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WHAT JUSTICE BRENNAN GAVE US TO KEEP

*Honorable Abner Mikva**

It is a special treat to be here with Mary Brennan who was so much a part of the memories I have of those golden years where the legal landscape and the country always seemed to be moving forward in the right direction. It has been more than a year since Justice William Brennan passed away and more than eight years since he retired from the Supreme Court. I miss him and so do millions of people, some of whom never had the privilege of knowing him or even reading his opinions. Hopefully, this event can help in the coping process.

Some marked Justice Brennan's time on the Court as a particular era. In his obituary, Linda Greenhouse, an acknowledged admirer of the Justice and a student of the Supreme Court, talked of how the Court and the country changed around him by the time he retired.¹ I think that was an injustice to the unique role Justice Brennan played in helping shape the legal landscape during his tenure. You have to remember, Justice Brennan came to the Court at the height of McCarthyism, hardly our finest liberal hour. While he was an integral part of the great enhancement of our fundamental liberties with the help of colleagues like Chief Justice Warren, and Justices Goldberg, Fortas, Marshall, Black, and Douglas, he also forged majorities of the likes of Chief Justice Burger and Justices Stevens, O'Connor, Powell, Blackmun, White, Stewart, Harlan, Whittaker, Frankfurter and Clark. It was not just that he articulated the liberal and visionary views of like-minded colleagues, but he also found common ground with people very much unlike him. You have all heard the story of

* Visiting Professor of Law, University of Illinois. The notes accompanying this article are citations to authority, and contain nothing of substance. See Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647 (1985).

1. See Linda Greenhouse, *William Brennan, 91, Dies: Gave Court Liberal Vision*, N.Y. TIMES, July 25, 1997, at A1.

how at every seminar he taught he would raise his hand and ask, "What is the first rule of the Supreme Court? You have to get to five." This was how he understood the way to move the legal landscape forward.

There is an ongoing argument about which was Justice Brennan's most important opinion. He always thought it was *New York Times v. Sullivan*.² Justice Brennan, however, never had to suffer as an intermediate judge trying to administer the complications of *New York Times v. Sullivan*. I think it was *Baker v. Carr*,³ the case that reshaped voting rights, the legislative process, and the political topography for all time. But before I talk about what the case did, I want to talk about what it did not do.

In 1952, Justice Frankfurter persuaded the Supreme Court to refuse relief in a malapportionment case arising out of Illinois, *Colegrove v. Green*.⁴ He pronounced the problem "a political thicket" and for more than a decade the Supreme Court dodged the bullet of deciding what to do about the failure of democracy in almost all of our legislative elections by refusing to enter the political thicket.⁵ With *Baker v. Carr*, however, Justice Brennan not only put the Court where it belonged on this hot button issue, but he did it without even mussing anyone's hair. First, he pointed out that the language in *Colegrove v. Green* regarding the lack of jurisdiction by the Court was joined in *Baker v. Carr* by less than a majority of the Court.⁶ Justice Brennan was able to persuade six other Justices to join him without having to overrule any real precedent of the Court.⁷ I always found that fascinating. I cannot remember a Brennan opinion where he used the awful words "so and so is hereby overruled." He always found a way of avoiding that problem. Only Justice Frankfurter's dissent in *Baker v. Carr*—as well as the Senate—complained in bitter tones about the short shrift that had been given the political thicket language.⁸ Second, although Justice Brennan had votes to

2. 376 U.S. 254 (1964).

3. 369 U.S. 186 (1962).

4. 328 U.S. 549 (1946).

5. *See id.* at 556.

6. *See Baker*, 369 U.S. at 202.

7. *See id.* at 201-03, 206-09.

8. *See id.* at 330-31 (Frankfurter, J., dissenting).

burn for his opinion, he still kept the language of *Baker v. Carr* narrow.⁹ Indeed, I have always thought it interesting that for all the claims of Justice Brennan being this awful judicial activist, it is very hard to find any of his opinions where language contemplated such words as “penumbras” or “emanations.” Justice Brennan was a craftsman; he understood that words count, and he counted his words carefully.

Why was *Baker v. Carr* so monumental in the 1960s? You have to remember what the political landscape looked like in 1962 when it was decided. The Court and the country had been grappling with the denial of voting rights for over a century. The post-Civil War Amendments to the Constitution had been pretty much an empty promise as far as black voters were concerned. In addition, the rapid transformation of America from rural to urban had created innumerable rotten boroughs in the states, and the legislative product reflected those distortions of our democracy. I clerked at the Supreme Court shortly after *Colegrove v. Green* was decided, and I recall my dismay at the Justice’s political naïveté when Justice Frankfurter told a group of clerks that the answer to the Illinois problem that had been brought up in *Colegrove v. Green* was for the voters to vote in a better legislature that would reapportion the state. He never explained to us why the beneficiaries of those inequities would be enthusiastic about giving them up by voting in a better legislature, and of course they never did; nor did the white voters share their political power with minorities as long as courts continued to avoid the political thicket.

In the 1950s, when I entered elective politics, less than 100 blacks held elected offices in the entire country. There were two black members of Congress—Illinois had one of them. Illinois had three black state legislators in the entire state legislature—one state senator and two state representatives. To use a Chicago phrase, “blacks had zero clout.” The suburbs of Chicago with over 500,000 people had only one state senator representing them. Down state county with less than 20,000 people also had a state senator. Does it surprise you that the legislative product reflected those inequities and that the laws passed took care of the problems of rural Illinois while

9. *See id.* at 197-98, 209.

ignoring the problems of urban Illinois? Historians and political scientists will say that a lot of that changed because of the Voting Rights Act of 1965,¹⁰ and I have no doubt the Act deserves a lot of credit for the enfranchisement of black voters in the South.

Yet the Voting Rights Act would never have happened and never been enforced but for the doctrinal foundation of *Baker v. Carr*.¹¹ I can still recall all of the constitutional law that I learned in law school about the voting rights cases. Even where the minority of rural voters won the case, they lost the war. By the time the case wound its way through the Supreme Court and got back to the state, the state had found some new way of dodging the requirement that black voters were entitled to vote. It is hard to imagine a civil rights movement developing the way it did without the doctrinal backstopping of *Baker v. Carr*. Many of the marches were to enforce the very rights that the Court had enhanced and none more important than the franchise.

One of my former colleagues who is still on the bench and should have known better since he clerked for Justice Brennan, opined that the Brennan legacy would not last, pointing to the changing times and the nibbling at the edges of some of the Justice's opinions. Like many of the bean counters my former colleague leads, he underestimated the political skills of Justice Brennan and his careful craftsmanship in putting together his opinions. In *Baker v. Carr*, Justice Brennan refused to go beyond the jurisdiction question because he brought Justice Stewart along to the majority with that limitation.¹² And even after Justice Clark surprisingly joined in the decision, Justice Brennan stayed to the narrow result and ended up with six votes rather than five. More importantly though, he laid out this blueprint for a political revolution in narrow terms. He avoided reaching too far and this made the decision absolutely impregnable.

I was in the state legislature at the time and our senior United States Senator was a man named Everett McKinley Dirksen. When the Supreme Court used to hand down its decisions on Mondays and

10. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. § 1973 (1994)).

11. See *Baker v. Carr*, 369 U.S. at 188.

12. See *id.* at 197-98.

on Tuesdays, Senator Dirksen would hold a press conference announcing he had introduced constitutional amendments to overturn the decisions of the day before. Fortunately, none of the amendments, including those to overturn *Baker v. Carr*, passed. Since this was a case with so much impact in Illinois, Senator Dirksen and I were on the talk circuit going around the state arguing about the case. I remember one radio program we were, and where he said, "You LaSalle Street farmers do not understand the problems us farmers have." He was a lawyer in Pekin, Illinois and I do not think he knew any more about farming than I did. Nevertheless, he said, "We need our own representatives. We need people to understand these problems. We cannot let you city folk overwhelm us with your votes and that is what *Baker v. Carr* is going to do." I responded "Senator Dirksen, what you are talking about is interest representation, and that is a way of dividing political power. The Soviets are using that—they elect their representatives from the factories and the farms, but we have always believed in a population base." He fell strangely silent, and I thought I had persuaded him. As we walked out, he looked at me and said, "Sonny, nobody has ever called me a Communist before."

Those who knew Justice Brennan personally found it awfully hard to square the charges that he was some kind of an officious federal meddler with the persona of the warm, generous, sensitive Bill Brennan. The "Hiya, pal" phrase, a phrase that Justice Souter used in the Brennan eulogy, was the way Justice Brennan greeted everybody—the elevator operator, the taxi driver, the Chief Justice—and they were all his pals. More than any other judge or any other politician I have known, he knew how to disagree without ever being disagreeable. He was always dismayed to find out that his decisions caused personal anguish to someone. I remember a discussion with him once about a New Jersey reapportionment case after *Baker v. Carr*. Justice Brennan was convinced that the way to handle political gerrymandering was to insist on precise mathematical equality in districts.¹³ In the New Jersey case, his opinion threw out a map drawn by the New Jersey legislature, which had almost infinitely

13. See, *Karcher v. Daggett*, 462 U.S. 725, 727 (1983).

small variations in population.¹⁴ But Justice Brennan found that the map did not square to the absolute norms he insisted on. After the decision came down, I got nowhere trying to persuade him that mathematics would not stop the smart politicians from their gerrymandering. I leave it to those of you who have been involved in the California scene. Did mathematical precision stop Phil Burton from doing the kind of job that he did with the California reapportionment? Of course not. I could not persuade Justice Brennan, but when I casually mentioned that one of the New Jersey incumbent Congressmen, who was a mutual friend, would probably lose his seat as a result of that decision, Justice Brennan was dismayed.

I always found it fascinating that Justice Brennan, almost alone among the brethren, felt that the traditional tools of judicial interpretation allowed him to do justice and move the legal landscape forward. He never thought of himself as making it up as he went along. He thought that the splendid ambiguities that the Founding Fathers deliberately put in the Constitution—due process of the law, equal protection of the law, cruel and unusual punishments—gave the Court full authority to do what is necessary and come up with the right result. Judge Richard Arnold said about Justice Brennan, “For judges to make up new principles is illegitimate; for them to adapt old principles to change the conditions is necessary.”¹⁵ That was Justice Brennan to the core. It was his genius. He did not lock himself into narrow dictionary definitions found in 1789 because he believed that short-changed the hopes of our Founding Fathers. I think the best example of this belief is in the Oliver Wendell Holmes lecture he delivered at Harvard some years ago where he took on the “originalists” on their own turf. He cited the brief legislative debate regarding the adoption of the Eighth Amendment to the Constitution in the very first Congress.¹⁶ You will remember that the Constitution itself kept no records aside from Madison’s notes and so we have relied on the *Federalist Papers*, which clearly were political essays written after the fact.

14. See *id.* at 743-44.

15. Richard S. Arnold, *Mr. Justice Brennan—An Appreciation*, 26 Harv. C.R.-C.L. L. Rev. 7, 14 (1991).

16. See William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View From the Court*, 100 Harv. L. Rev. 313, 323-25 (1986).

The advantage that Justice Brennan had when he was talking about the Eighth Amendment to the Constitution was that there was a record, albeit brief, of the First Congress that debated and passed the Bill of Rights. I am paraphrasing here I assure you, but Justice Brennan pointed out that one of the opponents to the “cruel and unusual” language of the Eighth Amendment complained that the language was so vague because it had been taken from some obscure English bill of rights that had never been passed or interpreted in any way. The opponent suggested that because of the vagueness, it was unclear what would happen. Some future court might find “ear-cropping” or capital punishment cruel and unusual. Ear-cropping, which involved clipping off a piece of the ear, was a common punishment in the colonial days for people who stole or did other terrible things. Justice Brennan used that example to prove that it was perfectly proper to use the Eighth Amendment as a basis for outlawing capital punishment. Fortunately, I do not have to go that far. I was only an intermediate judge. Nevertheless, will you all agree with me that ear cropping would certainly be found as cruel and unusual punishment? Justice Brennan did not even have to move beyond the terms of the debate even as the “originalists” would find it. That is why the Justice defied classification. This judicial activist did not reach for feel-good results, but instead found a doctrine and precedent to justify his progressive decisions. This avid believer in the separation of powers understood the primacy of the legislative branch, but understood as well the necessity of review by the judicial branch.

The late Judge David Bazelon described his first meeting with Justice Brennan as “most disturbing.” Judge Bazelon, no stranger to the political mode himself—having come out of Chicago—was shocked to meet this New Jersey politician who seemed to have a “deses” and “doses” vocabulary. He was overwhelmed later when the classical nature of the true Justice Brennan began to reveal itself. After the first uncomfortable meeting they had, their friendship blossomed, causing Bazelon to describe his friend as the “closest thing to a saint that could ever get confirmed by the United States Senate.”

Justice Brennan loved being who he was. He loved the affection and the attention that people showed him. He was proud of his position and his influence, but he always remembered that he was

appointed and not anointed. He loved from whence he came. He was proud of his Irish heritage and his immigrant father, a union leader in New Jersey. In one of his first speeches of record he closed his remarks to an Irish-American audience this way:

For us, the Americans of Irish descent, to whom America is so much, I would close with Harry Lauder's story of the lamplighter. The great comedian told us of sitting at his window in his Scotland home many years ago, long before the advent of electric lights, watching the street lamp lighter light the evening lights. He would watch him as he would place his ladder, climb and light a lamp, then take down the ladder and go to another, and so on down the street until at last he could see the lamplighter no more, but could tell the way he went by the lamps he had lighted.¹⁷

Justice Brennan probably told that story with a catch in his throat because he lit so many lamps.

17. William J. Brennan, Jr., Speech to the Charitable Irish Society (Mar. 17, 1954).