

# Brennan v Tigar

by Andrew Kopkind

[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . First Amendment freedoms need breathing space to survive. — NAACP v Button, Mr. Justice Brennan, for the Court.

To read the recent Supreme Court opinions of William Brennan is to see affirmed and advanced the basic freedoms of American society. To lawyers at least, they are soul-stirring, like old-fashioned Fourth of July parades or an Inaugural Address. *Dombrowski*, *Jacobellis*, *NAACP v Button*, *New York Times v Sullivan* and others have significantly widened the area in which citizens can express their political beliefs. "Brennan is proud of the First Amendment," a friend of the Court mused the other day; "he thinks he invented it."

Brennan's invention of "breathing space" may apply to the general populace, but it seems to stop short at his own office. Last month, the atmosphere there was positively choking: Brennan fired a law clerk because of his politics. That is the simplest way to put it, but if any of the principals in the case would explain the matter (none of them will), they might offer up any number of qualifications, interpretations and mitigating circumstances, as lawyers and judges do. Even those on the periphery of the case are frightened to talk about it, but one or two have suggested their perceptions: it was a "failure of communication"; the clerk was "unreasonable"; the "good of the Court" was at stake.

Despite the reluctance of those involved to talk, many of the facts are now known. Last spring, Brennan asked his former clerk, Professor Robert O'Neil, to scout around among his students at the University of California's Boalt Hall School of Law for a promising candidate for future clerkship. O'Neil immediately thought of Michael E. Tigar, a second-year student who was at the top of his class and had just been chosen editor of the *California Law Review*. O'Neil knew that there could be trouble about Tigar's appointment; as an undergraduate, Tigar had been in the first generation of Berkeley political activists. He demonstrated against the House Un-American Activities Committee, went to a left-wing youth festival in Helsinki, protested ROTC and favored the Cuban revolution, and was president of SLATE, the student political organization at Cal. There

was a file on Tigar in the HUAC offices in Washington, and he had been condemned by California's little league Red-hunters, the State Senate Fact-Finding Subcommittee on Un-American Activities.

O'Neil told Brennan of those black marks in Tigar's copy book, but the good Justice was unimpressed. He agreed to take him as his clerk after graduation the next year. O'Neil was still worried; he knew California politics (and he was a researcher on the staff of the Democratic National Committee in Washington during the 1964 election campaign) and the virulence of the right-wing. Some time later, he saw Brennan and recited again the list of Tigar's undergraduate activities, but Brennan was not moved to reconsider his acceptance of the clerk.

A faculty committee officially endorsed Tigar for the clerkship, and it was assumed all during the succeeding year that he had the job. Then, a few months before graduation this spring, Tigar became a minor political issue. A far-right California publication called *Tocsin* attacked Tigar's appointment. A cosmetics manufacturer named William Penn Patrick, who was running for the Republican gubernatorial nomination on a strategy of out-Reaganing Ronald Reagan, made an issue of "Communism" at Berkeley and singled out Tigar as a case in point (in fact, Tigar had been too busy in law school to engage actively in recent politics; he was often in sympathy, but rarely participated). The newspaper *Human Events* finally made the necessary finding of conspiracy: "Brown, Berkeley, Brennan," it headlined, over a two-column indictment of Tigar (taken primarily from the California subcommittee's report). The story spread across the country on the right-wing's network: Bill Schulz, a substitute columnist for Fulton Lewis Jr., used it one day, and James J. Kilpatrick picked it up later. They believe that clerks make justices' decisions, and they also believe that radical clerks write radical opinions.

Before long, the Pacific breezes were blowing in Washington. Rep. William M. Tuck of Virginia ("of Bavaria," someone said), a member of HUAC, put the Kilpatrick column into the *Congressional Record*. California's Sen. George Murphy built and crossed his own personal bridge from the legislative to the judiciary branch and queried Justice Brennan. Congressmen and the White House were getting mail on Tigar. The Lemon Grove (Calif.) Republican Assembly wrote an

irate letter – with many erroneous charges – to a California representative.

It was all very disquieting to the justices. The organized right operates at a low level of public visibility but it generates a high level of fear. Representative Tuck's involvement raised the specter of a HUAC investigation, or, which is almost as bad, the public threat of an investigation. There were obvious implications for California – and national – politics. "Brown, Berkeley, Brennan" was too convenient an issue for Reagan, who considers the Berkeley upheavals part of Governor Pat Brown's record of achievements. Reagan has been plugging a *Human Events* subscription drive.

And so, a few days after Tigar graduated (first in his class), Brennan decided the appointment needed a second look. He called O'Neil and another California law teacher, Robert Cole, and voiced his anxiety. The professors relayed it to Tigar, who flew from Los Angeles to Washington to meet with Justice Brennan at the end of June.

Brennan said he would like to have a resumé of Tigar's political activities, for what purposes it was not entirely clear. Tigar hesitated; political confessions are not generally favored by those with strong passions for civil liberties. But he tentatively agreed, and flew back to Berkeley to discuss the proposition with his friends. Two days later, he phoned Brennan and read him the statement as well as a covering letter which, he thought, made it plain that the document would be for the Justice's eyes only. The special relationship between a justice and his clerk might require personal compromises, but Tigar thought that he had no duty to make public confession.

Brennan seemed to agree, at least on the telephone. Tigar dropped the statement and the letter in the mail, returned to Los Angeles, and began a camping trip across the continent with his family in a Volkswagen bus. But Brennan was not entirely content: why was Tigar so adamant in his wish to keep the statement private? Brennan thought he just might let others take a peek: another justice, perhaps, or one or two congressmen. The Justice confided his feelings to O'Neil (Brennan was in San Francisco on another matter) and the professor began to worry. He located the Volkswagen bus somewhere in the middle of the country, and told Tigar to get to Washington as fast as he could to see Justice Brennan.

Tigar arrived on Sunday, July 10. The next morning, he went to the Court. Brennan told him he wanted control of the dissemination of the statement. Tigar refused; he would not testify, informally or formally, about his political beliefs or activities, nor would he let Brennan do it by proxy. The "negotiations" lasted several hours. At one point, an observer reported, Tigar was spirited around corners and into other offices to

avoid being seen in the Court. By the end of the meeting, Brennan gave Tigar until Friday, July 15, to relinquish control of the statement. The next morning, Tigar was brooding about the decision when Brennan called to say that no matter what he might decide, he no longer had the job.

Some days later, the matter received minor treatment in the press. The most informative story was in the *Washington Post*, which did not mention Tigar's *apologia pro vita sua*; at the time, it was difficult to get any information at all. By their silence, the actors in the case thought they were protecting the Court, or Brennan, or Tigar. What they seemed to be doing, however, was exaggerating the threat that the right-wing can pose, and limiting the "breathing space" in which personal liberties can operate. "A lot of law students will think twice before getting active in politics," a lawyer said last week.

How much Brennan's decision to fire Tigar was his own is still unclear. Justice Abe Fortas discussed the case with Brennan at some length. Berkeley professors say that Chief Justice Warren took an interest in it before he left for Europe after the Court's term ended. The three justices are close, personally and philosophically. Curiously, all three took an unexpected position narrowing First Amendment freedoms in the recent *Eros* obscenity conviction of Ralph Ginzburg.

Warren may have been aware of the touchy California political situation (his son works in Pat Brown's campaign). Brown's message is that Reagan is a dangerous extremist, and he is careful not to give his opponent cause for a counterattack on the mirroring charge. When civil rights demonstrators were sentenced to outrageously long jail terms in San Francisco last month, Brown refused to act. He has been generally insensitive to the strike of the grape-pickers, and he has avoided identification with the left-wing in his own party on the issues of Vietnam, Watts and Berkeley. A law professor involved in the Tigar-Brennan negotiations said that Tigar's appointment could be used as an issue against Brown and the Supreme Court. "The Chief runs vicariously for governor of California every four years," a former Court clerk remembered.

Tigar's career should not suffer inordinately. He was close to an offer of a job at Yale Law School (where one leading professor said he was "a person of extraordinary talent and promise," and another said he was "easily the brightest student to go through Berkeley in years") when he joined the law firm of Edward Bennett Williams, the popular defense attorney. Brennan will have the services of a perfectly able clerk named Abraham Sofaer, who accepted the post after Tigar was axed. In fact, if Justice Brennan's great decisions were not so good a guide, it would be impossible to tell just who will suffer from it all.