

The Original Activist Judge:

Justice William Brennan, A Liberal Lion Who Wouldn't Hire Women

By David J. Garrow

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JUSTICE BRENNAN: Liberal Champion

By Seth Stern and Stephen Wermiel

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William J. Brennan Jr. served on the Supreme Court from 1956 to 1990 and came to be seen as "the very symbol of judicial activism." As Seth Stern and Stephen Wermiel write in this superb, definitive and long-awaited biography, based in part on extensive interviews that Brennan gave to Wermiel, he also became "perhaps the most influential justice of the entire twentieth century."

Brennan was a 50-year-old Roman Catholic Democrat and a seven-year veteran of the New Jersey state courts when Republican President Dwight D. Eisenhower -- or, more truthfully, Attorney General Herbert Brownell -- chose him for the Supreme Court. As a state jurist, Brennan "had certainly not developed anything resembling a coherent judicial philosophy," and his first five years on the top court exhibited no consistent approach.

By 1962, however, in tandem with Chief Justice Earl Warren, Brennan had begun to mold a solid liberal majority that revolutionized constitutional interpretation with regard to reapportionment, freedom of speech, privacy and the rights of criminal defendants. Stern and Wermiel reveal, however, that even in the mid-1960s, Brennan's young law clerks were crafting much of the language for the justice's most important opinions, such as *New York Times Co. v. Sullivan*, which transformed libel law.

While Brennan emerged at work as the nation's most important jurist, at home he struggled with his wife's alcoholism, troubles with two of his three children and long-term personal debts that left him "at my wits end" and kept his family in rental homes throughout the 1960s and '70s.

Stern and Wermiel describe Brennan as "an intensely conflict-averse person" with "a strong desire to be liked by everyone." Though he became a crusading liberal strategist, Stern and Wermiel show that his private conduct, especially his long-standing refusal to appoint female clerks, sometimes stood in stark contradiction to his constitutional principles.

"While I am for equal rights for women, I think my prejudices are still for the male," Brennan wrote one law school dean who sought to recommend clerks. In 1970, when a former clerk nominated a highly accomplished young woman, Brennan brusquely instructed, "Send me someone else." Only when that former clerk, Stephen Barnett, bluntly told Brennan in an early 1974 letter that his behavior was "both unconstitutional and simply wrong" did the justice relent and hire his first female clerk. Seven years passed before he took on a second.

Stern and Wermiel conclude that "the profound disconnect" that allowed Brennan to "condemn gender discrimination while continuing to practice it" reflected how "he strictly compartmentalized his Court opinions and his life, often taking positions in opinions that were far more liberal than his own personal views."

The denouement of the Warren court left Brennan leading a diminished liberal bloc under two very conservative chief justices, Warren E. Burger and William H. Rehnquist; his dissenting opinions often featured "overwrought language" that resulted from "Brennan and his clerks egging each other on, rather than the justice moderating his clerks' impulses toward excess." Upset by the conservative majority in a 1971 case, for instance, an angry Brennan told his clerk, "Let's blow them out of the water."

By 1979, at age 73, Brennan was frail and pondering retirement. Then his wife died in late 1982, and three months later he suddenly married his longtime secretary. Court colleagues were astounded, but with his new spouse, "Brennan underwent a sudden and dramatic transformation," exhibiting a fresh youthfulness and passion for public appearances that belied his age.

Brennan had long believed that "the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers," and the Reagan administration's mid-1980s attacks on "judicial activism" gave him prominent opportunities to respond. The "facile historicism" championed by conservatives was really "little more than arrogance cloaked in humility," he declared in 1985, saying that "the genius of the Constitution" lay in "the adaptability of its great principles to cope with current problems."

By 1988, at age 82, Brennan was "noticeably less engaged" with the court's work and providing so little direction about the writing of opinions "that it made some of his clerks nervous." Two years later he retired after injuring himself in a fall, but he lived until 1997, when he died at age 91.

Scrupulously honest and consistently fair-minded, "Justice Brennan" is a supremely impressive work that will long be prized as perhaps the best judicial biography ever written.

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