutional text.\footnote{Ibid., 641.}

Dousing with kerosene and burning a United States flag taken from a flagpole at the 1984 Republican National Convention in Dallas, Gregory Johnson led a protest against national policies outside the convention center. He was arrested and convicted under a Texas law prohibiting the desecration of the Texas and United States flags. Johnson’s conviction was overturned by the Texas Criminal Court of Appeals, and the State appealed. Justice William Brennan writing for a five-to-four Court in \textit{Texas v Johnson}, 491 U.S. 397 (1989) affirmed the lower Court decision,
concluding that the First Amendment protects the desecration of the United States flag as a form of symbolic speech.

During the same term as Johnson the Court considered the application of the death penalty to the mentally retarded. Mr. Penry was mildly to moderately mentally retarded, probably from birth but possibly as a result of childhood beatings. Though but a child in mental age (nine to ten years) and maturity, he was found legally sane and competent to stand trial and was sentenced to death for rape and murder. Justice Sandra Day O’Connor announced the judgment and delivered the opinion of the Court in *Penry v Lynaugh*, 492 U.S. 302 (1989) that the application of the death penalty to persons who are mentally retarded but not legally insane does not violate the Eight Amendment prohibition against cruel and unusual punishment. The Court remanded the matter for further proceedings so that a jury could consider defendant's mitigating circumstances in determining whether to impose the death penalty.197

An abortion case was argued before the Court in April of 1989. *Webster v Reproductive Health Services*, 492 U.S. 490 (1989) involved restrictions imposed on abortions by the State of Missouri. A plurality opinion delivered by Chief Justice William Rehnquist upheld the Missouri law, stating “that the people of Missouri, through their legislature, could put limits on the use of public funds for abortion.”198 This decision narrowed the protection of *Roe*.

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United States v Eichman, 496 U.S. 310 (1990) involved two consolidated appeals by the United States in which appellees had been prosecuted for publicly burning American flags in violation of the 1989 Flag Protection Act. Two United States District Courts had ruled the 1989 unconstitutional based on Texas v Johnson (1989). In Eichman the government contended the Flag Protection Act was not directed at offensive expressive conduct, but rather at all forms of flag mistreatment. The Supreme Court disagreed with the government and Justice Brennan in his five-to-four opinion suggested that a majority of the Court would construe virtually any law directed a forms of flag desecration as constitutionally suspect, for such laws are inescapably linked to government’s disapproval of the message conveyed.

The State of Michigan had established a highway sobriety checkpoint program with specific guidelines regarding operation of the checkpoints, site selection, and publicity. In its first operation, state police arrested two persons out of drivers and occupants in 126 vehicles for driving under the influence of alcohol. Before the program could continue, a group of licensed Michigan drivers sued on the grounds that the checkpoint operation violated the Fourth Amendment, in that it constituted a warrantless and unreasonable search and seizure. The drivers won their case in the lower courts, with the state tribunals ruling that although the state had a legitimate interest in curbing drunken driving, the checkpoint program constituted a substantial intrusion on individual liberties.199

The Supreme Court reversed the lower courts and ruled that the state court had erred in interpreting the balancing test for administrative searches. Chief Justice Rehnquist writing for a six-to-three Court, with Justice Brennan dissenting, agreed with the lower courts and the state, arguing that Michigan had a substantial and legitimate interest in curbing drunken driving. Justice Brennan in his dissent expressed the concern of the police being unchecked in their actions. He stated, “By holding that no level of suspicion is necessary before the police may stop a car for the purpose of preventing drunken driving, the Court potentially subjects the general public to arbitrary or harassing conduct by the police.”

In Rutan v Republican Party of Illinois, 497 U.S. 62 (1990) a five-to-four Court with the opinion written by Justice Brennan extended First Amendment protection against party tests covering promotions, transfer, recalls from layoffs, and even hiring itself. Plaintiffs asserted that “party tests” had been applied in Illinois under a Republican governor’s order prohibiting state hiring without his express permission.

Justice Brennan held that denying low level government jobs on partisan grounds would abridge First Amendment rights and that such infringement served no vital government interests that could not be secured by defining work standards for non-policy makers and choosing or dismissing only certain high level employees on the basis of political views. Nor, Brennan added, was patronage necessary to preserve the democratic process cine, in his view political parties prosper by other means.

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Hodgson v Minnesota, 497 U.S. 417 (1990) was the Court’s first confrontation with the abortion issue after its decision in Webster indicated that substantially greater restrictions on abortion were constitutionally permissible. The case involved a statute requiring minors seeking abortions to notify both parents; a minor who obtained a court’s determination that she was mature or that abortion without notice to the parents was in her best interest could have an abortion.

Justice John Paul Stevens wrote for a five-member majority that included Justice Brennan. Justice Stevens concluded that the two-parent notification requirement was unconstitutional. It was not a reasonable method of assuring proper parental involvement in the abortion decision, given the large numbers of families in which the minor seeking the abortion did not reside with both parents, often because the absent parent was physically abusive. Hodgson was the first case in which Justice Sandra Day O’Connor voted to hold a restriction on the availability of abortions unconstitutional.

Conclusion

In assessing President Eisenhower’s appointments of Earl Warren and William Brennan to the Supreme Court for conformity to expectations and the right to be disappointed if they did not conform, several areas will be analyzed. One, what were President Eisenhower’s objectives for each vacancy? Two, what were his criteria in selecting a nominee? Three, was the political landscape at the time of the vacancy,

i.e., public opinion and the Senate constraining in his selection of a nominee? Four, how did performances of his appointees on the bench match with his views on issues? Five, if he was disappointed ideologically, given their backgrounds prior to being nominated, should have been disappointed?

President Eisenhower had admirable criteria set for appointments to the Supreme Court. He and his Attorney General Herbert Brownell discussed the criteria prior to any vacancies and they amended the criteria as the years progressed.

The criteria summarized here are described in detail earlier in this chapter. President Eisenhower wanted nominees who had character and ability; a basic philosophy of moderate progressivism; the absence of extreme views; prior judicial service (this added after Warren’s appointment); geographical and religious balance was preferred on the Court; the nominee was to be sixty-two years or younger; an F.B.I. check would take place; and finally, they would have to be endorsed by the American Bar Association.

Of the criteria mentioned, the only area in which it could legitimately be argued that they (Warren and Brennan) failed to fit the criterion once on the bench is moderate progressivism or extreme views. At no point in Chief Justice Earl Warren’s tenure on the Court could he be considered extreme relative to the others on the Court. The question would be: were his views extreme “to the left?” Warren always, during his tenure, had at least two, if not three or four justices on the Court who were more liberal than he. Justices William Douglas and Hugo Black were more liberal than he, and so, arguably, was William Brennan, and for his last two terms on the Court,
Justice Thurgood Marshall was to Warren’s left. Chief Justice Warren, in the last two Supreme Court terms of his career on the Court was actually right in the center of the Court ideologically.

William Brennan, on the other hand, served the first fourteen terms of his tenure as arguably the third most liberal Justice, Douglas and Black being to his left. It was probably not until 1975 that he was the most liberal justice on the Supreme Court.

Thus, the only portion of President Eisenhower’s criteria that possibly they did not fulfill was that of “extreme views.” But, as it has been discussed, Warren was never on the far left of the Court, and Brennan was not on the far left until President’s Nixon and Ford had had the opportunity to appoint four justices, two of whom often ended up joining Justice Brennan.

The political landscape in the senate and across the country at the time of Chief Justice Fred Vinson’s death was such that President Eisenhower had significant latitude in whom he could appoint to the Chief’s position. The Vinson vacancy occurred in September of 1953. It was not an election year; Eisenhower was still a newly elected popular president with an approval rating of 61 percent.\textsuperscript{203} His party marginally controlled the Senate where confirmation hearings were not the contentious affairs they are today. While it took two months for Earl Warren to get confirmed, the nomination was never in any trouble. Once it made it to the floor of the Senate, debate and a unanimous voice vote took a mere eight minutes.

The political landscape in the Senate when Justice Sherman Minton resigned was different from the Vinson vacancy, but not significantly so that Eisenhower should have felt constrained. It was, to be sure, a presidential election year, and he was concerned about being re-elected. He had, according to his biographer Stephen Ambrose, a sincere, albeit unnecessary, concern about his chances in the election. He ended up winning the 1956 election by even larger margins than he did the 1952 election. He won the popular vote 35.5 million to 26.02 million and the electoral vote 457 to 73.

Justice Minton’s resignation was effective October 15, 1956. President Eisenhower could have waited a few weeks, until after the election, to nominate Minton’s replacement. Thus, he would have been politically in an even stronger position than just prior to the election. The Senate that confirmed Brennan was the one that would have confirmed him whether Eisenhower had waited until after the election or right away as he did. In that Senate the Democrats had a two seat majority, forty-nine to forty-seven.

As shown earlier in this chapter, Brennan certainly met all of President Eisenhower’s original judicial criteria. He also met Eisenhower’s current political criteria: he was Catholic, a Democrat, a state judge, and from the East. Attorney General Herb Brownell, Eisenhower’s trusted advisor, urged him not to wait to nominate William Brennan, but to do it right away—for political gain.

William Brennan did run into significant opposition in the Senate from Senator Joseph McCarthy, whom he had criticized in speeches across the country. McCarthy
made Brennan’s appearances before the Committee on the Judiciary uncomfortable, but the nomination cleared the committee eleven-to-zero and on the Senate floor he was confirmed by voice vote with only Senator McCarthy voting nay.

Civil Rights was an issue in which the three principals—Dwight Eisenhower, Earl Warren, and William Brennan—at least implicitly, were in agreement. While President Eisenhower remained publicly silent on the Civil Rights decisions by the Supreme Court, he did publicly state—where he had jurisdiction, the military and Washington, D.C.—segregation had to end. The federal government had to set the example. Where Chief Justice Earl Warren and Justice Brennan and the Supreme Court had jurisdiction—the entire country—they did their best to end segregation. In Brown and Bolling the Warren Court unanimously struck down the “Separate but Equal Doctrine.” In Cooper v Aaron a unanimous Court, including Warren and Brennan, refused to allow the delay of desegregation. Finally, in Heart of Atlanta Motel, the Court ruled that private businesses could not discriminate on the basis of race.

The “anti-communist” legislation that was tested in the Supreme Court was also an issue that found Eisenhower, Warren, and Brennan in more agreement than disagreement. President Eisenhower was very much opposed to the “Communist-disclaimer oath” required of union-leaders that was in the Taft-Hartley Act of 1947. He felt that the oath should be dropped or required equally of employers and employees.204 The three men were “on the same page” if the “oath requirement” in

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Taft-Hartley is looked upon as equivalent to the registration requirements of the Smith Act and the Internal Security Act challenged in the numerous anti-communist legislation cases the Court heard, e.g., Watkins, Kent, Barenblatt, Scales, and Albertson. In each instance discussed in this chapter, Chief Justice Warren and Justice Brennan voted against the registration provisions.

In National League of Cities, Garcia, and Skinner Justice Brennan each time voted in favor of the laborer. In National League of Cities and Garcia he voted for the minimum wage and maximum hour laws to be applied to state workers, and in Skinner he opposed drug testing for the railway workers. While President Eisenhower may have disagreed with Brennan in Skinner, he likely would have agreed with his position in the other two cases, given Eisenhower’s support of labor as evidenced in the discussion on his reaction to the Taft-Hartley Act of 1947 earlier in this chapter.

The rulings of Chief Justice Warren and especially Justice Brennan in the areas of criminal procedure, e.g., Gideon, Miranda, Mapp, Terry, In re Gault, and Leon were probably too expansive and too early for President Eisenhower. But their decisions in the criminal procedure area and their decisions in the Eighth Amendment area, e.g., Robinson, Tropp, McCleskey, Coker, Furman, and Gregg do fit in with President Eisenhower’s definition of dynamic conservatism “in all those things which deal with people, be liberal, be human; when it comes to the people’s money, or their economy, or their form of government, be conservative.”

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The voting rights decisions of the Supreme Court may have been a disappointment to President Eisenhower. Possibly *Reynolds v Sims*, with the court holding that state legislative districts must be equal, went against Eisenhower’s belief of not interfering with state business. Any of the others, e.g., *Wesbury*, dealt with congressional districts and federal jurisdiction and would have had to have been somewhat pleasing.

In Eisenhower’s memoirs, *The White House Years: Mandate for Change* and *The White House Year: Waging Peace*, the President emphasized repeatedly his economic conservatism. The Courts that Chief Justice Warren and Justice Brennan served on did not have significant cases dealing with this issue, so he could not have been disappointed in that area.

Was President Eisenhower disappointed in the performance on the bench of Chief Justice Earl Warren and Justice William Brennan? When asked by his biographer Stephen Ambrose what was the biggest mistake he made while president, Eisenhower’s reply was “The appointment of that S.O.B. Earl Warren.”

Henry Abraham in *Justices, President, and Senators* recounts Dwight Eisenhower being asked if he had made any mistakes while he had been president. Eisenhower’s response was “Yes, two, and they are both sitting on the Supreme Court.”

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allow President Eisenhower’s words to answer the question whether or not he was disappointed with Earl Warren and William Brennan.

The question is now: Should Eisenhower have been disappointed in Warren and Brennan? In the area of civil rights Eisenhower got exactly what he bargained for. There can be little doubt Eisenhower knew civil rights was a significant and timely issue in the country. His appointments, with the help of his advisor Attorney General Brownell, helped lay the groundwork for the broad expansion of civil rights in the 1950s and 1960s.

As far as the appointment of Earl Warren, he had to know what he was getting. His Attorney General, Herbert Brownell, had been a close advisor of Governor Thomas Dewey of New York who ran for President in 1948 with Warren on his ticket. He had to be fully familiar with Warren’s reputation as a liberal-progressive Republican from the 1948 and 1952 campaigns.

Discussed earlier in this chapter was Warren’s political and legal record which was sufficiently liberal that in 1938 he was able to cross-file for Attorney General on the Republican, Democratic, and Progressive parties’ tickets and win all three. His three campaigns for Governor of California also witnessed substantial liberal and progressive support because his record was one of progressivism, if not liberalism.

Earl Warren fulfilled each of Eisenhower’s criteria for a federal judge when he was on the high court. His record legal and legislative record prior to his nomination

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was public record. If President Eisenhower was disappointed in Earl Warren’s
performance on the Supreme Court, he did not have the right to be.

William Brennan fit and fulfilled on the Court each of President Eisenhower’s
criteria for a federal judge and he also fit the political criteria of the moment—
Catholic, Democrat, state judge, and easterner. Herbert Brownell claimed to have read
all Brennan’s state Supreme Court opinions. His public speeches caught the attention
of Senator McCarthy, why not the attention of President Eisenhower? As with the
Warren appointment, if Eisenhower was disappointed with William Brennan’s
performance on the Supreme Court, he did not have the right to be.

*Albertson V Subversives Control Board*, 382 US 70 (1965).


Michigan Dep't of State Police V Sitz, 496 US 444 (1990).


"Senate Unit Votes 11-0 for Brennan." New York Times, March 5 1957, 23.
Spaulding V Vilas, 161 U.S. 483 (1896).
Terry V Ohio, 392 US 1 (1968).