

July 20, 1966
1079 Ninth
Albany, California

Dear Mike,

Enclosed you will find a letter constructed by Lee and myself after consultation with Professor Cole. Our purpose is, as the letter indicates, to send it to a limited number (around one hundred) of attorneys and professors, with the hope that they will in turn write Brennan, voicing disapproval of his actions. It is obvious that what we are doing is (1) intermeddling in your affairs and (2) in a limited fashion using you as a cause. Because of this, we will do it only if you give us the green light.

There are a couple of consequences of which we're sure you're aware if you do give us the green light. One, it may make things somewhat rougher on you. How much, you yourself can best judge. Many of the faculty here think that as little publicity as possible should be given the affair, primarily because you "smell" a little different after one of these fishy deals, even if you're on the "innocent" end. Second, Justice Brennan will attribute the information to you rather than our source (O'Neil via Cole). This may cause you problems. Cole seems to say that there's no way we can attribute this to him or O'Neil. We have not yet spoken to O'Neil, but we will do so if you approve. (There are two sentences which may get axed because of this: The one about the original phone call to Brennan recommending you for a clerkship, and the ones concerning the Brennan trip to the West Coast.) We understand that you have promised the Justice not to release any information. This may cause a conflict. Also, let us repeat that many faculty consider it unwise for your personal future.

So what's to recommend it? Perhaps the most important reason is an attempt, perhaps futile, to have people whom Brennan holds in high regard bring home to him that he's done underhanded and, we think, unprincipled thing. Second, those in government, including the Supreme Court, should know that there are those who feel strongly enough that integrity should have its place in politics that they'll raise hell if unprincipled things are done. Third, we feel that the Supreme Court should not only be the voice of the first amendment, but should also act in accordance with its decisions. To the extent that they act in what appears to be a hypocritical manner, it should be made publicly known. Supreme Court Justices are not accountable as are other public officials. Perhaps publicity is one of the few ways of trying to "shape them up."

A possibility, rather than the letters, is sending a version of this letter to the Editors of the New York Times. Whether

this approach is better than the individual letters depends on the future publicity. If it is widespread enough, a letter to the Times might be more effective in putting the facts before the public. Also, if it were printed, it would be apparent to Brennan that he was being publicly taken to task. With the letters, every person may beg off doing something or sympathize with Brennan. Either way, our requests will probably get round filed.

I am sorry that we have to put the burden on you to decide. Because of the narration of facts (assuming they're right), I'm afraid there's no alternative.

Our best to Pam.

A handwritten signature in cursive script, appearing to read "Bob". The signature is written in dark ink and is centered on the page.

P.S. On rereading this letter, Lee and I felt that it presents to you the alternative of being principled, unselfish, and on a white horse, ie. giving us the green light, or being uncourageous and not true to those ideals you've advocated. That we don't perceive as the choice up to you. First, there is, we understand, the promise to Brennan. Second, this whole goddam thing could fall on its face, either way it's done.

Dear _____:

In April 1965 Justice Brennan of the United States Supreme Court asked Professor Robert O'Neil, University of California at Berkeley (Boalt Hall) to recommend an outstanding student for a clerkship for the 1966-67 term. Professor O'Neil stated that he wanted to check with some of his colleagues before making a recommendation. O'Neil had in mind Michael Tigar, then a second year student at Boalt, who stood first in his class and who was to become the Editor-in-Chief of the California Law Review in his third year. Professor O'Neil subsequently discussed the matter with other Boalt faculty members and particularly Professor Robert Cole. They agreed that Tigar would be an outstanding candidate for a clerkship, but because of his controversial political background, they felt that it was necessary that Tigar's complete background be disclosed to Brennan. Tigar agreed to this request, and supplied Cole and O'Neil with a statement of his past political connections. Among these are his chairmanship of Slate, a liberal campus political group, his organization of the United States delegation to the World Youth Festival in Helsinki, participation in the San Francisco demonstrations against the House Unamerican Activities Committee, participation in Fair Play for Cuba Committee meetings, and calling for the formation of the W.E.B. DuBois clubs. O'Neil and Cole phoned Justice Brennan, recommending Tigar. At the same time, they informed Brennan of Tigar's background. Brennan promptly thereafter wrote to Tigar, offering him a clerkship. Tigar immediately accepted.

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Tigar
Right or
wrong

In the latter part of June 1966, Tocsin, a Northern California publication of limited circulation, printed an article concerning the Tigar clerkship, and informing its readers of Tigar's background. A similar article appeared in Human Events magazine. Subsequently several newspapers, including the Chicago Tribune, the San Diego Union, the Richmond (Virginia) News Leader, and the Fort Lauderdale _____, printed either ~~editorial~~ editorial comment or a Fulton Lewis Jr. column, deploring the appointment. A number of letters were sent to Justice Brennan expressing opposition to the Tigar appointment, and several letters and telephone calls from members of Congress were received. Chief Justice Warren was personally contacted by Senator Murphy, and along with Justice Fortas, expressed concern. After conferring by phone with Professors O'Neil and Cole, Brennan requested an interview with Tigar, for which Tigar chose to fly to Washington from Los Angeles. At the interview, attended by Professor Sanford Kadish, Boalt Hall, Brennan requested Tigar to give Brennan a written resume of his political activities. Tigar returned to Berkeley to consider this request, and two days later he agreed, but felt that the resume should be used only for the Court's internal purposes. During a long-distance telephone call from Tigar, Justice Brennan agreed to this arrangement, and reaffirmed his commitment to have Tigar as his clerk.

^
b this night?
It sounds
feeling that
you would
consider
this after
already giving
him the info.

Tigar returned to Los Angeles to pick up his family, and began a two week automobile trip back to the East Coast, assuming that the matter had been settled. In the meantime, Justice Brennan continued to receive protests by mail.

Justice Brennan, on a trip to the West Coast for other matters,

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had an opportunity to discuss the appointment with O'Neil and Cole.
At that time, he implied that he had decided to drop Tigar as a clerk.

After Tigar's arrival in Washington, Justice Brennan told Tigar that it was necessary to make public the information on the resume. Aware that requiring disclosure of political activities was contrary to Tigar's principles, Brennan said that he would allow Tigar until Friday, July 15, to agree to the disclosure. Nevertheless the following day, Tuesday, July 12, Brennan withdrew the clerkship.

Aside from the very disappointing outcome to Mr Tigar, we find it disturbing that Justice Brennan, after consulting Chief Justice Warren and Justice Fortas, has allowed the burden of controversy to be ~~shifted~~ shifted entirely to Mr. Tigar. Justice Brennan's request for making public the information came long after he was informed of Tigar's activities. Knowing these activities, he had not only accepted Tigar as a clerk, but remarked that such participation showed a commendable independence of mind and inquisitiveness.

The Court has become to many of us the institution to which we look for the preservation of the freedoms of association and speech, which are so necessary in the constant pursuit of an informed electorate. Exercise of these rights is manifested in many ways. For some of us, it may be no more than ~~ei~~ slight involvement in local political parties or professional activities. For others, such as Mr. Tigar, it may be the joining of more controversial groups. Preservation of the right of association is most important; it is substantially diminished if one is subsequently treated with unique disfavor because of these activities.

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Justice Brennan's actions seem at worst hypocritical, and at best in bad faith. That one of the Court's stalwart defenders of individual liberties should feel it necessary to withdraw a commitment made after being fully apprised of all relevant facts leaves a hollow ring to his words.

It is, of course, inevitable that the Supreme Court will be subject to pressures from the public, the Congress, and the Executive. In an election year certain members of the Court may feel particularly constrained to prevent controversies which could have repercussions outside the Court. Political expediency should not be accorded the respect of an overriding virtue, however. First, succumbing to political pressure cannot but help bring disrespect for the Court and its members. Second, such political considerations inevitably will lead to further political pressures and compromises. Third, the public has the right to expect the members of its highest court to act in a manner unrelated to the political future of ^{others,} ~~their favorites~~.

We are writing to you and several ~~other~~ members of the bar and teaching profession in the hope that you will write Justice Brennan voicing your disapproval of actions such as the Tigar dismissal. We are not seeking to have Mr. Tigar reinstated as a clerk. Nor do many of us agree with his political philosophy. Nevertheless, we believe that the utmost integrity is demanded of our judiciary in its dealings with the citizenry. We at least have a right to expect integrity of our Supreme Court. We have been sadly disappointed.