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William J. Brennan, Jr.

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WILLIAM J. BRENNAN, JR.

*Peter L. Strauss**

One thing we are not doing here today is saying goodbye to William Brennan, the Justice. It is true, the life of the man is over; so is the liberal era when Justice Brennan's voice was the voice of the Supreme Court. But the law as he saw it will transcend his own time, and only the Lord can know when the Court and the country will come to final terms with Justice Brennan's reading of the American Constitution. He has left so much to be dealt with.

*Justice David Souter*¹

When I was privileged to be Justice Brennan's law clerk, he had not yet earned even from his own law school the affection and respect that have prompted the editors of this law review, and doubtless many others, to offer an issue in dedication to him. In the three decades following, he made his claim to both unmistakably clear. His extraordinary tenure on the Court produced 1360 opinions, spread over the last 146 of the Court's first 497 volumes. Nearly a decade after his retirement, it is probably still the case that more opinions in constitutional law teaching materials carry his name than any other. *Baker v. Carr*,² *New York Times Co. v. Sullivan*,³ *Goldberg v. Kelly*,⁴ *United Steelworkers v. Weber*,⁵ *Frontiero v. Richardson*,⁶ and *Plyler v. Doe*⁷ stand as monuments to a vision that permitted the best in America to prevail. Less dramatically but typically, *United Mine Workers v. Gibbs*,⁸ *NLRB v. Insurance Agents' International Union*,⁹ *American Textile Manufacturers Institute, Inc. v. Donovan*,¹⁰ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,¹¹ and *School Board v. Arline*¹² reflect his unfailing craftsmanship, and his capacity to bring the Court to abiding resolution of the more mundane though important issues that mark both the bulk of its diet and its steadiest contribution to the American legal enterprise. In those cases, particularly, an attorney arguing before him could easily hear in his questions a striving for the

* Betts Professor of Law, Columbia University School of Law; Law Clerk to Justice Brennan, 1965-1966.

1. Justice David Souter, Remarks at the Funeral Mass for Justice Brennan (July 29, 1997) (transcript on file with the Columbia Law Review).

2. 369 U.S. 186 (1962).

3. 376 U.S. 254 (1964).

4. 397 U.S. 254 (1970).

5. 443 U.S. 193 (1979).

6. 411 U.S. 677 (1973).

7. 457 U.S. 202 (1982).

8. 383 U.S. 715 (1966).

9. 361 U.S. 477 (1960).

10. 452 U.S. 490 (1981).

11. 403 U.S. 388 (1971).

12. 480 U.S. 273 (1987).

approach that might bring the Court to consensus. Not one to show off, or to play at ducks and drakes with attorneys, he earnestly sought the understanding that would foster the best lines of resolution.

It may be unclear whether we are mourning the passing of a man or of an age. As he began his very moving remarks at Justice Brennan's funeral mass, Justice Souter, the inheritor of his seat on the Court, conjoined Justice Brennan's death with the end of the liberal era in American law. The questions of radio and television interviewers in the moments after his death did indeed focus attention on the political hot-button issues—the Justice's views on flag burning, on the death penalty, on school prayer, on abortion. These references to particularly dramatic social conflicts on which the Justice had a view tended to polarize the listener, to obscure both the Justice's humanity and his deeper contribution to a centering of constitutional debate upon the rights of individuals. The sound bite invites reference only to the most controversial; symbol is all and the man disappears. Justice Souter, with more time and profound thoughtfulness, clearly separated the judicial opinions from their writer. The former, he reminded us, have not died. They remain for the Court to embrace or grapple with, as it finds them persuasive or an obstacle to its current view; they will persist after that grappling, as have the opinions of his predecessors, as a constant call on the Justices of our future. Only their author has died.

The man who died gave his respect and friendship to all who returned it, whatever their political views. To borrow another frequent observation, to be with Bill Brennan was to be treated as the best of friends. Even if you knew that many others, wonderfully, shared just this experience exactly, for the time you were with him yours was the friendship that mattered most. He was without self-importance, radiating a tremendous respect for other people and a genuine interest in their well-being. These qualities armed a memory that never lost the name of a spouse or child. The genuineness of this interest and openness, for all but the most insensible, added enormously to his influence on the Court. The very fact of his accepting the integrity and value of points of view different to his made it easier for him to seek the resolutions that are, at root, the Court's most important business.

The relationship between a Justice and his law clerks is both individual and revealing. When in another office a colleague's child became seriously ill, his Justice refused a request that he might stay home with the child: "I did not hire you to be a nanny." Elsewhere, one heard, clerks easily got the impression that their Justice's deepest concern about their work was with the embarrassment any errors might cause him. Justice Brennan seemed to know only about the carrots of praise and support, not the sticks of shame. When a coclerk's child became ill, it was no more than a signal for the rest of the chambers to roll up its collective sleeve and work that much harder so that he could attend to her. It was a race to see if we could beat him to the office in the morning, to make the

pot of coffee that accompanied start-of-the-day conversations that might be about our work—or the goings on at the Court, or the news more generally. His attitude towards allocating the work of the office was that his clerks should not waste their time on repetitive or transitory matters he could handle on his own. Once the office had opinions to write, he took the certiorari petitions home for evening reading; there was never a bench memo to write before oral argument. Our time was to be spent on what he thought would be most valuable for us, as well as for him, helping him to develop the opinions that had come his way, or that he had decided to write in concurrence or dissent. The reader will understand the reciprocal loyalties and commitments that the Justice's attitude engendered. And the sadness that comes with the passing of such a man.

The passing of the age, if that is what has happened, requires deeper and more prolonged attention than is appropriate in pages like these. How much building on the Justice's views the future will bring, and how much grappling with them, will appear only with our tomorrows. It is hard to imagine a return to the rotten boroughs that preceded *Baker*, to a tolerance for destruction of the free press via tort law, to indifference to the way in which the state exercises its power in relations with the weakest and most dependent among us. That, as a society, we have given up on the search for justice among us before is an occasion for the deepest social shame. Against the risk that it might happen again, we can hope to marshal, on the Justice's side, the very forces that his opinions, along with others, have unleashed. The formerly excluded, now securely a part of the political landscape, will not easily let us live with a vision of the Constitution founded in the sensibilities of eighteenth-century slaveholding gentlemen. The alternative is the one Justice Brennan so well understood, a Constitution interpreted with the needs of the current day securely in view, after the deepest and most respectful of debates among those whose honor it is to keep the nation's vision alive. With the stakes so very high, and the outcome hardly assured, the human qualities of intelligence, empathy, patriotism, and passionate respect for all individuals that so characterized Justice Brennan, are what we must hope for in his successors.