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A Tribute to Justice William J. Brennan, Jr.

Richard A. Posner

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justice went together in his way of thinking, and that fueled his immeasurable contribution to both.

*Richard A. Posner**

I had the great privilege of clerking for Justice Brennan in the 1962 Term. The world of the Supreme Court was different then, and from a clerk's perspective better. Justices had two clerks rather than four, and most clerks came directly from law school rather than from a clerkship with a judge of a lower court. I was twenty-three years old. The Court had no computers, there was no cert. pool, and law clerks had no secretarial assistance; my fellow clerk (Bob O'Neill, who has just stepped down as President of the University of Virginia) and I typed our cert. memos and opinion drafts ourselves. Despite the fewness of the clerks and the absence of what have come to seem indispensable support facilities, the atmosphere was calm and the pace relaxed. Thus is Parkinson's Law vindicated.

The 1962 Term was a turning point in the modern history of the Supreme Court, as was evident even then, and even to one as green as I. Justice Frankfurter had just resigned, to be replaced by Justice Goldberg. The balance of the Court had shifted decisively, and the heyday of the "Warren Court" had begun. The Brennan chambers were the cockpit of the revolution.

History will judge Justice Brennan's contribution to the Supreme Court, the law, and American life. We must await its verdict with patience. I will say this, however. The political liberalism that is the salient feature of Justice Brennan's judicial opinions is, I am convinced, not the product of commitment to a doctrine. It is the emanation of a warm, generous, and good-hearted person. You learn a lot about a person from working for him. No man is a hero to his valet, it is said, and few bosses are heroes to their underlings; but Justice Brennan has always been beloved by his law clerks, and this regardless of whether they share his political views.

I myself — although not perhaps by virtue of being warm, generous, or good-hearted — was a political liberal back in the early 1960s, and therefore assisted Justice Brennan with enthusiasm, indeed with relish. Later our ideological paths diverged. But Justice Brennan never held my apostasy against me. The kindness of his manner, the warmth of his regard, did not abate. The notes that he has written me at notable personal crossroads such as my own appointment as a

* Judge, United States Court of Appeals for the Seventh Circuit.

judge by a President whose Attorney General waged open warfare against Justice Brennan's judicial philosophy contain no trace of frost, no hint of disappointment or censure.

The capacity to maintain friendship across a political divide is rare. It bespeaks a large man. This largeness has been a factor in Justice Brennan's judicial success. Justice Holmes described the Justices of the Supreme Court as nine scorpions in a bottle. The tensions within an appellate court in which all the judges sit en banc (rather than in rotating panels, the normal mode in the federal courts of appeals) are great; they are greatest in the Supreme Court. It is like arranged marriage in a system with no divorce. The tensions fester, generating debilitating personal rivalries, resentments, apathy, burn-out, idiosyncrasy, and a shrill and nasty rhetoric of invective. From all these occupational hazards of judging at the highest level Justice Brennan has been entirely free. He has been the supremely collegial Justice.

The tensions that I have just described exert their greatest pressure on judges who, after many years as leading members of the majority coalition, find themselves in a minority in a court dominated by much younger judges. This was of course the situation in which Justice Brennan increasingly found himself. It was a test of character. He passed with flying colors. The skill in building coalitions and taste for compromise that had stood him in such good stead in the years of glory enabled him to project his influence long after the balance of power had shifted against him. His career has been a triumph of character.

I said that it is too early to judge his contribution. The landmark cases that he wrote, the other landmark cases that he helped to shape behind the scenes, are bold social experiments whose net consequences — for political freedom, social order, family stability, the organization of government, racial harmony, the workload of the courts, the costs of public services, the stability of legal doctrine, even the future of the Supreme Court — are not yet clear. And it is by their consequences that they will be judged. Justice Brennan has not pretended that the constitutional revolution in which he has played a leading role was dictated by the text of the Constitution or by the intentions of its framers. He does not ask to be judged by his fidelity to a text and a history, or by the craft standards of the legal mandarin. He has striven, in the American pragmatic tradition, for concrete results and will be judged in history by the results achieved, both intended and unintended. But although ultimate evaluation must be deferred, I trust that no one will question the *effectiveness* with which Justice Brennan has pursued his conception of the judicial role, or the impact of his work on contemporary legal and social thought. I have tried to suggest that the key to that effectiveness, and to that impact, lies

in a personality warm and serene, and in a character that can fairly be described as noble.

*Norman Dorsen**

The extraordinary outpouring that quickly followed Justice William Brennan's retirement from the Supreme Court revealed a broad consensus among young and old, the legal profession and the laity, conservatives and liberals, that a titanic figure had passed from the public scene. For example, two Reagan Justice Department officials who long disagreed with Justice Brennan, in the course of appraising his career, saluted him as "the most skillful, most charming, and most intelligent advocate for his activist brand of jurisprudence."¹ Yet all the instant summaries of his judicial service did not do justice to the legacy that Justice Brennan left in the form of a panoramic and coherent statement of individual liberty as guaranteed by the United States Constitution. Moreover, as Professor Vincent Blasi has pointed out, although there have been great dissenters on the Supreme Court and great leaders of majorities, "Brennan was the only Justice in the court's history to excel in both roles."²

Some idea of what Justice Brennan achieved may be appreciated by considering the state of constitutional law when he took his seat in October 1956. At best, the Court had no clear direction; at worst, much of the Constitution was, to borrow a phrase from Lawrence Sager, "an underenforced norm."³ *Brown v. Board of Education*,⁴ just two years old, was unimplemented; the equal protection clause was a sleeping giant; free speech doctrine was partial and chaotic; criminal procedure was virtually the exclusive domain of state law; and the idea of using the Constitution to protect personal choice on matters such as contraception and abortion was utopian.

Within eight months after Justice Brennan's arrival a new Court was born. In a single month, June 1957, it rendered decisions that curbed the ability of the House Un-American Activities Committee to

* Stokes Professor of Law, New York University School of Law. President, American Civil Liberties Union.

¹ Fein & Reynolds, *Brennan's Law: How Durable a Legacy?*, Legal Times, Aug. 13, 1990, at 32, col. 4.

² Magnuson, *Right Turn Ahead?*, TIME, July 30, 1990, at 16, 18.

³ Sager, *Fair Measure: The Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

⁴ 347 U.S. 483 (1954).