



JUDICIAL BIOGRAPHY

A FEW REFLECTIONS

Bennett Boskey

Reviewing

SETH STERN AND STEPHEN WERMIEL,
JUSTICE BRENNAN: LIBERAL CHAMPION
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BIOGRAPHER AND BIOGRAPHEE may sometimes have the luxury of working together, more or less contemporaneously, towards achieving a common end. Certainly the means of doing this may vary. For example, in the annals of English literature, the exceptional partnership can easily be recognized between Boswell and Dr. Johnson. While Dr. Johnson's sturdy claims to being imitated need not be augmented here, Justice William Brennan carefully pursued his own formula for arriving at this remarkable volume of Brennan's life and times.

How this biography was accomplished will be described. But first it should be emphasized that this is a volume clearly in the top

Bennett Boskey is a practicing lawyer in Washington, DC. He was the law clerk to Justice Stanley F. Reed in October Term 1940 and the senior law clerk (of the two) to Chief Justice Harlan F. Stone in October Term 1941 and October Term 1942. He has done substantial writing about the Supreme Court and its Justices. He recalls meeting Justice Brennan only once incidentally at a large dinner where Brennan was accompanied by his second wife. But he had read most of Brennan's opinions contemporaneously and, while he occasionally had his doubts or even disagreements, he always regarded the bulk of Brennan's output and accomplishments as singularly advantageous.

tier of American judicial biography. It narrates and assesses the Justice as a man and in his family and personal life. It analyzes his opinions over the course of his long tenure on the Supreme Court of the United States, and it measures the consequences of those opinions in major areas of governance of the United States. And perhaps most notably, it furnishes a continuous array of the internal workings of the Court via the various Justices in their viewpoints, their personalities, and successive exchanges of drafts of opinions. Brennan, it was said to his incoming law clerks, would like to indoctrinate them with the notion that the Court's hallmark was the word "FIVE"; and from the book it is evident that he crafted a number of his opinions to make changes to satisfy other Justices (however he might feel about some of the changes) so that "FIVE" could be attained.

William J. Brennan, Jr., a master of affability, was a member of the Supreme Court from October 15, 1956, to June 27, 1990, a span of nearly 35 years – an almost historic incumbency. He served with three Chief Justices. First was Chief Justice Earl Warren, with whom Brennan developed the closest of relationships intellectually and personally; in this warm reciprocating alliance the Court's leadership prospered. Next, Chief Justice Warren Burger, whom Brennan came to regard almost scornfully as a Chief and as a jurist, and for whom Burger's eventual biographer will collect much additional derogatory baggage from other sources. And, third, by the President's promotion, Burger's successor William H. Rehnquist, whom Brennan felt became an excellent and admirable Chief, in fairness and in prudence, even though the two of them could differ markedly in important Court decisions (incidentally, when Rehnquist was in dissent and Brennan was in the majority, Brennan as the senior Associate Justice held the prerogative of assigning the majority opinion).

Supreme Court nominations often tend to a fortuitous side. Special circumstances may inspire what a President at the moment is seeking. Facing his third vacancy on the Court, and a strong Democratic challenger in an upcoming Presidential election, Dwight Eisenhower at this juncture looked to his Attorney General Herbert Brownell to find a nominee who was a Catholic, a Democrat, and a

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well-accepted judge not above the age of 62. Brownell found and vetted his man. Brennan was a graduate of the University of Pennsylvania and of the Harvard Law School with an impressive resume: as a young lawyer and afterwards in the Army as a successful labor relations expert to expedite war production, then a partnership in a prominent New Jersey law firm, succeeded by judgeships in New Jersey's trial and intermediate court systems, with a current position as a respected and efficient member of the highest state court of New Jersey. After a brief meeting with Brennan, Ike announced the appointment. At the age of 50, Brennan thus had become the Court's newest Justice.

As is not unusual, any Justice who comes to the Court with a modestly open mind may find opportunities to learn on the job. State court experience helps to create reliable habits of judiciousness, but yet may be far from the agenda of the Supreme Court of the United States. Brennan was obviously a quick learner. He began to acclimate himself promptly to a national viewpoint, and the times were ripe for federal law to move forward. In areas such as freedom of speech, or criminal procedure, or nondiscrimination, or abortion rights, or regulatory administration, or a variety of other difficult subjects, the Court was on the verge of progress. Brennan had the instinct, the intelligence, the compromising spirit, and the energy to become a major factor in accomplishing the result.

As time went on, however, and vacancies occurred, several key Justices changed and Brennan found that his ability to reach the number "FIVE" was diminished. In some Terms he wrote many dissenting opinions, and on occasion he issued them in strident language that he would later regret. He seemed to worry that too much of his work was likely to be overruled; others who have made this assessment feel that much of it (with its "liberal" cast) remains standing, though perhaps a little chipped. The long illness of his wife Marjorie humbled his spirit, and shortly after her death in December 1982 he felt severe loneliness, redeemed fortunately by Mary Fowler, who had for many years been his secretary and who accepted his proposal for marriage. This second marriage refreshed his spirits and ushered in a burst of renewed activity that made it plau-

sible for him to continue remaining on the Court. A serious stroke led to retirement on June 27, 1990. He died on July 24, 1997.

Of the 112 Justices who have graced the Court (and Elena Kagan is the most recent), probably a majority of these have been examined through the lens of a serious biographer – or for a few Justices even a multiplicity of them. The life style and the opinions of a Justice may be the first stimulus to attract a biographer’s undertaking. But for all the modern Justices, and many of the earlier ones as well, the trove of the Justice’s often-mountainous files of papers is where much of the action is. This will include not only the Justice’s memoranda and drafts of opinions, but also the frequent interchanges with other Justices, as well as speeches and articles and what may be an endless correspondence with third parties.

With Brennan’s long and forceful tenure, the opinions alone might easily have whetted the appetite of a serious biographer. Let me just set forth a sample of some noteworthy opinions where it was Justice Brennan who “delivered the opinion of the Court.” Start with *Cooper v. Aaron*, 358 U.S. 1 (1958), a monument of federal supremacy, where in the Little Rock school desegregation case, for emphasis, each of the nine Justices fortified the statement that each one delivered the opinion of the Court (much of the opinion had been drafted by Brennan). Let me go on to list: *Baker v. Carr*, 369 U.S. 186 (1962) (the basic legislative reapportionment case); *Fay v. Noia*, 372 U.S. 391 (1963) (opening up federal habeas corpus for certain constitutional claims of state prisoners); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (the basic holding supporting freedom of the press); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (requiring constitutional protection for fair procedures for welfare entitlement claimants); *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658 (1978) (enabling plaintiffs to recover from a municipality where the person who violated plaintiffs’ rights was attributed to municipality’s “official” policy); and *Johnson v. Santa Clara Transportation Agency*, 480 U.S. 616 (1987) (upholding affirmative action for women). I add *Metro Broadcasting Inc. v FCC*, 497 U.S. 547 (1990), where in what turned out to be Brennan’s last majority opinion, and 5-to-4 at that on the closing day of the 1989 Term, the Court sustained the

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FCC for giving certain preferences for broadcast licenses to minority-owned companies.

By the end of the 1985 Term, Brennan's repository of his Court papers – of which this small sample is illustrative – had become massive. He had also determined that he wanted a biographer. Apparently at the suggestion of Abner Mikva, Brennan, in June 1986, selected Stephen Wermiel, who was covering the Supreme Court for *The Wall Street Journal*. Brennan liked the idea of a journalist-lawyer and hoped the resulting book would be accessible to a broad audience. He settled with Wermiel on a novel proposal. This biographer would have unrestricted access to the papers in Brennan's Chambers, often visiting at 7:30 a.m. before the building opened. The secrecy of the project would be maintained because Brennan did not wish it to affect his working relationship with his colleagues. His law clerks participated at times, even when current cases were under discussion. Perhaps more exceptional than all, Brennan eagerly granted in his Chambers what would be a series of 60 interviews over the course of the next five years.

One group of the Brennan documents was a Term History prepared by the law clerks for each Term. I know of no other Justice who has done this (perhaps there are some), but in the Brennan Chambers the document was a standard practice. It looked like the law clerks, however opinionated they might occasionally be, were assessing the developments within the Court and also commenting on what they thought about various Justices, not always in a positive or even friendly mode. Brennan asked the Court's print shop to print the Term Histories for him. It appears as though Brennan must have edited them in draft form if appropriate, so that serious comments might really be almost the equivalent of his own.

A fundamental portion of the protocol was that "Brennan promised not to exercise editorial control over the content, and he never tried to do so" (p. 450). Nevertheless, somehow or other, the biography was not getting written, though some efforts at it continued; Wermiel "largely put the project aside in the years after Brennan's death in 1997" (p. 450). Finally he sought another journalist-lawyer to co-author the book, and that is where Seth Stern, who was a re-

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porter for *Congressional Quarterly*, entered the ranks. By then significant additional material was becoming available. Hence a fuller, though delayed, volume made its appearance in 2010.

Brennan, I think, would have been pleased with the biography. While it does not shy away from his shortcomings, it clearly expounds his manifest accomplishments. Whether Brennan is, or is not, the Court's only "Liberal Champion," he has made his legacy strong and enduring, and this would have been his lasting satisfaction.

