AFJ NOMINEE REPORT

MICHAEL BRENNAN

U.S. Court of Appeals for the Seventh Circuit

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INTRODUCTION

On August 3, 2017, President Trump nominated Milwaukee attorney Michael Brennan to the United States Court of Appeals for the Seventh Circuit.[1] Alliance for Justice opposes his confirmation on grounds related both to the process that led to his nomination, and to the merits of his record.

In nominating Brennan, the White House ignored the Wisconsin Federal Nominating Commission, used by every Wisconsin senator since 1979. By his own admission, Brennan was apparently selected before the commission even began to interview candidates. Furthermore, after the commission considered his potential nomination, Brennan failed to meet commission standards, that a candidate receive the support of five out of six commissioners, which Senator Ron Johnson himself had insisted on under President Obama and reaffirmed under President Trump. He was also nominated without meaningful consultation with Wisconsin Senator Tammy Baldwin.

Notably, with regard to the blue slip, Brennan wrote an op-ed in 2011 saying that it was appropriate for Ron Johnson to block the nomination of Victoria Nourse to the Seventh Circuit by not returning his blue slip. Brennan emphasized that Senators Herb Kohl and Russ Feingold "had their say in Nourse's first nomination" and "Johnson should have his say."[2] Moreover, Brennan wrote, "[t]here are now two senators from Wisconsin from different political parties, so to exclude Johnson and those citizens who voted for him would be a purely partisan move."[3]

As of this writing, Sen. Baldwin has not yet returned her blue slip on Brennan's nomination. If she does not return the blue slip, by Brennan's own standard his nomination should not proceed.

There are good reasons for Sen. Baldwin to withhold her blue slip, as well as good reasons for Brennan to have failed to receive the requisite bipartisan support from the nominating commission. Brennan's record is problematic and renders him unfit to serve on the Court of Appeals.

Brennan's record and writings indicate that he holds a singularly troubling belief: that conservative judges should not follow precedents they disagree with. Along with archconservative judge Robert Bork, Brennan embraces the notion of the "anti-evolutionary purpose" of the Constitution, which raises questions about his own views of some of our nation's most important Supreme Court cases.[4] Not only that, Brennan has advocated for conservative judges to go farther and to take an active role in invalidating congressional actions with which they disagree, such as those that protect civil rights. He has celebrated Supreme Court decisions that have weakened civil rights, and encouraged conservative judges to be more vigorous in overturning acts of Congress. He has called for unchecked executive power and sought to weaken rights of criminal defendants.

1 Press Release, President Donald J. Trump Announces Sixth Wave of Judicial Candidates and Fifth Wave of U.S. Attorney Candidates, The White House (Aug. 3, 2017), https://www.whitehouse.gov/the-press-office/2017/08/03/president-donald-j-trump-announces-sixth-wave-judicial-candidates-and.

2 Michael B. Brennan, et al, *Sen. Johnson only wants to have his say on Nourse nomination*, Journal Sentinel (July 23, 2011), http://archive.jsonline.com/news/opinion/126042043.html/.

3 *Id.*

4 Brennan, speaker, "What is the Federalist Society?" Marquette University Law School Federalist Society Chapter, Milwaukee, WI (Sept. 9, 2015), slide 33, https://www.afj.org/wp-content/uploads/2018/01/What-is-the-Federalist-Society-Sept.-9-2015.pdf.

Indeed, during his tenure as a trial court judge in Milwaukee, Brennan frequently ignored precedents, facts, and basic legal principles in his pursuit of this agenda. Illustrative:

» In *State v. Lord*, 723 N.W.2d 425 (Wis. 2006), he ignored a U.S. Supreme Court case that was directly applicable and ruled instead to deny a motion to suppress evidence under the Fourth Amendment. His decision was so flawed that the prosecution conceded on appeal that the evidence should have been suppressed and the Wisconsin Supreme Court unanimously agreed "without further briefing or argument" since "the issue of law is well-settled requiring no extensive research or explanation" because U.S. Supreme Court case law "is clear." *Id.* at 426.

» In *Greenfield Senior Hous. v. Tannehill*, 2007 Wisc. App. LEXIS 564 (Wis. Ct. App. June 19, 2007), the Wisconsin Court of Appeals reversed a Brennan decision evicting a tenant, in which Brennan held Wisconsin's law did not give the tenant an opportunity to correct a breach of the lease. As the Court of Appeals noted, Brennan "cited no case law to support [his] conclusions. In reaching these conclusions, [Brennan] ignored the procedure set out in the statute and ignored the fact that [the landlord] stated" that the tenant "could remedy the breach[.]" *Id.* at *8.

» In *Maryland Arms Ltd. P'ship v. Connell*, 786 N.W.2d 15 (2010), the Wisconsin Supreme Court upheld the reversal of a decision by Brennan in which he narrowly construed a lease to favor a landlord. In reversing, the appeals court found that Brennan ignored basic legal principles.

With regard to the rights of women and LGBTQ people, Brennan shares with other Trump judicial nominees a history of disturbing statements and actions. He has written derisively of the concept of a "glass ceiling" that prevents the advancement of women, expressing skepticism of such a "notion" that "rules were rigged" against some segments of society. As chair of Governor Scott Walker's state judicial selection commission, Brennan was responsible for selecting Supreme Court justices who referred to LGBTQ persons as "degenerates"; said that gay people who died of AIDS "deservedly receive none of my sympathy"; mocked the rights of women; and compared affirmative action to slavery.

BIOGRAPHY

Michael Brennan is a graduate of the University of Notre Dame and Northwestern University School of Law. After law school he clerked for Robert Warren, then judge in the Eastern District of Wisconsin, and Daniel Manion, judge on the Seventh Circuit Court of Appeals. He then served as an associate at Foley & Lardner. He also worked as staff counsel for the Wisconsin Criminal Penalties Committee and Governor's Task Force to Enhance Probation, and served as an Assistant District Attorney in Milwaukee County.

In 1999, Governor Tommy Thompson appointed Brennan to serve as a judge on the Milwaukee County Circuit Court, where he sat until 2008. In 2009, Brennan returned to private practice and became a partner at the law firm of Gass Weber Mullins, where he currently works.

From 2011 to 2017, Brennan served as chairman of the Governor's Judicial Selection Advisory Committee, which helped Governor Scott Walker choose state-level judicial nominees.[5]

In keeping with the Trump Administration's heavy reliance on the Federalist Society for its judicial picks, Brennan is the founder of the Milwaukee chapter of the ultraconservative group.

NOMINATION PROCESS

It is clear that in nominating Brennan, President Trump chose to ignore Wisconsin's longstanding bipartisan nominating process. If Brennan is confirmed, it will be a blow to Wisconsin's Federal Nominating Commission. Further, it will be contrary to the very principles that Brennan himself espoused in 2011 when he said it was appropriate for Senator Ron Johnson not to return his blue slip on President Obama's nominee to the Seventh Circuit, Victoria Nourse, as described below.

By way of background, since 1979, senators of both parties in Wisconsin "have used the commission for every federal judicial and U.S. attorney vacancy, under both Republican and Democratic administrations." [6]

After Judge Terry Evans took senior status in 2010, President Obama nominated Victoria Nourse to the vacant seat on the Seventh Circuit. The Senate did not consider Nourse before the end of the 111th Congress, and the President renominated Nourse. Despite the fact that Nourse had been thoroughly vetted and approved by Wisconsin's nominating commission, Senator Ron Johnson, who had replaced Senator Russ Feingold in the Senate, refused to turn in his blue slip and insisted that the commission process begin anew.

Under President Obama, the Senate made no exceptions to the 100-year-old tradition that both home state senators had to return their blue slip before the Senate Judiciary Committee considered a nominee. Thus, because Johnson did not return his blue slip, Nourse's nomination did not proceed, and her nomination was ultimately withdrawn.

At the time, in 2011, Brennan wrote an op-ed saying that it was appropriate for Johnson to block Nourse's nomination.[7] Brennan emphasized that Senators Herb Kohl and Russ Feingold "had their say in Nourse's first nomination" and "Johnson should have his say." Moreover, Brennan wrote, "[t]here are now two senators from Wisconsin from different political parties, so to exclude Johnson and those citizens who voted for him would be a purely partisan move."

5 Bruce Vielmetti, *Michael Brennan to lead Walker's judicial advisory group*, JOURNAL SENTINEL (May 11, 2011), http://archive.jsonline.com/blogs/news/121661004.html.

6 *Federal Nominating Commission*, STATE BAR OF WISCONSIN (2017), https://www.wisbar.org/aboutus/governmentrelations/pages/federal-nominating-commission.aspx.

7 Michael B. Brennan, et al, *Sen. Johnson only wants to have his say on Nourse nomination*, JOURNAL SENTINEL (July 23, 2011), http://archive.jsonline.com/news/opinion/126042043.html/.

Before President Obama again tried to fill the vacancy, there were drawn-out negotiations between Wisconsin's senators regarding the contours of the nominating commission. Ultimately, Senators Johnson and Tammy Baldwin, who had replaced Senator Kohl, agreed that Wisconsin's federal nominating commission would comprise three Democrats and three Republicans and that only a candidate who received five votes from commission members would be recommended for a judgeship.[8] Yet Senator Johnson again prevented President Obama from proceeding by requiring that the commission first complete the process to fill two Wisconsin district court vacancies before acting to fill the Seventh Circuit seat.[9]

Ultimately, the commission interviewed eight candidates for the Seventh Circuit vacancy. Donald Schott was one of two finalists who had the *full* support of the commission, and President Obama nominated him on January 12, 2016. On June 16, 2016, Schott was reported out of the Senate Judiciary Committee with bipartisan support, including the support of Chairman Grassley and Senators Hatch, Graham and Vitter.[10] Despite this bipartisan backing, the Republican Senate refused to bring Schott's nomination to a vote in the full Senate. His nomination was returned to the President at the end of the 115th Congress.

After President Trump was inaugurated, Senators Johnson and Baldwin renewed the commission and its criteria.[11]

Despite the fact that under President Obama, both Johnson and Brennan emphasized the importance of Wisconsin's bipartisan commission, under President Trump Brennan was, as he himself noted, "contacted by the White House Counsel's Office concerning my interest in serving as a federal judge"[12] – before the commission even had an opportunity to solicit applicants for the Seventh Circuit vacancy. On March 15, 2017, Brennan interviewed with attorneys from the White House Counsel's Office and the U.S. Department of Justice.

In April, the Federal Nominating Commission solicited applications for the Seventh Circuit vacancy, and in June the commission interviewed Brennan. Importantly, Brennan never received the requisite support, five votes, laid out in commission criteria that Ron Johnson insisted on under President Obama and renewed under President Trump.[13]

Yet President Trump still nominated Brennan. Given that Brennan had already met with the White House and Justice Department long before the commission even began interviewing applicants, this was clearly the intent all along.

Indeed, a comparison between the process used to nominate Donald Schott – whom Republicans would not confirm – and Brennan is telling.

As Schott described the process:

8 *Wisconsin Federal Judicial Nominating Commission*, STATE BAR OF WISCONSIN (Feb. 13, 2017), https://www.wisbar.org/aboutus/governmentrelations/Documents/Wisconsin%20Judicial%20Nominations%20Commission%20Charter%202017.pdf.
9 Carl Tobias, *Filling the Seventh Circuit Vacancies*, 2017 WIS. L. REV. 225 (2017), http://wisconsinlawreview.org/wp-content/uploads/2017/05/Tobias-Final.pdf.
10 Sen. Comm. on the Jud., Executive Meeting (June 16, 2016), https://www.judiciary.senate.gov/imo/media/doc/Results%20of%20Executive%20Business%20Meeting%2006-16-16.pdf.
11 Press Release: *Wisconsin Senators Renew Agreement on Wisconsin Judicial Commission and Call for Applications for U.S. Attorney Vacancies*, Senator Tammy Baldwin (Feb. 13, 2017), https://www.baldwin.senate.gov/press-releases/wisconsin-federal-nominating-commission.

12 Sen. Comm. on the Jud., 115th Cong., Michael Brian Brennan: Questionnaire for Judiciary Nominees, 51.
13 Patrick Marley & Jason Stein, *Baldwin: Trump ignored bipartisan panel by nominating Gov. Scott Walker ally to 7th Circuit Court of Appeals*, JOURNAL SENTINEL (Aug. 4, 2017), https://www.jsonline.com/story/news/politics/2017/08/04/donald-trump-appoints-gov-scott-walker-ally-federal-7th-circuit-court-appeals/539442001/.

> There is a commission that was formed by Senators Baldwin and Johnson to recommend judicial candidates to the Senators. I applied to that commission and was interviewed on November 18, 2014 in Madison, Wisconsin. On May 7, 2015, Senator Baldwin asked for my permission to include my name on a list of candidates she sent to the White House for consideration. On June 9, 2015, I interviewed by phone with an attorney from the White House Counsel's Office. Since July 16, 2015, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On September 1, 2015, I interviewed with attorneys from the White House Counsel's Office and the Department of Justice in Washington, D.C. On October 28, 2015, I interviewed with staff from Senator Johnson's office in Milwaukee, and on November 5, 2015, I interviewed with Senator Johnson at his office in Washington, D.C. On January 12, 2016, the President submitted my nomination to the Senate."[14]

As Brennan described the process:

> In March 2017, I was contacted by the White House Counsel's Office concerning my interest in serving as a federal judge. On March 15, 2017, I interviewed with attorneys from the White House Counsel's Office and the U.S. Department of Justice Office of Legal Policy, in Washington, District of Columbia. In early April 2017, the Wisconsin Federal Nominating Commission solicited applications for this vacancy. I submitted my application on April 28, 2017. I interviewed with that Commission on June 1, 2017. The results of the Commission's process were not released. On June 30, 2017, I was contacted by Senator Ron Johnson and the White House's Counsel's Office and informed that the White House was interested in nominating me for this vacancy. They informed me that they had consulted with and would continue to consult with Senator Tammy Baldwin. I have been in communications with officials from the Office of Legal Policy at the Department of Justice since that time. On August 3, 2017, the President submitted my nomination to the Senate.[15]

So, in comparison:

- With Schott, the Obama White House waited until it received the commission's recommendation through the senators. It took the commission, and its role, seriously. With Brennan, the White House made clear its intention to nominate him before the commission received applicants or interviewed candidates. When Brennan did not meet the criteria established by Johnson and Baldwin, the President nominated Brennan regardless.

- The Obama White House did not nominate Schott until he met with Senator Johnson (which occurred approximately one year after Schott first interviewed with the commission). In contrast, Brennan was nominated

14 Sen. Comm. on the Jud., 114th Cong., Donald Karl Schott: Questionnaire for Judiciary Nominees, 31, https://www.judiciary.senate.gov/imo/media/doc/Schott%20Senate%20Questionnaire%20Final.pdf.

15 Sen. Comm. on the Jud., 115th Cong., Michael Brian Brennan: Questionnaire for Judiciary Nominees, 51.

without having met with Senator Baldwin.

Brennan made clear in 2011 how important Wisconsin's bipartisan nominating commission is, and that it was legitimate for Johnson not to return his blue slip until he was satisfied that Wisconsin's bipartisan commission had a meaningful voice in the process and the commission's criteria were met. Here, President Trump circumvented the longstanding tradition of the bipartisan nominating commission in ensuring that a qualified, non-ideological nominee is put forward.

LEGAL AND OTHER VIEWS

I. TIES TO GOVERNOR SCOTT WALKER

Brennan has strong ties to Wisconsin Governor Scott Walker, and has abetted Walker in imposing a radical right-wing agenda in the state.

From 2011 to 2017, Brennan served as chairman of the Governor's Judicial Selection Advisory Committee, which helped Governor Walker choose state-level judicial nominees.[16] The individuals Brennan endorsed provide strong evidence of the type of federal appellate judge Brennan himself would be.

Indeed, with Brennan and the committee's guidance, Governor Walker appointed two justices to the Wisconsin Supreme Court: Rebecca Bradley and Daniel Kelly. Both of these nominees received Brennan's approval despite having made statements that raise serious questions about their ability to administer even-handed justice to all parties who come before them.

For example, Bradley referred to LGBTQ persons as "degenerates" and "queers."[17] In a column about AIDS and HIV, Bradley argued that "homosexuals and drug addicts who do essentially kill themselves and others through their own behavior deservedly receive none of my sympathy."[18] She also said that the "feminist movement" is "largely composed of angry, militant, man-hating lesbians who abhor the traditional family."[19] Additionally, Bradley has expressed extreme views regarding a woman's right to choose, notably equating abortion to the holocaust and slavery.[20] Bradley has also said "[w]omen even declare some right to control their bodies, neglecting the fact that in choosing abortion they are asserting a right to control another body, and a right to murder their own flesh and blood"[21] and, "[d]o not be persuaded by any pleas for a woman's right to control her body or 'choose' to be pregnant or not; they have no moral or

16 Bruce Vielmetti, *Michael Brennan to lead Walker's judicial advisory group*, JOURNAL SENTINEL (May 11, 2011), http://archive.jsonline.com/blogs/news/121661004.html; *See also* Michael Brennan, Op-ed, *Walker's approach to the judiciary*, JOURNAL SENTINEL (Sept. 21, 2013), http://archive.jsonline.com/news/opinion/walkers-approach-to-the-judiciary-b99101878z1-224655871.html/.

17 Jessie Opoien, *Rebecca Bradley called gay people 'degenerates,' 'queers' in college newspaper columns*, THE CAPITAL TIMES (Mar. 7, 2016), http://host.madison.com/ct/news/local/govt-and-politics/rebecca-bradley-called-gay-people-degenerates-queers-in-college-newspaper/article_7b92ace5-d4d2-54af-a2de-54860858be47.html.

18 *Id.*

19 Jessie Opoien, *Rebecca Bradley in 1992: Camille Paglia 'legitimately suggested' women play role in date rape*, THE CAPITAL TIMES (Mar. 9, 2016), http://host.madison.com/ct/news/local/govt-and-politics/rebecca-bradley-in-camille-paglia-legitimately-suggested-women-play-role/article_28cb63fe-d647-5ce3-b558-3497c8f6f418.html.

20 Jason Stein, Annysa Johnson & Mary Spicuzza, *In college column, Bradley likened abortion to Holocaust, slavery*, JOURNAL SENTINEL (Mar. 8, 2016), http://archive.jsonline.com/news/statepolitics/scott-walker-declines-to-condemn-bradley-anti-gay-college-writings-b99683523z1-371400881.html/.

21 Dave Begel, *Judge Rebecca Bradley facing the torture of a death by a thousand cuts*, ON MILWAUKEE (Mar. 11, 2016), https://onmilwaukee.com/myOMC/authors/davebegel/bradleyblog.html.

ethical basis[.]"[22]

Bradley, when running for election to retain her seat, told the business organization Wisconsin Manufacturers and Commerce (WMC), which spent millions of dollars in support of her and other conservative candidates to the Supreme Court, "I am your public servant...."[23] Remarkably, on the court, Bradley left *during* an oral argument in order to give a speech to the WMC –demonstrating that her real loyalty is to special interests groups.[24] Brennan's central role in putting an individual on the state supreme court who pledged her support to a special interest group, and not to the Constitution or laws of Wisconsin, is disturbing.

Brennan also supported the appointment of Daniel Kelly. Kelly argued that affirmative action is "morally, and as a matter of law...the same" as slavery.[25] He also "labeled as one of the best opinions in the past 30 years U.S. Supreme Court Justice Antonin Scalia's dissent railing against the 2015 decision that found same-sex couples had a right to marry. He excerpted a portion of Scalia's decision that ridiculed the majority opinion for allowing the high court – 'an unelected committee of nine' – to revise the U.S. Constitution." Kelly also "call[ed] court-ordered accommodation of same sex marriage 'coerced dignity.'"[26]

There are certainly many Republican lawyers in Wisconsin who are qualified for a seat on the state supreme court. It is troubling that the two Brennan supported for the Wisconsin Supreme Court held such deeply disturbing views.

II. THREAT TO CRITICAL LEGAL PROTECTIONS

Brennan has been very vocal in emphasizing his view that originalism, which in his words (in a regular recruiting speech for the Federalist Society) "respects the anti-evolutionary purpose of [the] Constitution[,]" suggesting it is the only valid form of jurisprudence.[27] For example, in critiquing a book by Judge Richard Posner, Brennan wrote that Posner "cannot credibly dispute [Robert] Bork's central thesis that anything other than original intent jurisprudence is undemocratic and at odds with the Framers' expressed intentions."[28] He added, "Bork's articulation and defense of originalism as a theory of judicial interpretation stands unrebutted by Posner's observations of its putative application."[29]

At the same time, Brennan has advocated for conservative judges to reverse key court decisions. He wrote:

» "The oath of a federal justice or judge at 28 U.S.C. 4553 makes express that his or her duty is first to the Constitution and the laws of the United States, not to other judges' interpretation thereof. That duty includes reexamination of precedent to ensure that the correct law is

22 *Id.*
23 *Rebecca Bradley Publicly Pledges Her Servitude to State Big Business Lobby*, One Wisconsin (Feb. 25, 2016), http://onewisconsinnow.org/press/rebecca-bradley-publicly-pledges-her-servitude-to-state-big-business-lobby/.
24 Patrick Marley, *Rebecca Bradley leaves arguments early to speak to business group*, Journal Sentinel (Mar. 4, 2016), http://archive.jsonline.com/news/statepolitics/rebecca-bradley-leaves-arguments-early-to-speak-to-business-group-b99681342z1-371062061.html/.
25 Josie Duffy Rice, *Judge who equates affirmative action and slavery appointed to Wisconsin Supreme Court*, Daily Kos (July 22, 2016), https://www.dailykos.com/stories/2016/7/22/1551102/-Judge-says-affirmative-action-and-slavery-are-morally-the-same-is-appointed-to-WI-Supreme-Court.
26 Bill Lueders, *Too extreme to be Supreme?*, Isthmus (June 30, 2016), https://isthmus.com/news/news/extreme-finalists-for-wisconsin-state-supreme-court/.
27 Brennan, speaker, "What is the Federalist Society?" Marquette University Law School Federalist Society Chapter, Milwaukee, WI (Sept. 9, 2015), slide 33, https://www.afj.org/wp-content/uploads/2018/01/What-is-the-Federalist-Society-Sept.-9-2015.pdf.
28 Michael B. Brennan, *Book Review: Overcoming Law by Richard Posner*, 79 MARQ. L. REV. 329, 336 (1995), http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1530&context=mulr.
29 *Id.* at 336.

applied." [30]

- "Such reexamination of precedent is part of a court's prudential judgment, and it may vary based upon the type of law interpreted by the court."[31]
- "In constitutional law, *stare decisis* has less strength, and overruling precedent is more common." [32]
- "With regard to the Constitution, as Judge Bork has pointed out, judges may defer to precedent that reflects a good-faith attempt to discern the original understanding of that text, or to decisions rendered soon after a constitutional provision's ratification which may reflect a superior knowledge of its original meaning."[33]
- "If after reexamination of a legal decision, a court concludes that the ruling was incorrect, *stare decisis* does not require that the rule of that case be followed. To do so would violate a judge's oath."[34]
- "Bush-appointed judges cannot accurately be labeled as activists for reexamining and following only correct precedent."[35]

If Brennan aligns with Bork, emphasizes the "anti-evolutionary purpose" of the Constitution, and believes conservative judges should not follow precedents they disagree with, that raises serious concerns about his own views of some of our nation's most important Supreme Court cases. His stances raise questions about his commitment to properly apply key court decisions that have recognized critical rights for people of color, women, and LGBTQ Americans.

Brennan's views are not just limited to criticizing key constitutional cases. Brennan has also called for conservative judges to be active in invalidating congressional actions, such as those that protect civil rights. He has written:

> Judicial conservatives should never legitimize the activism engaged in by judicial liberals, either in the past or should they come to power again, by engaging in the same behavior. That being true, justices and judges faced with activist legislatures are not required to roll over in the name of judicial restraint. This would leave in place a one-way ratchet of constantly expanding government."[36]

To that end, Brennan applauded the Supreme Court's decision in *United States v. Morrison*, 529 U.S. 598 (2000), which struck down as unconstitutional part of the Violence Against Women Act that provided a civil remedy to victims of gender-based violence.[37] He also praised the Court's decision in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), which held that persons with disabilities could not sue state governments for damages under the Americans with Disabilities Act (ADA).[38] In both cases the Court rejected extensive congressional fact finding.

Indeed, Brennan's defense of *Morrison*

30 Michael B. Brennan, *Bush's Judiciary*, NATIONAL REVIEW (Jan. 5, 2001), https://www.afj.org/wp-content/uploads/2018/01/Brennan-QA-Clip-170-1.pdf.
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.*
36 Michael B. Brennan & Michael S. Greve, *Hot Topics: Judicial Activism*, FEDERALIST SOCIETY (July 1, 2003), https://fedsoc.org/commentary/publications/hot-topics-judicial-activism.
37 *Id.*
38 *Id.*

and *Garrett* is particularly illuminating in demonstrating how ideological and results-oriented Brennan's judicial philosophy appears, because when it comes to laws that *do not* protect civil rights, Brennan has repeatedly emphasized that a mark of a "judicial activist" is "insufficient deference to political decision-makers."[39] He has said that "judges who practice restraint will exhibit a proper deference to the other branches of government."[40]

Illustrative of this is his criticism of the Wisconsin Supreme Court for invalidating a cap on non-economic damages in medical malpractice claims in *Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005).[41] The ruling came in a case in which a doctor's negligence injured Matthew Ferdon during birth and left him partially paralyzed with a deformed right arm for the rest of his life. *Id.* at 446. A jury awarded Ferdon $700,000 in non-economic damages and $403,000 to cover future medical expenses. *Id.* The Wisconsin Patients Compensation Fund then successfully moved to have non-economic damages reduced pursuant to the statutory limitation cap on non-economic damages of $350,000, adjusted for inflation. On appeal, Ferdon argued that the statutory limitation "violates the equal protection guarantees of the Wisconsin Constitution." *Id.* at 446.

The Wisconsin Supreme Court held that the caps were unconstitutional and remanded the case to the circuit court. *Id.* at 447. First, applying rational basis review, the court emphasized that statutes are presumed constitutional. *Id.* at 457. However, it noted, "when a legislative act unreasonably invades rights guaranteed by the state constitution, a court has not only the power but also the duty to strike down the act." *Id.* at 458.

In the court's view, the statute distinguished between "medical malpractice victims who suffer over $350,000 in noneconomic damages, and medical malpractice victims who suffer less than $350,000 in noneconomic damages." *Id.* at 462. As a result, "the cap divides the universe of injured medical malpractice victims into a class of severely injured victims and less severely injured victims." *Id.* at 462.

The court concluded that the statutory cap and the classification of medical malpractice victims "appear[ed] to express a legislative balancing of objectives: to ensure quality health care in the state; to compensate injured victims of medical malpractice; and to protect health care providers from excessive costs of medical malpractice insurance." *Id.* at 465. The court held that classifying medical malpractice victims on the basis of the severity of their injuries did not rationally advance these legislative objectives, and thus violated the Equal Protection Clause of the Wisconsin Constitution. *Id.* at 467; 447.

Brennan highlighted *Ferdon* as an example of improper judicial activism, and especially noted that the Wisconsin Supreme Court "most certainly did not defer to political decisionmakers [sic]; it overruled the

39 Brennan, speaker, "Should We Be Cynical or Hopeful about the Wisconsin State Judiciary?" BGB Luncheon Group, Milwaukee, Wisconsin (Apr. 27, 2007), https://www.afj.org/wp-content/uploads/2018/01/Brennan-QA-Clip-1623.pdf; Brennan, *Are courts becoming too activist?*, JOURNAL SENTINEL (Oct. 2, 2005), https://www.afj.org/wp-content/uploads/2018/01/Are-Courts-Becoming-Too-Activist.pdf.

40 Brennan, speaker, "Should We Be Cynical or Hopeful about the Wisconsin State Judiciary?" BGB Luncheon Group, Milwaukee, Wisconsin (Apr. 27, 2007), https://www.afj.org/wp-content/uploads/2018/01/Brennan-QA-Clip-1623.pdf; Brennan, speaker, "Judicial Activism: More than Whose Ox is Being Gored?" Federalist Society, Notre Dame Law School Chapter, Notre Dame, Indiana (Sept. 28, 2001), https://www.afj.org/wp-content/uploads/2018/01/Judicial-Activism-more-than-whose-ox-is-being-gored-CLEAN.pdf.

41 Brennan, *Are courts becoming too activist?*, JOURNAL SENTINEL (Oct. 2, 2005), https://www.afj.org/wp-content/uploads/2018/01/Are-Courts-Becoming-Too-Activist.pdf.

legislature's considered judgment, and the governor's signature pen."[42]

Contrast this with Brennan's support for *United States v. Morrison*, 529 U.S. 598 (2000) and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

In *Morrison*, after reviewing the record compiled by Congress, the five conservative members of the U.S. Supreme Court held that Congress's fact finding was insufficient to support its conclusion that violence against women affected interstate commerce. In doing so, the majority specifically disagreed with Congress's "method of reasoning" despite eight separate congressional reports on the subject and reports on gender bias from task forces in 21 states. As Justice David Souter wrote in dissent, "the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned.... Indeed, the legislative record here is far more voluminous than the record compiled by Congress and found sufficient in two prior cases upholding Title II of the Civil Rights Act." *Morrison*, 529 U.S. at 634, 635 (Souter, J. dissenting).

Similarly, in *Garrett*, the majority held that Congress did not have the authority under Section 5 of the 14th Amendment to enable disabled workers to sue state governments for damages even though, as Justice Breyer noted in dissent, Congress had "compiled a vast legislative record documenting 'massive, society-wide discrimination' against persons with disabilities," including 13 hearings, a task force that "held hearings in every State, attended by more than 30,000 people, including thousands who had experienced discrimination first hand[,]" and "roughly 300 examples of discrimination by state governments themselves in the legislative record." *Id.* at 377, 379 (Breyer, J., dissenting).

As Republican Chairman of the Senate Judiciary Committee Arlen Specter said, *Morrison* was an "encroachment on congressional authority."[43] Specter also said that *Garrett* was "inexplicable" and "has no grounding in the Constitution, no grounding in the Federalist Papers, no grounding in the history of the country, [and] comes out of thin air."[44] Republican Senator Mike DeWine likewise denounced the decision. He said, *Garrett* is "hardly a model of clarity" and he agreed with "scholars [who] have said that they find [Garrett] to be inconsistent with prior case law, at odds with the clear language of the Constitution, disrespectful of Congress's role in our system of government, and insensitive to the plight of those who are the victims of discrimination."[45]

Disturbingly, Brennan's approach to the law leads him to conclude that the Wisconsin Supreme Court acted in an untoward manner when it ensured that a paralyzed child received full compensation, but that the U.S. Supreme Court acted appropriately when it ignored Congress's extensive fact finding and efforts to ensure equality for women and persons with

42 Brennan, speaker, "Should We Be Cynical or Hopeful about the Wisconsin State Judiciary?" BGB Luncheon Group, Milwaukee, Wisconsin (Apr. 27, 2007), https://www.afj.org/wp-content/uploads/2018/01/Brennan-QA-Clip-1623.pdf. For a refutation of Brennan's criticism of the defense, *see* Lynn Adelman & Shelley Fite, *Exercising Judicial Power: A Response to the Wisconsin Supreme Court's Critics*, 91 MARQ. L. REV. 425 (2007), available at: http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1142&context=mulr. *See also* Lawrence Friedman, *Reconsidering Rational Basis: Equal Protection Review Under the Wisconsin Constitution*, 38 RUTGERS L.J. 1071 (2007), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1831647.

43 *Confirmation Hearing on the Nomination of Judge John G. Roberts Jr. to be Chief Justice of the Supreme Court Before the Sen. Comm. On the Jud.*, 109th Cong. (2005) (statement of Sen. Spector), available at: https://www.gpo.gov/fdsys/pkg/CREC-2005-09-19/pdf/CREC-2005-09-19-pt1-PgS10168-2.pdf.

44 *Sen. Comm. On the Jud.*, 109th Cong. (statement of Sen. DeWine quoting Sen. Spector) (2006), available at: https://www.congress.gov/crec/2006/08/03/CREC-2006-08-03-pt2-PgS8804.pdf.

45 *Sen. Comm. On the Jud.* 109th Cong.(statement of Sen. DeWine) (2006), available at: https://www.congress.gov/crec/2006/08/03/CREC-2006-08-03-pt2-PgS8804.pdf.

disabilities.

III. CIVIL RIGHTS

It is not just his support for the Supreme Court's decisions in *Morrison* and *Garrett* that demonstrate Brennan's very narrow views of the application of some of our nation's most critical laws.

Illustrative is a law review article he wrote titled *Orure* [sic] *v. Owens: Choosing Among Personal Injury Statutes of Limitations for Section 1983*, in which he argued to make a statute of limitations in Section 1983 civil rights suits as narrow as possible.[46] When he drafted the article, the Supreme Court had agreed to hear a case on the issue, but had not yet issued a decision.

In *Okure v. Owens*, State University of New York (SUNY) police officers beat Tom Okure during an arrest on the SUNY campus at Albany, and Okure filed suit under Section 1983 for violations of his constitutional rights. Because Section 1983 does not have an express statute of limitations, courts had to address whether New York's one-year statute of limitations for intentional torts or three-year limitations period for personal injury actions applied in the case. Brennan argued that the shorter limitation should apply.

Contrary to Brennan's argument, the district court, in *Okure v. Owens*, 625 F. Supp 1568 (N.D.N.Y. 1986) held that the three-year limitation applied to the battery suit. *Id.* at 1571. Subsequently, on appeal in *Okure v. Owens*, 816 F.2d 45 (2d. Cir. 1987), two of the three judges on a Second Circuit panel also held that New York's three-year limitations period applied. *Id.* at 49. The U.S. Supreme Court unanimously affirmed. Every justice of the court, including the most conservative justices, disagreed with Brennan's view that Section 1983 cases should be more difficult to bring.

All judicial nominees at their confirmation hearing pledge to follow Supreme Court precedent, but Brennan's article, importantly, illuminates how he would approach a civil rights issue before there is clear Supreme Court precedent to apply. Tellingly, Brennan's position was rejected by 12 out of 13 judges who heard the case, including every Supreme Court justice – providing strong evidence for just how out of the mainstream Brennan is on issues of civil rights.

Also striking is Brennan's dismissive attitude towards sex discrimination.

In an article on "personal responsibility," Brennan bemoans the fact that "[m]any of the words and phrases used in the media and in the academy suggest that things simply happen to people, rather than being caused by their own choices or behavior."[47] As one example, he criticizes women who recognize that sex discrimination still exists. He wrote, "[w]atch out for the use of *ex ante* words or expressions to describe *ex post* results. Another example is that a certain group was denied an opportunity to advance by a 'glass ceiling.' Implicit in that phrase is the notion that rules were rigged against some individual or group."[48]

46 Brennan, *Orure* [sic] *v. Owens: Choosing Among Personal Injury Statutes of Limitations for Section 1983*, 82 NW. L. REV. 1306 (1988), https://www.afj.org/wp-content/uploads/2018/01/Brennan-QA-Clip-261.pdf.

47 Michael B. Brennan, *The Lodestar of Personal Responsibility*, 88 MARQ. L. REV. 365, 373 (2004), http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1022&context=mulr.

48 *Id.* at 373.

IV. CIVIL LIBERTIES

In a letter to the editor in *The Wall Street Journal*, headlined "A citizen's freedom is bound by allegiance," Brennan objected to the notion that Yaser Hamdi, an enemy combatant detained indefinitely, "should enjoy the constitutional protection of habeas corpus."[49] He said such an argument "does not take into account the ancient Roman dictum 'inter arma silent leges' – 'in time of war, the laws are silent.'"[50]

He added, "[g]overnment imposition on individual liberties is related to the country's strength and stability. The greater threat a war poses to domestic order ... the greater deference exists to the executive's suspension of civil liberties."[51]

Moreover, "[c]ivilized society seeks to achieve a proper balance between freedom and order. In wartime, the balance shifts toward order, in favor of the government's ability to confront conditions that threaten the nation. Law functions only within the constructs of order. That is why President Lincoln suspended the ancient writ, to avoid 'all the laws but one' – habeas corpus – being enforced."[52]

The Supreme Court soundly rejected Brennan's views. As Justice O'Connor emphasized for the Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), "a state of war is not a blank check for the President," and "enemy combatant[s]" have the right to challenge their imprisonment "before a neutral decision maker." *Id.* at 536, 508. The Court added, "[i]t is during our most challenging and uncertain moments that our nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Id.* at 532.

Given President Trump's repeated efforts to erode the rule of law and eviscerate critical legal protections, Brennan's views on executive power are deeply concerning and raise serious questions whether he will be an independent jurist willing to hold accountable the President who nominated him.

V. CRIMINAL JUSTICE

Fourth Amendment

Brennan has questioned the Exclusionary Rule, which prevents evidence obtained in violation of a defendant's constitutional rights from being admitted in court. Reviewing Leon Scully's book, "Bombers, Bolsheviks, and Bootleggers: A Study in Constitutional Subversion," he praised the "convincing argument that the precedential underpinnings of the exclusionary rule are judicially created precepts that lack grounding in the original meaning of the Fourth Amendment."[53] He added that Scully's book "is thus the story of an activist judiciary guided by the doctrine of an 'evolving' Constitution, imposing political will instead of implementing constitutional principle. Scully's call for a return to the search for truth in courts of law deserves a wide hearing."[54]

Illustrative in this area is one of Brennan's

49 Michael B. Brennan, Letter to the Editor, *A Citizen's Freedom Is Bound by Allegiance*, WALL STREET J. (May 3, 2004), https://www.afj.org/wp-content/uploads/2018/01/WSJ-Letter-to-the-Editor-CLEAN.pdf.
50 *Id.*
51 *Id.*
52 *Id.*
53 Michael B. Brennan, *Book Shelf*, NATIONAL REVIEW (Dec. 18, 2000), https://afj.org/wp-content/uploads/2017/10/Book-Shelf-1.pdf.
54 *Id.*

decisions as a trial judge, as described in the appellate court decision in the case, *State v. Lord*, 2006 Wisc. App. LEXIS 88 (Wis. Ct. App. Jan. 31, 2006). There, police officers stopped a car solely on the grounds that the automobile had a temporary license plate. After the police saw a revolver in the car and then discovered another handgun, the police arrested the defendant. *Id.* at *2.

Additional investigation revealed that the defendant's temporary license place was in fact valid, *Id.* at *2, *3; and the defendant argued that the police violated his Fourth Amendment rights by stopping him solely because of the display of a valid, state-issued temporary plate. *Id.* at *2. Brennan denied the defendant's motion to suppress the evidence and, after the defendant pled guilty, also denied a post-conviction motion. *Id.* at *2. Brennan held that "law enforcement had legitimate cause to stop [the defendant's] vehicle." *Id.* at *3.

However, after the defendant appealed, the State of Wisconsin conceded that the evidence should have been suppressed, and the Wisconsin Supreme Court unanimously agreed. *State v. Lord*, 723 N.W.2d 425 (Wisc. 2006). As the Wisconsin Supreme Court noted, "[t]he State's motion for summary reversal concedes, as the defendant has argued all along and in its brief before this court," that Brennan's decision "conflicts with the holding and rationale of *Delaware v. Prouse*, 440 U.S. 648 (1979)." *Id.* at 426. The court continued, "law enforcement officers cannot stop an automobile to determine whether it is properly registered unless the officers have reasonable suspicion or probable cause to believe that either the automobile is being driven contrary to the laws governing its operation or that any occupant is subject to seizure in connection with the violation of an applicable law." *Id.* at 426.

The Wisconsin Supreme Court further stated that "we readily accept the State's concession without further briefing or argument because the State's concession on the issue of law is well-settled law requiring no extensive research or explanation." It added, "*Prouse* is clear." *Id.* at 426.

In *Prouse*, the U.S. Supreme Court had held:

> [E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

Id. at 426.

At his confirmation hearing, Brennan would be expected to state – as nominees typically do – that he will faithfully apply Supreme Court precedent. Yet, Brennan had a history of questioning the exclusionary rule, and in *Lord*, he ignored directly applicable Supreme Court case law, to the point where prosecutors and every justice on the Wisconsin Supreme Court agreed his decision was not only wrong, but so wrong that "no extensive research or explanation" was needed

because U.S. Supreme Court case law "is clear." *Id.* at 426.

Criminal Sentences

Brennan also served as staff counsel to the committee that wrote and implemented Wisconsin's Truth-in-Sentencing law in 1998.[55] That law abolished parole and increased penalty ranges by 50 percent for all felonies.[56] At the time it was one of the toughest truth-in-sentencing laws in the nation, requiring offenders to serve all of their sentences without parole and requiring judges to impose long terms of extended supervision. Since 2000, due to the law, the state prison population has increased nine percent and the corrections budget has increased 20 percent.[57]

Racial Inequality in Increased Sentences

As the (Madison, WI) Capital Times noted, "Brennan was the judge who presided over one of the most blatant demonstrations of racial inequality in justice in Milwaukee County."[58]

In the case referenced in the article, five young men, four of them African-American, were charged for a minor act of vandalism when they "let[] the air out of some tires." Notably, "the vans that suffered the temporary inconvenience had been rented by the Republican Party of Wisconsin for use on Election Day 2004" and two of the men involved were sons of "prominent African-American politicians, Congresswoman Gwen Moore and former acting Milwaukee Mayor Marvin Pratt."

When the jury appeared deadlocked, the Milwaukee County district attorney sought a plea agreement, and four of the young men, including the politicians' sons, pleaded guilty to a misdemeanor in return for a recommended sentence of probation. Thereafter, the Republican Party of Wisconsin was very vocal in criticizing the plea bargain and "urge[d] Judge Brennan to disregard the District Attorney's recommendation for probation and in turn call for him to invoke a sentence of jail time."[59]

Judge Brennan did indeed heed the Republican Party's recommendation. He rejected the district attorney's recommendation and sentenced the men to six months in jail to "send a message."[60]

VI. LANDLORD-TENANT DISPUTES

One area of law, landlord-tenant cases, is demonstrative of Brennan's approach to being a judge.

During his tenure on the Milwaukee County Circuit Court, on May 21, 2007, Brennan spoke to the Apartment Association of Southeast Wisconsin.[61] He talked about "Mistakes Landlords Make" and "successful ways to make your case in court."[62] A similar presentation does not appear to have been given to tenants or consumer

55 Michael Brennan Bio, Gass Weber Millins LLC, https://www.gwmlaw.com/lawyers/brennan/.
56 Michael B. Brennan, *Truth-in-Sentencing, part II*, THE THIRD BRANCH, Vol. 3 (Summer 2002), https://www.afj.org/wp-content/uploads/2018/01/Brennan-QA-Clip-159.pdf.
57 Matthew DeFour, *Grover Norquist urges lawmakers to embrace cost-saving prison reforms*, WISCONSIN STATE JOURNAL (Apr. 1, 2015), http://host.madison.com/wsj/news/local/govt-and-politics/grover-norquist-urges-lawmakers-to-embrace-cost-saving-prison-reforms/article_b3bbc3a5-4752-5c06-b5a5-59951a82c241.html.
58 Joel McNally, *Ziegler, WMC Establish New Low in Court Ethics*, THE CAPITAL TIMES (Apr. 14, 2007), https://afj.org/wp-content/uploads/2017/10/ZIEGLER_-WMC-ESTABLISH-NEW-LOW-IN-COURT-ETHICS.pdf.
59 Gretchen Ehlke, *Lawmaker's Son Charged in Election Day Tire-Slashing*, CNN (Jan. 24, 2005), http://www.bigbigforums.com/news-and-information/457533-lawmakers-son-charged-election-day-tire-slashing.html.
60 Joel McNally, *Ziegler, WMC Establish New Low in Court Ethics*, THE CAPITAL TIMES (Apr. 14, 2007), https://afj.org/wp-content/uploads/2017/10/ZIEGLER_-WMC-ESTABLISH-NEW-LOW-IN-COURT-ETHICS.pdf.
61 Brennan, speaker, "Landlord-Tenant Practice in Milwaukee County Circuit Court," Apartment Association of Southeast Wisconsin, Milwaukee, WI (May 21, 2007), https://www.afj.org/wp-content/uploads/2018/01/Apartment-Association-of-Southeast-Wisconsin-May-21-2007-CLEAN.pdf.
62 *Id.*

advocates.

One year later, on June 18, 2008, Brennan issued a significant decision, which, if it had stood, would have increased the financial burden of tenants vis-à-vis landlords.

In *Maryland Arms Ltd. P'ship v. Connell*, No. 07-CV-002291 (Milwaukee County Circuit Court June 18, 2008), a landlord suffered damages when a hair dryer owned by a tenant caused a fire and the landlord sought over $8,000 from the tenant for the cost of repairs to the apartment. *Id.* at *1. There was no allegation that the tenant was negligent. Maryland Arms did not contend that the tenant mishandled the hair dryer or the electrical outlet in any way. Rather, the landlord alleged that the tenant was strictly liable for the fire damage under the terms of the residential lease.

However, Wisconsin law provided that the tenant was responsible for damage caused by fire resulting from the "negligence or improper use of the premises by the tenant." *Id.* at *2. Further, the statute provided that "an agreement to waive the requirements of this section in a residential tenancy is void." *Id.* at *2. Finally, the lease at issue in the case stated that the "lessee shall be responsible for all intentional and negligent acts or breaches of this Lease by Lessee, Lessee's occupants, guests and invitees Lessee shall be liable for all damage to the premises and appliances and equipment belonging thereto, in any way caused by the acts of Lessee, Lessee's occupants, guests and invitees." *Maryland Arms Ltd. P'ship v. Connell,* 769 N.W.2d 145, 146 (Wis. Ct. App. 2010).

Brennan, as trial judge, ruled for Maryland Arms. First, he concluded that the statute indicating a tenant was responsible in cases resulting from negligence or improper use was inapplicable because the "statute does not indicate it is the exclusive remedy for recovery." *Maryland Arms Ltd. P'ship v. Connell*, No. 07-CV-002291 at *2–3. Second, he held that the express terms of the second sentence of the lease imposed absolute liability. Even though the liability paragraph in the lease did not even discuss "accidental fire damage," and the first sentence of the lease indicated that the lessee is responsible for "all intentional and negligent acts" Brennan, examining the second sentence of the lease in isolation, determined that the lease "memorialize[d] the parties' intent that the defendants would be liable for accidental fire damage." *Id.* at *4.

The Court of Appeals reversed Brennan's decision. *See Maryland Arms Limited Partnership v. Connell*, 769 N.W.2d 145 (Wisc. App. 2009). It held that "both the lease" and Wisconsin statute "require that [the tenant] must be negligent in connection with the fire as a precondition to the imposition of liability." *Id.* at 146. The court also remarked that "[i]f indeed the lessee is responsible for 'all damage' caused in any way by the lessee, the first sentence of the provision limiting [tenant's] liability to damage caused by negligent acts or improper use is unnecessary." *Id.* at 147. The Court of Appeals then went on to conclude that the lease provision was void as "an attempt to waive the requirements of [Wisconsin law]." *Id.* at 146. It determined that the clear intent of Wisconsin's statutory law "is to have the landlord shoulder the responsibility for fire repairs when there is no tenant negligence or improper use of the premises." *Id.* at 150.

Because the tenant was not negligent and did not improperly use the premises, the court of appeals concluded that the tenant was not liable for the fire damage.

The Court of Appeals decision was affirmed by the Wisconsin Supreme Court, in *Maryland Arms Ltd. Partnership v. Connell*, 786 N.W.2d 15 (Wis. 2010), in a decision joined by conservative justices Patience Roggensack and Annette Ziegler. First, the court held that, even if Brennan's interpretation of the second sentence of the lease was accurate – that it provided for strict liability – courts cannot read contracts in isolation but must read the entire contract as a whole. *Id.* at 23. And, if Brennan's interpretation was correct, then it would make the first sentence of the lease unnecessary and meaningless. *Id.* at 24. Reading the contract as a whole, the court emphasized that the lease was ambiguous, and since it was drafted by the landlord under contract law any ambiguity is construed against the drafter. *Id.* at 25.

Like Brennan's views on *Okure*, *Maryland Arms* illustrates Brennan's flawed approach to judging. In this case, unlike other conservative judges, he ignored basic legal principles – like reading a contract as a whole, rather than specific words in isolation, and construing ambiguity against the drafter – to reach a decision favorable to landlords (a group he gave advice to just one year before).

Also relevant is *Greenfield Senior Hous. v. Tannehill*, 2007 Wisc. App. LEXIS 564 (Wisc. Ct. App. June 19, 2007). There, a landlord brought an eviction notice against Thomas Tannehill, a deaf tenant. *Id.* at *1. Tannehill was evicted because of an incident while boarding a bus. While Tannehill was talking to the bus driver, he felt someone pushing him from behind, saw another deaf resident behind him, and told her to stop pushing him. *Id.* at *2. She left the bus and told another person, using sign language, that Tannehill was an "asshole." *Id.* at *2. Seeing this, Tannehill came up from behind and slapped the back of her head, which caused her glasses to fly off her head. *Id.* at *2. The woman later called the police, told them what Tannehill had done (leaving out her profanity) and Tannehill was cited for battery. Several days later, Tannehill received a notice from the landlord indicating he had five days to remedy his default of the terms of the lease or to vacate the premises, and filed an eviction action saying that Tannehill had breached the terms of the lease. *Id.* at *3.

Tannehill challenged the landlord's claim that he had failed to remedy the situation. *Id.* at *5. At trial, Brennan determined that it was impossible for Tannehill to remedy the situation, and that Wisconsin law did not give Tannehill the opportunity to correct the breach. *Id.* at *5.

In fact, Wisconsin law requires that the landlord give a tenant "a notice requiring the tenant to remedy the default or vacate the premises," and the landlord's notice to Tannehill did say how he could rectify the breach: he was to have no future contact with the victim. *Id.* at *7. On appeal, the Wisconsin Court of Appeals concluded that Brennan failed to recognize Tannehill's efforts to remedy the situation, even though the record showed that he had been avoiding the victim, that a medication he had been taking that sometimes causes aggression had been adjusted, and that

Tannehill had been behaving properly since the incident. *Id.* at *11. As a result, Tannehill's eviction was reversed. *Id.* at *12.

The language of the Court of Appeals is particularly telling as to the type of judge Brennan is:

> Here, the trial court found that a breach of the lease occurred, but then found that the breach is "not the type of an act that can be cured by good behavior after the fact." Later, the trial court followed up this comment, stating "I don't find a real ability to cure from something like this because of the nature of what he did." The trial court cited no case law to support these conclusions. In reaching these conclusions, the trial court ignored the procedure set out in the statute and ignored the fact that [the landlord] stated in its five day notice that Tannehill could remedy the breach by having no future contact with [the victim].

Id. at *8.

VII. THREAT TO QUALITY EDUCATION

In 1999, Brennan wrote a letter to the editor of *The Wall Street Journal* highlighting his efforts in support of school choice in Wisconsin, and specifically his efforts to "protect choice schools from overburdensome government regulations."[63]

Given the enormous potential for misconduct and mismanagement in unregulated school choice programs, risks that were ultimately borne out in notable public scandals in Milwaukee, Brennan's pride in fighting government regulation of these institutions is alarming. Indeed, shortly after Brennan authored his letter, several voucher schools in Milwaukee were involved in scandal and fraud. In one well-publicized situation, a convicted rapist opened a voucher school.[64] In another, leaders of a voucher school stole $330,000 of their public funds and spent $65,000 on two Mercedes vehicles—something the principal pointed out was "legitimate" under current law.[65]

By way of background, the Milwaukee Parental Choice Program,[66] also known as the Milwaukee voucher school program, is the longest-running private school voucher program in the country.[67] Created in 1990 and championed by then-Governor Tommy Thompson, the program provided state vouchers to about 350 low-income Milwaukee children. Under state law at the time, tax money paid students' tuition if they wanted to leave the Milwaukee Public Schools and attend a non-religious private school. The state capped the percentage of students permitted to exit the Milwaukee Public Schools in this way at 1 percent of enrollment.

Over time, the program grew significantly.[68] In 1998, eight months before Brennan's letter was published, the Wisconsin Supreme Court ruled that taxpayer money

63 Michael B. Brennan, Letter to the Editor, *School Choice Fight: Both Sides Relentless*, WALL ST. J. (Feb. 1, 1999), https://www.afj.org/wp-content/uploads/2018/01/Brennan-QA-Clip-197.pdf.

64 Erin Richards, *Milwaukee's Voucher Verdict*, THE AMERICAN PROSPECT (Jan. 12, 2017), http://prospect.org/article/milwaukee%E2%80%99s-voucher-verdict.

65 Sarah Carr, *Choice funds used to buy 2 Mercedes*, JOURNAL SENTINEL (Feb. 17, 2004), http://archive.jsonline.com/news/education/163337666.html/.

66 Private School Choice Programs, Wisconsin Department of Public Instruction, https://dpi.wi.gov/sms/choice-programs.

67 Alan J. Borsuk, *25 years into Milwaukee's voucher schools, lessons for Wisconsin*, JOURNAL SENTINEL (Oct. 24, 2015), http://archive.jsonline.com/news/education/25-years-into-milwaukees-voucher-schools-lessons-for-wisconsin-b99602322z1-336657181.html/.

68 Milwaukee Parental Choice Program-Enrollment and Payment History, Wisconsin Department of Public Instruction, https://dpi.wi.gov/sms/choice-programs/data/mp-cp-historical.

could be used to send pupils to parochial or other religious schools.[69]

While Brennan emphasized his efforts to protect choice schools from "overburdensome government regulations," voucher school operators faced very few regulations.[70] For example, voucher school teachers did not need more than a high school diploma.[71] They did not even need a license to teach.

Moreover, the schools did not have to offer an approved curriculum, subscribe to state standards or participate in the state's school accountability system. Private voucher schools did not, and do not, have to comply with the state's Open Meetings and Open Records laws, and voucher schools do not need to provide services to students with disabilities.[72] They also do not have to provide students with the same due process protections afforded students in public schools. The lack of regulation went so far as to create a situation in which the Wisconsin Department of Public Instruction was not allowed to shut down schools for any reason, even if it determined that the school was not offering *any* level of instruction to children.[73]

Brennan wrote in his letter that critics might be "right when [they] say[] vouchers can have a hidden cost, though the 'cost' fear remains at this point hypothetical."[74] In fact, the cost – to students and to the state – was very real; the lack of regulation that Brennan was so proud of resulted in many children receiving inferior educational experiences. It allowed the squandering of millions of dollars through fraud and the systematic under-education of thousands of Milwaukee's most vulnerable students.

In his letter to *The Wall Street Journal*, Brennan highlighted research he conducted "for the benefit of the Partners Advancing Values in Education (PAVE) group" to support school choice.[75] In fact, data collected by the Wisconsin Department of Public Instruction on voucher and public school students' 4th-, 8th- and 10th-grade performance in reading, math, and science during the 2010-2011 school year demonstrated that "Milwaukee Public School students outperformed voucher students in eight out of nine categories."[76] Other studies reflected that the overwhelming negative determinants of poverty are not negated by voucher schools.[77]

VIII. IMPOSING A PERSONAL VIEW OF "MORALITY"

Brennan once wrote, "[i]t is beyond the scope of this Review to delve into the shortcomings of the Enlightenment, including that law and morality are inextricably intertwined and that the state has a moral mission to inculcate virtue."[78]

He should be asked to clarify the meaning

69 Ethan Bronner, *Wisconsin Court Upholds Vouchers in Church School*, N.Y. TIMES (June 11, 1998), http://www.nytimes.com/1998/06/11/us/wisconsin-court-upholds-vouchers-in-church-schools.html.
70 Michael B. Brennan, Letter to the Editor, *School Choice Fight: Both Sides Relentless*, WALL ST. J. (Feb. 1, 1999), https://www.afj.org/wp-content/uploads/2018/01/Brennan-QA-Clip-197.pdf.
71 Alan J. Borsuk, *Fuller backs new choice regulation*, JOURNAL SENTINEL (Mar. 26, 2009), http://archive.jsonline.com/news/education/41920962.html/.
72 Rory Linnane, *Critics say Wisconsin's voucher schools fail to provide equal access*, THE CHIPPEWA HERALD (July 7, 2013), http://chippewa.com/news/local/critics-say-wisconsin-s-voucher-schools-fail-to-provide-equal/article_e1f6ea5e-e6ae-11e2-b89a-001a4bcf887a.html.
73 Sarah Carr, *Who cleans up problem choice schools?*, JOURNAL SENTINEL (Sept. 15, 2003), http://archive.jsonline.com/news/education/163336116.html/.
74 Michael B. Brennan, Letter to the Editor, *School Choice Fight: Both Sides Relentless*, WALL ST. J. (Feb. 1, 1999), https://www.afj.org/wp-content/uploads/2018/01/Brennan-QA-Clip-197.pdf.
75 *Id.*
76 Press Release: Report Confirms Lack of Accountability, Transparency in Voucher Program, State Senator Chris Larson District 7 (Aug. 31, 2012), http://legis.wisconsin.gov/senate/07/Larson/press-releases/2012/report-confirms-lack-of-accountability-transparency-in-voucher-program/.
77 Erin Richards, *Milwaukee's Voucher Verdict*, THE AMERICAN PROSPECT (Jan. 12, 2017), http://prospect.org/article/milwaukee%E2%80%99s-voucher-verdict.
78 Michael B. Brennan, *Book Review: Overcoming Law by Richard Posner*, 79 MARQ. L. REV. 329, 343 (1995), http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1530&context=mulr.

of this statement, including whether he believes judges have a right or duty to impose a personal view of "morality" from the bench.

CONCLUSION

The White House's nomination of Michael Brennan to the Seventh Circuit is insulting to the integrity of Wisconsin's bipartisan judicial selection commission. Brennan was apparently selected before the Wisconsin nominating commission even began interviewing candidates. He was chosen without meaningful consultation with Wisconsin Senator Tammy Baldwin. Furthermore, he was chosen despite failing to meet the commission criteria that Sen. Ron Johnson himself insisted on under President Obama and reaffirmed under President Trump.

Brennan's record is also deeply concerning and AFJ believes he would not be able to rule impartially because of his public and deep bias. Brennan has been forthright about his belief that judges need only adhere to "good precedent." He has celebrated Supreme Court decisions that have weakened civil rights, and encouraged conservative judges to be more vigorous in overturning acts of Congress. He has called for unchecked executive power, sought to weaken rights of criminal defendants, and as a judge, has ignored precedents, facts, and basic legal principles.

For the foregoing reasons, Alliance for Justice opposes the nomination of Michael Brennan to the United States Court of Appeals for the Seventh Circuit.