

## Tribute to the Honorable William J. Brennan, Jr.

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William J. Brennan, Jr. will surely be remembered as among the greatest Justices who have ever sat on the Supreme Court. And well he should be.

He took his seat on October 16, 1956 and sat continuously through thirty-four Terms until he retired in July of last year. Over these years he wrote 425 opinions for the Court, 220 concurring opinions, 492 full or partial dissents, and 16 separate opinions. He averaged four dissents per Term under Earl Warren, twenty under Warren Burger, and stayed busy at it under Chief Justice Rehnquist. Furthermore, few Associate Justices in history have authored the number of majority opinions that have so markedly changed the face of our fundamental law. A few examples will follow.

*Brown v. Board of Education* predated Bill Brennan, but he authored the unanimous opinion in *Green v. County School Board*, a decision that announced that freedom of choice by school children and their parents was not enough. Further measures had to be taken to eliminate segregation and its effects “root and branch,” a phrase that has permanently entered the lexicon of equal protection jurisprudence. He also authored the opinion in *Keyes v. School District No. 1, Denver, Colorado*, which sent the *Brown/Green* commands to the North and West.

Bill Brennan was a major force in developing multilevel equal protection analysis. In *Frontiero v. Richardson* and *Craig v. Boren*, he set down his firm, insightful views about how the equal protection clause should be applied in the context of gender discrimination. *Goldberg v. Kelly*, a decision and opinion of which Bill is quite justifiably proud, dealt with the procedures that were required to prevent arbitrary deprivations of entitlements. It is regarded to have created a new kind of property, and it subjected the bureaucracy to oversight under the due process clause.

Brother Brennan also wrote *Baker v. Carr*, which not only exemplified his determination to expand access to the courts by the powerless, but also paved the way for the reapportionment revolution. Chief Justice Warren at one time remarked that *Baker v. Carr* was as important as, if not more important than, any decision handed down during his regime. And the reapportionment line of cases added another phrase to the equal protection lexicon—one man/one vote.

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Of course, it may be that Bill's best known opinion is *New York Times Co. v. Sullivan*. That decision went far towards constitutionalizing and limiting the manner and extent to which state libel laws could penalize oral or written expression injurious to the reputation of public officials. His opinion, among other things, announced that a public official could not recover for the publication of a defamatory falsehood without proving that it was published with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Such a privilege to publish inadvertent defamation was essential to the proper functioning of a free press. The *Sullivan* case, not unexpectedly, spawned an entire line of decisions flushing out the implications of that holding. It is worth noting that not all of these were satisfactory to Justice Brennan.

Brennan, J., also authored *Freedman v. Maryland*, a case that focused on the procedures that were necessary when the publication of certain kinds of expression was to be regulated or forbidden. The *Freedman* opinion also referred to the possible "chilling effect" of a particular regulation, a phrase now often encountered in constitutional discourse.

Bill Brennan was a principal architect in developing another concept used in adjudicating the validity of state legislative or administrative regulation of expression, the concept of overbreadth—that is, permitting a defendant who himself would have no First Amendment defense to escape liability or other sanctions by asserting the rights of others whose expression the law could not proscribe. Under the overbreadth analysis, until the state cures the regulation's unconstitutional overbreadth, the regulation may not be enforced against anyone.

These few cases only exemplify the many, many opinions that have come from the pen of Justice Brennan and that have contributed so much to movement in the constitutional and statutory law. The volume and quality of Justice Brennan's work leads one to wonder how and why this remarkable rise to eminence occurred. There are, however, some reasons that are beyond speculation.

Anyone who knows Bill Brennan would surely agree that he is as amiable as anyone can be. He is quiet and gentle, friendly and sociable, unfailingly polite, sensitive and sympathetic. He is interested in others, and those others realize it. And among other things, he is an excellent conversationalist, in large part because he is an acute observer of current events, but also because of his fine sense of humor. Being with Bill Brennan is always a pleasant personal experience.

The short of it is that he was an extremely enjoyable colleague, and I have no doubt that his personal warmth contributed a great deal to his effectiveness as a Justice, particularly when combined with his other admirable qualities. Bill is a very principled man with a highly developed sense of what is right and wrong, mete and proper. And he lives by his principles. He is honest, forthright,

and courageous. He was dedicated to his work and worked hard and long, arriving earlier than most but always getting home for dinner. He is a personally disciplined person and followed a set routine. For the most part, he did his own certiorari work, and I suspect that if he missed reading a number of petitions every morning, it would have been worse to him than going without coffee.

Strength of character is often measured by how one deals with adversity. And all of us who watched Bill Brennan through those years when his first wife, Marjorie Leonard Brennan, struggled with and finally succumbed to cancer deeply admired the way he cared for his wife and still quietly and effectively carried out his work. And this is to say nothing of how he coped with and survived his own bout with cancer. It should also be said that Bill has three outstanding children, all very successful in their own right. The Brennans are a close family, very supportive of one another. It is plain enough that his family life played a major role in his great success as a Justice.

He is very bright and quick, has an Irish gift for language, and was obviously blessed with sufficiently good health to permit him to endure his rigorous schedule through the years. He took good care of himself. For years when he lived in Georgetown, he rose early and walked several miles before coming to the office at about 7:30 a.m. He later switched to a stationary bicycle, which, as Marjorie once told us, he rode to Newark and back every morning.

Neither should it be forgotten that prior to coming to Court, Bill had been practicing law for nine years, had been a colonel in the army for a substantial time, and had been a state court judge in his native New Jersey for seven years, for a year as a trial judge and then six years as an appellate judge, four of them on the New Jersey Supreme Court. He was thus a man of impressive experience when he arrived at the Supreme Court in 1956 and had little trouble getting up to speed.

When I arrived in 1962, it was evident that Bill's stature was already firmly established. For eighteen terms of Court, from 1962 until Potter Stewart retired, I sat beside Bill Brennan during oral arguments, and for years sat beside him in Conference. No one from such a vantage point could help being impressed with his intelligence and grasp of the material with which we work. And as the years wore on I was glad that someone with a better memory than mine could recall the Court's past practices and explain the internal common law of the Court.

Bill Brennan's view of the role of the judge in our federal system also had much to do with his rise. He was convinced that the judicial function was critical to a government of laws and that the judicial role was deliberately made part of the structure of government, with the intention that it be exercised not only with reason but with "passion." That quality he defined in his 1987 Cardozo lecture to the Association of the Bar of the City of New York as "the range of emotional and intuitive responses to a given set of facts or arguments,

responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason. . . . Sensitivity to one's intuitive and passionate responses, and awareness of the range of human experience, is therefore not only an inevitable but a desirable part of the judicial process, an aspect more to be nurtured than to be feared." For him the Constitution aimed at protecting the individual, including the powerless ones. Implementing this purpose lay at the heart of the judicial function, which he believed should be performed with the essential dignity and worth of each individual in the forefront of the judge's mind.

In interpreting the majestic, open-ended clauses of the Constitution, to be forever bound by the perhaps undiscoverable intent of the Framers was not for him. In his 1985 lecture at Georgetown University he made this unmistakably clear: "[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs." And the judge should proceed with "a sparkling vision of the supremacy of the human dignity of every individual."

Bill Brennan at the same time was a thoroughly practical and realistic Justice. He was absolutely dedicated to the Court as an institution and realized that the Court should not overstep its legitimate role, but as I understood some of his many eloquent dissents in recent years, he thought that the majority in these cases had a far too narrow view of the Court's function in this modern world. He remained true to the vision of the Court that he had from the outset, a vision that kept him close to the cutting edge and produced such opinions as *New York Times Co. v. Sullivan* which, said one Court watcher, caused much dancing in the streets.

Bill Brennan was a friend and a mighty force. We miss him around the table and wish him well.