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Memorial Dedication to Justice William J. Brennan, Jr.

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*Nina Totenberg**

Some years ago, I introduced Justice Brennan to my sister; as luck would have it, she had just found out she was pregnant and was aglow all night with the news. About eight months later, I stopped by the Justice's chambers to say goodbye for the term. "Say," he said, "that baby must be due any day now." "She was born," I replied, "just two weeks ago."

Quickly, he grabbed pen and paper, asking, "Name, address?" And a few days later, a letter arrived in Atlanta addressed to Clara Green. "Dear Clara," he wrote, "Welcome, welcome, welcome. It's a great world if you will just make it so." William J. Brennan, Jr., tried to do just that.

To meet Justice Brennan was to fall in love with him. I never knew anyone, liberal or conservative, who could resist the Irish charm and genuine warmth of that twinkling leprechaun. But that grandfatherly appearance belied one of the great legal minds of our times and of all times in American history. Name a subject—school prayer, press freedom, school desegregation, church-state relations, women's rights—just name any area of law and I guarantee you that William J. Brennan, Jr., wrote one of the key, if not pivotal, opinions of the U.S. Supreme Court in that area. Indeed, the list of his liberal accomplishments is so long that two of his conservative critics wrote in the *National Review*: "[A]n examination of Brennan's opinions, and his influence on the opinions of his colleagues, suggests that there is no individual in this country, on or off the Court, who has had a more profound and sustained impact upon public policy in the United States" over the past twenty-five years.¹

In all, Justice Brennan served almost three and half decades on the Court, most of it molding majorities. One of the great things about being a reporter is that once in a while, you get to have a real

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1. Markman & Regnery, *The Mind of Justice Brennan: A 25-Year Tribute*, NAT'L REV., May 15, 1984, at 30, 30.

talk and get to know someone who is called "great." As I got to know Justice Brennan over the years, even though I often disagreed with him, I realized more after each meeting that he really was a great man—that his beliefs were genuine, his soul a gentle one, that he had a rare gift of perception and tolerance for others, even when their beliefs threatened his, that he had a head that was wise and a heart that was kind.

People often wondered how Brennan could eke out Court majorities even after it seemed that conservative justices outnumbered the liberals. I guess the best way to answer that is to describe what would happen each year when a new crop of law clerks would arrive at the court, and he would gather them around him and ask, "What is the most important rule at this court?" And they would say, "the First Amendment, or due process, or the Fourteenth Amendment,"—all manner of things. He would shake his head no and hold up one hand. "The rule of five," he would say. It takes five votes to prevail in a case, and he was a master at understanding his colleagues, what was acceptable to them, what mattered and didn't matter—in short, what was doable. With that perceptiveness, he forged majorities that others might not have been able to. For example, he wrote the Court's opinion striking down a law that made flagburning a crime.² He stressed the political nature of the protest at issue, which took place outside the Republican National Convention. And one suspects that helped win the votes of two of the Court's conservative justices, Antonin Scalia and Anthony Kennedy.

His critics called him a liberal activist, and certainly his view of the Constitution was a liberal one that saw it as a document written in general terms so that it could live and change with the times. That, of course, is exactly the opposite of Justice Scalia's, Justice Thomas's and Judge Bork's view—that the Constitution means exactly what the founding fathers said at the time they wrote it and no more. Thus, for example, since political patronage existed at the time the Constitution was written, it does not violate the First Amendment guarantee of free speech and political association. But Brennan saw it differently in the modern state. He saw political patronage as a way to penalize lower level officials for supporting the wrong candidate, and he wrote the Court's opinion virtually banning political patronage for middle and lower level bureaucrats.³

2. See *Texas v. Johnson*, 491 U.S. 397 (1989).

3. See *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75-76 (1990).

For me, one of the most fascinating and compelling things about Justice Brennan was the way he saw the world, not through his own experience, but as someone transcending his own background. How is it that this man, born in an era when women didn't even have the vote, could see the most subtle forms of discrimination against women? How is it that this man, the son of a police commissioner, wrote so many opinions favoring the rights of the accused? How is it that this man, so proper and decent in his own life, could tolerate the most god-awful adult books and movies? How is it that this church-attending Roman Catholic, who was personally revolted by abortion, could also see the plight of the woman who so desperately sought one? And how is it that this man, raised with all the privilege of a white man in the first half of this century, could see so clearly the evils of segregation and racial discrimination, even in its subtler forms? The Justice was never very introspective about any of this, and it remained a constant puzzle to me.

But then I never have met anyone as genuinely good as Bill Brennan. He always urged me to call him Bill, and I just couldn't. He was the Justice. In the last year of his life, when he was so ill, I would visit him often, and I could never get over his warmth and love, even in those difficult circumstances. He always had open arms and a pucker for a kiss when I would come into the hospital room.

Burt Neuborne, of the Brennan Center, once said to me that Justice Brennan's was the aspirational voice of the Court and the country—like Lincoln's and Roosevelt's—appealing to us to do better and be better. His was not the pragmatic voice. I can't think of other voices like Justice Brennan's in American government today and I miss it. I miss him too, every day. I miss him in much the same way I miss my mother, who died last year, and I hope the two of them are up there somewhere having a scotch and a laugh. I'm sure they are.

