

*Symposium: The Bill of Rights Yesterday and Today: A Bicentennial Celebration*

## In Honor of Justice William J. Brennan, Jr.: Brennan's Faith

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## BRENNAN'S FAITH

OWEN FISS\*

Retirements are odd events. They stir feelings of both joy and sadness, and that is emphatically true of Justice Brennan's. He served the Court for nearly thirty-four years and retired with a grandeur that is indeed stunning. The tributes have been lavish and almost unending. In this, there is reason for joy because the Justice fully deserves all the accolades and honors that have been bestowed upon him. I rejoice in Brennan's glory and feel the pleasures of the moment, but I would be less than honest if I did not also acknowledge my sadness at his departure from the Court, not just for the Justice who so loved his work, but even more for the law.

Justice Brennan took his seat on the Court in 1956. *Brown v. Board of Education* had already been announced, but its fate hung in the balance. Resistance to the decision mounted. Jim Crow refused to budge. Schools, jobs, housing, and places of public accommodation were segregated, or placed off bounds to blacks altogether. Blacks were also systematically disenfranchised and excluded from juries. The situation outside of race was also ugly. State-fostered religious practices, like school prayers, were pervasive. Legislatures were grossly gerrymandered and malapportioned. McCarthyism stifled radical dissent, and the jurisdiction of the censor over matters considered obscene or libelous had no constitutional limits. The heavy hand of the law threatened those who publicly provided information and advice concerning contraceptives, thereby imperiling the most intimate of human relationships. The states virtually had a free hand in the administration of justice. Trials often proceeded without counsel or jury. Convictions were allowed to stand even though they turned on illegally seized evidence or on statements extracted from the accused under coercive circumstances. There were no rules limiting the imposition of the death penalty. These practices victimized the poor and disadvantaged, as did the welfare system, which was administered in an arbitrary and oppressive manner. The capacity of the poor to participate in civic activities was also limited by the imposition of poll taxes, court filing fees, and other barriers.

These were the challenges that the Supreme Court took up in the late 1950s and in the 1960s. The Court measured everyday life against the lofty ideals of the Bill of Rights and the Civil War Amendments. The result was a program

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of constitutional reform almost revolutionary in its aspiration and, now and then, in its achievements. Of course the Court did not act in a political or social vacuum. It drew on broad-based social formations like the civil rights and welfare rights movements. The Court also looked to the executive and legislative branches for support. The dual school system of Jim Crow could not have been dismantled without the troops in Little Rock, the Civil Rights Act of 1964, the interventions of the Department of Justice and HEW, the suits of the NAACP Legal Defense Fund, or the black citizens who dared to become plaintiffs or, even more, to break the color line or march on behalf of their rights. The sixties would not have been what they were without the involvement of all these institutions and persons, and the world would have looked very different. Yet the truth of the matter is that it was the Supreme Court that spurred the great changes to follow, and inspired and protected those who sought to implement them.

A constitutional program so daring and so bold was, of course, the work of many minds. As is customary, we use the name of the Chief Justice to refer to this period of Supreme Court history, and in the case of Earl Warren, who served as Chief Justice from 1954 to 1969, that practice seems especially appropriate. Warren was a man of great dignity and vision, in every respect a leader, who discharged his duties (even the most trivial, such as admitting new members to the bar) with a grace and cheerfulness that were remarkable. He presided in a way that filled the courtroom with a glow. Yet the substance of the Court's work, the revolution that it effectuated in our understanding of the Constitution, drew on the talents and ideas of all those who found themselves entrusted with the judicial power at that unusual moment of history.

Justice Brennan's contribution to the ensemble known as the Warren Court had many dimensions. He was devoted to the values we identify with that institution -- equality, procedural fairness, freedom of speech, and religious liberty -- and was prepared to act on them. More importantly, he was the justice primarily assigned the task of speaking for the Warren Court. The overall design of the Court's position may have been the work of several minds, fully reflecting the contributions of such historic figures as Hugo Black, William Douglas, and Earl Warren, but it was Justice Brennan who by and large formulated the principle, analyzed the precedents, and chose the words that transformed the ideal into law. Like any master craftsman, he left his distinctive imprint on the finished product.

Warren and Brennan were invariably on the same side in the great constitutional cases of the sixties. They served together for thirteen terms and agreed in 89 percent of the more than 1400 cases they decided. Indeed, it is hard to think of a case of any import where they differed. As Chief Justice, Warren had the responsibility of assigning the task of speaking for the Court

when his side prevailed. Sometimes, as in *Reynolds v. Sims* and *Miranda v. Arizona*, where he felt the need for the imprimatur of his office, or where the issue was especially close to his heart, Warren wrote the opinion. But generally he turned to Justice Brennan.

In part, this reflected the unusual personal tie that developed between the two. I clerked for Justice Brennan during the October 1965 Term and at that time the Chief -- as Justice Brennan always called him -- frequently visited Justice Brennan. Each visit was an important occasion for the chambers as a whole and for Justice Brennan in particular. One could see at a glance the admiration and affection that each felt for the other. The relationship between Earl Warren and William Brennan was one of the most extraordinary relationships between two colleagues that I have ever known; surely, it must be one of the most famous in the law.

But more than personal sentiment was involved. In turning to Brennan, Warren could be certain that the task of writing the opinion for the Court was in the hands of someone as thoroughly devoted as he was to the Court as an institution. An assignment is always an expression of trust, and Warren could depend on Brennan to formulate and express the Court's position -- to declare the principle and attend to the details that constitute the law -- in a way that would strengthen the Court in the eyes of both the public and the profession, and thus enhance its capacity to do its great work. Brennan was, in the highest and best sense of the word, a statesman: not a person who tempers principle with prudence, but rather someone who is capable of grasping a multiplicity of conflicting principles, some of which relate to the well-being of the institution and remind the judge that his duty is not just to speak the law, but also to see to it that it becomes an actuality -- in the words of *Cooper v. Aaron*, to make sure that the law becomes "a living truth."

Brennan could be trusted to choose his words in a way that would minimize the disagreement among the justices, not only to avoid those silly squabbles that might interfere with the smooth functioning of a collegial institution, as the Court most certainly is, but also to produce a majority opinion and strengthen the force of what the Court had to say. Only five votes are needed for a decision to become law, but the stronger the majority and broader the consensus, the more plausible is its claim for authority. Brennan could also be trusted to respect the traditions of the bar and to pay homage to the principle of *stare decisis*. He always tried to build from within. Sometimes that was not possible, for the break with the past was just too great. Yet, even then, Brennan's inclination, once again rooted in a concern for the Court's authority, was to minimize the disruption, and to find, if at all possible, a narrow path through the precedents. Brennan also understood that reform as bold as the Court tried to effectuate required a coordination, not a separation, of powers, and that

gratuitous confrontations with the other branches were to be avoided. In fact, as evident from Justice Brennan's opinion in *Katzenbach v. Morgan*, affirming a broad conception of congressional power under Section 5 of the Fourteenth Amendment, every effort was made to invite the other branches of government to participate and collaborate in the program of constitutional reform then afoot.

Aside from a proper regard for institutional needs, a successful opinion requires a mastery of legal craft, which Warren also found in Brennan. Justice Brennan was as much the lawyer as the statesman. Law is a blend of the theoretical and the technical, and though there were others as gifted as Brennan in the formulation of a theoretical principle, there was no one in the ruling coalition -- certainly not before Fortas's appointment -- who had either the patience or the ability to master the technical detail that is also the law. Everyone on the Court, law clerk and justice alike, admired Brennan's command of vast bodies of learning, ancient and modern. He knew the cases and the statutes, and how they interacted, and understood how the legal system worked and how it might be made to work better. He was the lawyer's judge.

Even Brennan's most theoretically ambitious opinions, like *New York Times v. Sullivan*, bear the lawyer's mark. In that case Justice Brennan spoke of the national commitment to a debate on public issues that is "uninhibited, robust, and wide-open," and he has been justly celebrated many times for reformulating the theory of freedom of speech associated with the work of Alexander Meiklejohn in a fresh and original way. Meiklejohn, then in his nineties, saw Brennan's opinion in *New York Times v. Sullivan* "as an occasion for dancing in the streets." Of even greater importance to the lawyers and judges among us (Meiklejohn was a political theorist) was Brennan's analysis of the common law of libel and his deft reformulation of doctrine -- the announcement of the "actual malice" requirement -- in order to create a rule that, one, would be operational and, two, would effectuate a just accommodation of reputational interests and democratic values. *New York Times v. Sullivan* is a great decision, a fountainhead of freedom in our day, because it is an exercise in political philosophy made law.

In 1968, Richard Nixon ran against the Warren Court, and with victory in hand made a number of appointments that ushered in a new phase of Supreme Court history. Due to many fortuities, he had the opportunity to replace Earl Warren, Abe Fortas, and Hugo Black, and then in 1975, during the Ford presidency, William Douglas retired. The life of the Warren Court was over and Justice Brennan found himself working in a wholly new environment. No longer a dominant figure in the ruling coalition, he became part of the opposition, pitted against a majority driven by a contrary vision of American law and life. The new majority believed that the doctrine of the Warren Court was mistaken and had to be limited, corrected, and perhaps even eradicated.

1991]

Coping with this new situation was not easy for Justice Brennan. It proved to be a test of sorts, and as such brought to the fore many of his strengths. Value commitments that were shared in the sixties became distinguishing features of the Justice in the seventies and eighties and, as a result, are now recognized as a source of his identity and also his greatness. In some instances, his understanding of the Constitution evolved over time. For the most part, however, the seventies and eighties were for Brennan a period devoted primarily to defending the Warren Court's interpretations of the Bill of Rights and Civil War Amendments. As a result, the nation learned what his clerks knew first hand -- namely, that the Justice is extraordinarily strong-minded. On issues of detail Brennan is conciliatory, but when it comes to what he regards as matters of principle, he is adamant and, in the best sense of the word, stubborn.

This stubbornness expressed itself in many ways, not the least of which was the profusion of dissents during the 1970s and 1980s. Yet they were not the core of his mission. At the occasional law clerk dinners held during this period, he would wryly announce the tallies to the assembled. We would cheer the resistance offered by his dissents. But it was obvious that the Justice's true source of pleasure came in the cases in which he somehow -- miraculously, I think -- formed a majority that preserved the achievements of the Warren Court. Justice Brennan's last term on the Court was marked by a large number of dissents, but of equal, even greater, significance is the fact that in two important cases -- one involving flagburning, the other patronage -- he was able to speak for the majority in support of freedom of speech. It was entirely fitting that on the last day of his last term on the Court, after almost thirty-four years of service, he announced an opinion for a majority of the Court upholding an FCC policy -- born of another era -- that favored minorities and women in awarding broadcasting licenses. Later that afternoon, Justice Brennan received the prognosis from his doctor that led to his decision to retire.

Justice Brennan is a proud man, not in the least bit arrogant -- indeed he is one of the most modest men I have ever known -- but he is someone who takes a very special pride in his work. He is a fighter who likes to win, and as such, would be pained to see an earlier victory reversed, especially when the new majority, also trying to build from within, turned Brennan's doctrinal creations to another purpose. The fight in Brennan no doubt accounted for the sense of engagement that carried him through the seventies and eighties, and helps explain the unusual role he created for himself during that period. It was, however, dwarfed by an even more significant factor: his devotion to the institution.

In the Warren Court era, this devotion accounted for Brennan's role as Court spokesman and for the distinctive nature of his opinions. He took no pleasure in speaking alone, but always tried to speak through the Court and to

mold judicial doctrine in a way that was fully sensitive to the needs of that institution. His first priority was to have the Court speak authoritatively and his second was to produce an opinion that would strengthen the effectiveness of the Court. He strove to avoid any gestures that would either dissolve or splinter the majority, infuriate those on the other side of the bench, or set into motion a political dynamic that would undermine the ability of the Court to achieve all that it might. During the second half of his tenure, these same sentiments shaped his strategy of resistance. Dissent was always a possibility, but his first priority was that the Court speak to the issue in an authoritative manner, because he continued to believe in the Court: law mattered. He remained committed to working through the institution, not to propounding his views, speaking his mind, or otherwise indulging himself. Dissent was a reluctant last resort -- almost an acknowledgment of failure.

In this way, Brennan served as the bridge between the Constitution that was and the Constitution that is. He was the mediating force in the negative dialectic between the Warren and Rehnquist Courts. Now there is no one on the Court who can play that role, and the achievements of the Warren Court are imperilled in new and profound ways. Of course, Justice Brennan has left us a written legacy. The pages of the United States Reports are filled with his opinions, both dissents and majority opinions. A few years back, another of his law clerks surveyed the leading casebooks on constitutional law and reported that of all the so-called "principal" cases featured in those books, Justice Brennan had written more than any other justice in the entire history of the Supreme Court. These opinions define the field within which the present Court operates; for some they will act as constraints, for others a resource. But these opinions will not compensate for the loss of Brennan's vote, even less for his absence within the councils of the Court.

During the October 1965 Term, the Court's conferences were held on Fridays. Later that day, or more commonly on Saturdays, when the Justice would regularly have lunch with his clerks, he would describe what transpired at conference, or at least what he thought we should know about the conference. Some sense of the inner workings of the Court was also conveyed during the dinners he had with his clerks during the late 1960s and early 1970s. At that time the law clerk dinners were an annual event and the number of former clerks small enough that we could sit around a table upstairs at the Occidental. Those were also the days -- prior to the publication of *The Brethren* -- when he could assume that law clerks could be trusted with a confidence. The Justice was not a man for gossip, or small talk about his colleagues (though his interest in the personal lives of his clerks was boundless -- he treated us as members of his family). But he saw himself as a teacher, supplementing and enriching what we might have learned in the classroom. He believed that understanding the dynamics among the justices was a crucial part of our education, especially if,

as he hoped, we would ourselves go on to become teachers. He wanted us and our students to know how law was truly made.

His role in the deliberations was not the principal point of these conversations, but one could see in an instant how the personal qualities that drew us to the man -- the quickness and clarity of his mind, the warmth of his personality, the energy that he brought to argument, his sensitivity to the views of others -- were present in the Conference Room and, even more, accounted for much of what happened there. In conference, Justice Brennan always had more than one vote. Who could possibly resist him when he grabbed you by the elbow, or put his arm around your shoulder, and began, "Look, pal . . . "?

The Constitution has lost a great friend. The bar and academy understood his special role on the Court and thus received the news of his retirement with great concern. His decision to step down added to the sense of disenchantment and alienation from the Court that had been growing during the 1970s and 1980s. Justice Marshall's retirement the very next term exacerbated the situation. One's despair only deepens at the thought of their replacements.

In coming to terms with this despair, I often remember with admiration Justice Brennan's attachment to the Supreme Court as an institution. It is this attachment that unifies the two phases of his career and accounts for the unusual role that he created for himself during the last fifteen or twenty years, as he saw so many of the achievements of the Warren Court being dismantled and destroyed. Justice Brennan served through this period of retrenchment in a cheerful and determined manner, always with an unqualified devotion to the Court. I wonder whether those, like myself, who wish to honor him and that extraordinary age of American law that made the Bill of Rights one of our great national treasures, might not look to him as an exemplar and an inspiration. He resisted, tenaciously, but kept the faith -- why can't we?

