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Stephen J. Wermlel

"Is yours a judicial biography?" people inquire about my biography-in-progress of U.S. Supreme Court Justice William J. Brennan, Jr. There is a strange aura about

"judicial biography"—a mix of curiosity and awe that is more often reserved for sightings of rare birds or triple plays. For reasons I may never fully understand, much of the mystery quickly fades when I respond that my hope is to cover Justice Brennan's entire life, not merely his seven years as a judge in New Jersey and his thirty-four years as a Justice on the Supreme Court of the United States.

There have been myriad reactions during the eight years that I have worked part-time on the authorized biography of Justice Brennan. Some have barely been able to disguise their feelings. "I hope you aren't going to write a hagiography," said Harvard Law School Professor Charles Fried when informed of my project during his tenure as Solicitor General of the United States. Others, although no less disparaging than Fried of Justice Brennan's constitutional view, have seemed more gracious; Chief Justice William Rehnquist on one occasion threw an arm around my shoulder and another around Justice Brennan's and remarked, "If it isn't Boswell and his subject."

Most inquirers have simply been fascinated by the process of writing a biography of a Supreme Court Justice and by the difficulties and problems that one encounters. That pro-
Chief Justice Earl Warren often lunched at Milton Kronheim's luncheon club and was joined by other Justices including William O. Douglas, William J. Brennan, Jr., and Thurgood Marshall. Justice Brennan's influence on and close relationship with Chief Justice Warren afforded Brennan many opportunities to influence events in a way beyond his standing as one of nine Justices. 

cess is the subject of this essay.

**Staying In Focus**

One of the most difficult problems in writing Supreme Court biography is deciding what the focus of the book will be and keeping it constant. Is the biography to be simply an account of a particular era in Supreme Court history, or is it to be something more? What makes it biography, not simply Supreme Court history?

The answers to these questions may seem self-evident, but their resolution is not always handled with success or dispatch. It is not uncommon to find biographers in other fields very much absorbed with a broader picture than the life they are chronicling. David McCullough, author of *Truman*, explained his goal, "I'm trying to look deeper into the heart of America by looking into the life and times of this one man." 

Supreme Court biographers, however, have sometimes been accused of looking too deeply into the heart of the Court. Reviewers criticized Professor Bernard Schwartz and his massive volume, *Super Chief,* for offering too much detail about the Court under Chief Justice Earl Warren, and too little insight into Warren as a Justice and leader. Among the many reviews was one by Judge Ruggero Aldisert of the U.S. Court of Appeals for the Third Circuit, who wrote:

A biography is a history of an individual's life told by another, and both the book's title and size suggest a detailed examination of Warren's life as Chief Justice. But after you work through the pages, you realize that this book does not qualify as an account of Warren's
life. . . Rather, what emerges from the author’s prodigious research is only a summary: a summary of court calendars that strains the reader’s attention as much as studying an outdated railroad timetable . . . the book’s most glaring disappointment is its failure to inquire into how Warren functioned as a judge: how he decided cases.4

Professor John Jeffries has addressed this concern in the preface to his new biography of Justice Lewis Powell.5 While Jeffries, like Schwartz, provides extensive narrative of the behind-the-scenes evolution of important cases, he explains that “the decisions in these areas are especially revealing of the individual beneath the judicial robes. Here the link between private man and public figure can be clearly seen, and the surprising impact of one Supreme Court Justice on the nation’s history can be correctly gauged.”6 Jeffries’ use of detailed give-and-take among the Justices is more focused on the points he seeks to make about Justice Powell.

I have followed a path closer to Jeffries than to Schwartz, trying never to lose sight of the goal of elucidating Justice Brennan and his contribution to modern American constitutional and statutory law. If I am interested, as of course I am, in the impact of the Court under Chief Justice Warren on the country and on different facets of law, it is because of the role Justice Brennan played in shaping history, not because of a general desire to explain the significance of the Warren Court.

Take, for example, Cooper v. Aaron,7 the Little Rock, Ark., schools case. The details are of great interest to me, not so much for the history of desegregation, but because Chief Justice Warren relied on Justice Brennan to write most of the Court’s per curiam decision. I find this reliance extraordinary when one considers the importance of the case and that Justice Brennan had been on the Court for only two years. Looking at the evolution of this decision sheds light on the very close relationship that developed between Warren and Brennan and that afforded Brennan countless significant opportunities to influence events and shape decisions far beyond his own standing as one of nine Justices.

**Mythology In a Nonagon**

Any biography of a Supreme Court Justice faces the difficult problem of accurately assessing that individual’s influence over eight others. In writing about Justice Brennan, that problem may be more acute than with others, since a major part of the story is his uncanny ability not only to get and hold his own Court majorities, spanning thirty-four years, but also to influence decisions that appear under the authorship of other Justices.

This task has been made more difficult by the mythology about Justice Brennan, which exceeds even his prodigious reputation for influence on the bench. Ever since the publication of The Brethren,8 there has been an image extant of Justice Brennan as the Tip O’Neill9 of the Supreme Court—the jaunty, happy Irishman roaming the corridors, slapping colleagues on the back and asking for their vote. This image is perpetuated by the network of law clerks, many of whom recall Justice Brennan waiting in the halls to walk to the Court’s weekly, closed-door conferences arm-in-arm with Justice Powell, Justice Harry Blackmun or others with whom he sat.

This mythology, perhaps more than any other factor, has shaped the reaction of people when I tell them about my biography. Typically, people say the book must be easy and fun because Justice Brennan has so many wonderful stories to tell.

It is true that Justice Brennan is an extraordinarily warm and friendly man who has the uncommon ability of making every person he meets feel like his best friend. There the confluence of reality and mythology stops. He is not a wonderful storyteller, certainly not in the style of Justice Thurgood Marshall, or of Tip O’Neill. He has no shortage of stories to tell, but he does not proffer them with the ease and lack of prompting that the myth suggests. While Justice Brennan has been remarkably generous and patient with me with his time, his enthusiastic support, access to his records and files and introductions to others who may be able to help, I have had to extract details of
Chief Justice Warren Burger served with Justice William J. Brennan, Jr., for seventeen years and for eleven of those years Brennan was the senior Associate Justice. Chief Justice Burger has called Brennan one of the most persuasive individuals he had met and suggested he could sell refrigerators to Eskimos in Alaska.

his life with the same persistence that marks most historical research.

I have concluded that the same problems exist in the mythical image of his power and influence. I do not mean to suggest that his influence and success were any less immense and impressive than the myth, but simply to take issue with the means. Justice Brennan’s ability to forge majorities and to effect the outcome of cases came not from cajoling other votes like a congressional whip. It came, substantively, from a consistency of constitutional vision that, over a very long period, attracted others, and, pragmatically, from an unusual receptivity to suggestions from other Justices for changes in opinions, especially when those changes left the bottom line unaltered.

Like his colleagues, and contrary to the mythology, Justice Brennan did most of this accommodation in written exchange of memoranda with other Justices and far less of it in face-to-face conversation.

How, then, do I assess Justice Brennan’s impact? The answer is with great care and caution. It would be easy to make sweeping generalizations about how he provided the legal know-how for Chief Justice Warren, won over Justice Blackmun, and swayed Justice Powell. But all such relationships are far more complex, and observations about Justice Brennan’s contacts with others on the Court hold meaning only to the extent that his influence can be documented.

Finding this documentation is difficult. Occasionally, a Justice’s case file will include a letter to the author of an opinion, saying, “I voted the other way at Conference, but your fine opinion has persuaded me.” These overt references to the influence of one Justice on another are rare. The notes that the Justices take at Conference are often subjective and unreliable. Justice Brennan’s notes often record next to Justice Thurgood Marshall’s name that he “agreed with me.” It is a big leap to conclude from that kind of notation that Justice Brennan had a major influence on Justice Marshall.

Personal interviews are only marginally more helpful, since few Justices have the humility that would be required to admit that their constitutional view was attributable to another, even if that were clearly the case. In my interviews with Justices Powell and Blackmun, neither would concede much influence from Justice Brennan, although conventional wisdom would argue that he left his mark on both men. Retired Chief Justice Warren Burger, in contrast, remarked that Justice Brennan was one of the most persuasive individuals he had ever encountered and suggested that Justice Brennan might be able to sell refrigerators to Eskimos in Alaska.

This issue of influence in a nine-person body is seen most clearly in the Court’s 5-4 decisions. Is there a play maker who should be credited with forging this delicate majority, or does the real influence rest with the swing or fifth vote? Jefferies and I will differ in our accounts of some cases. He credits Justice Powell, who was very often the pivotal fifth vote in the late 1970s to mid-1980s and says Justice Powell influenced the outcomes of cases because of the fragile nature of his vote. I will argue, instead, that it was Justice Brennan
who jumped through hoops to get and keep the majority in some of the same cases.

**Tapping the Sources**

I have spent substantial amounts of time agonizing over what may be considered legitimate and reliable sources of information for a biography of a contemporary Supreme Court Justice. Some of the more obvious sources of the great biographies of the past do not exist in this instance. It appears, for example, that the era of legendary letter writers is long past. Justice Brennan’s files have no contemporary collection of letters to rival those of Justice Felix Frankfurter, who bared his innermost soul, and his most petty jealousies, in prolific correspondence with dozens of friends. There are letters in Justice Brennan’s files, but their insights are generally more mundane.

Justice Brennan’s files do contain a remarkable resource, however, one seemingly unparalleled in Supreme Court history. Each summer, for about thirty of his thirty-four years on the Supreme Court, Justice Brennan had his law clerks prepare a narrative, printed account of the behind-the-scenes discussions and exchanges among the Justices in the major cases of the Court Term. Some of them read like a dry play-by-play for a tedious sporting event, but some of them convey the genuine suspense of good mystery novels.

What use should I make of these “case histories,” as they are called? Isn’t it obvious, one might say, that these are an unsurpassed treasure to be used liberally throughout the biography? The answer is not so obvious. The histories are a wealth of anecdotes, of documentation of dates of face-to-face meetings, and of other details.

However, they are also replete with what must be at best gossip along the clerks’ network. A case description might recount how Justice Brennan learned from his law clerk assigned to a case that Justice John Paul Stevens’ law clerk had heard from Justice Byron White’s law clerk that Justice White was thinking about writing a separate concurring opinion. In my judgment, neither history nor biography is served by passing on such unreliable detail. Where Justice Brennan or his law clerk was a direct participant in the event being described, clearly the reliability of the remembrance is far more trustworthy. But even some of the hearsay serves a useful purpose; it provides good insight into how the world looked to Justice Brennan and his clerks, a valuable perspective for a biography.

What of former law clerks as sources? It has become fashionable in the last decade to criticize the reliability of law clerks as sources. In his review of *Super Chief*, Professor Eugene Gressman, the expert on Supreme Court practice, criticized Schwartz for his reliance on law clerk memories:

> At most, a law clerk can observe the whole of the collegial process only through the eyes and mouth of the one Justice for whom he works; what the Justice does not tell him, or what he is not otherwise privy to, the clerk knoweth not. The law clerk, in short, is not a very reliable witness to decisional motivations of the Justices.

For intimate observation of a Justice, in-
stead of demonstrative evidence of a Justice's influence, the law clerks are a valuable resource. I have interviewed all but four of the more than 105 law clerks who worked for Justice Brennan on the U.S. Supreme Court. I reject the common admonition that the law clerks are a poor source because they think they are more important than they really were. I do not find it difficult to sort through the very useful interviews and to make some threshold decision about when the topics being discussed are beyond the clerk's memory or expertise.

For me, there has been no greater resource than Justice Brennan himself. I have tape-recorded and transcribed sixty-six hours of interviews with Justice Brennan, and have spent hundreds more hours watching him with others, listening and learning. I have seen for myself the fabled memory—the way he could swivel in his desk chair to face the bookcase behind him, reach up for the correct volume of U.S. Reports, and open to the case we had just mentioned. He allowed me on several occasions to sit in for his ritualistic "morning coffee" with his law clerks, the informal daily get-together to talk over the events of the Court and of the world. He allowed me to observe some of his preparation sessions for oral argument—a lengthy review with his law clerks of the issues and arguments in the cases to be argued in an upcoming two-week argument session. Sometimes in these meetings he would express a tentative position, and he and the clerk assigned to the case would contemplate how other Justices might see the issues. All of these opportunities provided additional dimensions of the picture I am trying to paint.

**Court Papers**

The most extensive resource is the papers of the Justices, a controversial source after the furor created by the *Washington Post*’s series on the papers of Justice Marshall. I have examined all or parts of the papers of eleven Justices, some held by the Manuscript Division of the Library of Congress, others held by university and law school libraries scattered around the country.

Typically, a Justice’s papers include different kinds of files. First, there are case files which contain drafts of opinions and copies of correspondence circulated among the nine chambers. It is possible through these files to trace some of the evolution of a decision to its final form, looking at changes from one draft to the next and examining the requests for alterations by other Justices. Second, there are conference notes, in which each Justice records the initial comments made about a case by the other members of the Court.

I have found the case files particularly useful. Justice Brennan was a very active player in the process of sending memos to other Justices suggesting minor changes or major modifications in their draft opinions. The case files enable me to try to document when and how he made a difference, and how he worked with others or others with him. The conference notes are of more questionable utility to me. They do not purport to be a verbatim account of what other Justices said, regardless of which Justice’s papers you use. Inevitably, I am seeing what Justice Brennan thought others said at conference, or what others

William J. Brennan, Sr., was a labor leader in Newark, New Jersey and later became the Director of Police and Public Safety there.
thought he said. Neither situation is as reliable as the paper trail of case files.

Some Justices’ papers also include correspondence files, and these can be helpful. Justice Brennan’s correspondence has not yet been turned over to the Library of Congress, where his case files are. The more than a dozen file drawers filled with correspondence provide a variety of useful detail about a man’s life. There are letters from people who say they remember him as a boy or a young man growing up in Newark. I have tried to follow up on many of those leads to piece together his early years. There are other letters talking about places, events, visits, activities, mutual acquaintances, speeches, cases and the other pieces of a puzzle. To the extent that a biographer is a detective, these are my clues.

The Thrill of Discovery

Following these leads, using these clues may take countless hours of patience and persistence. Sometimes it ends in frustration, but often there are rewards. Recently, at the Newark Public Library I came across a previously unavailable treasure trove of information about Justice Brennan’s father, William J. Brennan, Sr., a labor leader and later police and public safety commissioner in Newark in the 1920s. Some years ago, I tracked down a former classmate and rooming housemate of Justice Brennan’s in the Harvard Law School Class of 1931 and found that he had kept a diary of some of their mutual activities. Recently, I also located a research paper about Justice Brennan’s path to the Supreme Court written in 1958 by a young Yale Law School student; the student had interviewed a number of people who died long before I began work on the biography.

Not all of the detective work is successful. On more than one occasion, I have picked up the New York Times obituary section and read about someone whose whereabouts I had just discovered the day before or whose importance as a potential interview subject I had just come to understand.

Then there was my follow-up on a letter to Justice Brennan from a woman in her eighties who said he might not remember her but they had danced together at the Barringer High School prom about two-thirds of a century earlier. I called her to see what she could tell me about that debonair high school senior, William J. Brennan, Jr. But, perhaps influenced by the trend in modern biography, she took my call as a muckraking mission, insisted that they had been good kids who did not get into any trouble, and hung up.

Some discoveries have happened by accident. One day I decided to take a break while working in the papers of Justice John Marshall Harlan II at the Seeley Mudd Library at Princeton University. For a diversion, I decided to see what other collections of papers were available. While browsing through the lists and catalogues, I came across the papers of former New York Times columnist Arthur Krock. Being a former Supreme Court correspondent for the Wall Street Journal, myself, I thought Krock’s papers might be interesting.

One of my favorite pastimes while working on the biography has been to see if I could find any evidence that President Eisenhower, who appointed Justice Brennan in 1956, had later said of Justice Brennan and Chief Justice Warren, “My two worst mistakes are both sitting on the Supreme Court.” This quote has been attributed to Eisenhower thousands of times, but never with any source or documentation. At Princeton, in the Arthur Krock papers, I stumbled across a memo the columnist had written to himself after meeting with Eisenhower at the White House in 1960. Krock wrote, “It was clear that the President has been disappointed in the far Leftist trend of Chief Justice Warren, and has been equally astounded at the conformity to this of Justice Brennan.” I was thrilled at this discovery.

Some searches have proved futile. I was convinced for the longest time that if I kept looking, I would be able to pinpoint the precise moment at which Justice Brennan’s name was first suggested for the U.S. Supreme Court, and by whom. After years of searching, I have given up that quest. The Deputy Attorney General in 1956, William P. Rogers, insists that he suggested Justice Brennan’s name to Attorney General Herbert Brownell, and there appears to be no written record to prove it or to
show when or how it happened.

Capturing the Justice

The most difficult task for a Supreme Court biographer is, without question, trying to capture the legal essence of the Justice and trying to determine its roots and origins. Professor Philip Kurland has chided:

Although the biography of a judge ought to concern ideas rather than deeds, intellectual biography is a difficult literary form to manage well. Ideas are fleeting and difficult to capture, however well documented in legal opinions they may seem. And few judicial biographers successfully elucidate the ideological foundations of their subjects' actions.  

Some would say the legal essence of Justice Brennan cannot be captured because he had no jurisprudential philosophy during his Supreme Court tenure. Justice Brennan might even agree that he cannot be conveniently pigeonholed into a single school of thought or encapsulated in a word or phrase.

I have concluded that it is possible to ascribe a judicial philosophy of sorts to Justice Brennan and to trace its origins to the progressive household in which he was raised. It took me a long time to feel that this was legitimate, that I did not need to feel embarrassed because I could not describe him as a legal realist, a strict constructionist or an interpretivist or as an heir to some specific school of constitutional thought. Moreover, I could not get him to describe himself in these or other philosophical terms, and for the longest time I thought that was essential. I no longer think so.

The hallmark of Justice Brennan's judicial approach was an abiding belief that law must be dedicated to preserving the essential human dignity of every individual. This must be achieved by reading the values of compassion and fairness into the law. He believed deeply that government must be accountable to the people in court, even to the point of paying damages where necessary to correct wrongs brought about by government actions. These views, although they took decades to evolve, may be traced in part to Justice Brennan's childhood and to a father who had a progressive, populist view of the role of government. Indeed, the senior Brennan became involved in government only because he believed it was meeting the needs of big business and the wealthy while ignoring the needs of individuals, particularly workers.

Although it undoubtedly follows from the same tradition, it is more difficult to trace the origins of Justice Brennan's view of constitutional interpretation. He described this view best in a 1986 speech at Georgetown University Law School, where he said, "[We] current Justices read the Constitution in the only way we can: as twentieth-century Americans...the ultimate question must be, what do the words of the text mean in our time."  

Justice Brennan adhered consistently to the approach that the words of the Constitution must be continually adapted to the meaning and understanding of our time, not locked in a literal interpretation of the meaning of those phrases for 1787 when the Constitution was drafted or 1789 when the Bill of Rights was proposed. It has been difficult to find specific influences or contributing factors for this view, and Justice Brennan can shed little light on this question, himself. He has said that his constitutional approach is simply his own, one that has evolved from his own experiences. I have tried to trace it to any influence at Harvard Law School, in law practice or on the New Jersey bench. No such roots appear on the radar screen.

Having felt the thrill of discovery and the excitement of history, I am still searching.

Confronting Other Judgments

There are other issues to be decided. For some reason, it seems obvious that well-versed readers of biographies of Presidents of the United States, Speakers of the House or captains of industry will want to read every detail, every facet of the early lives of their subjects. It is less obvious that readers are interested in the same degree of detail about Supreme Court
Justices, in part because many Justices are less visible as public figures before or during their tenure on the Court or in some instances are virtually unknown to the public.

I have chosen a full-length biography of Justice Brennan because he is something of an enigma to many people. Americans are somewhat familiar with Justice Brennan's very liberal record on the Court, and perhaps with the debate over whether the Warren and Burger Courts were appropriately protective or overly protective of constitutional rights and liberties. But few people know anything about Justice Brennan's background, origins and activities and views before 1956. The few that may have heard something about him include those who think he was a conservative who became liberal once on the High Court, explaining Eisenhower's oft-quoted surprise at how Justice Brennan developed.

My premise is that a full-length biography, not simply a judicial one, is necessary to explain that the Justice Brennan of the Supreme Court was really the same man who was known to his friends in New Jersey as a liberal and progressive lawyer and judge, who cared deeply even in the 1940s and early 1950s about fairness and justice.

There is the question of how much detail to include about Justice Brennan's life off the bench, both before and during his tenure on the Supreme Court. The answer is that a certain amount of that detail is essential to capturing the man and the influences on his life. With Supreme Court Justices, I think, since they are often so insulated from the rest of the world, it is particularly interesting to have a sense of what they saw and how the world appeared to them. It is insightful to explore Justice Brennan's relationship to the Catholic Church hierarchy in Washington, D.C., during and after the 1960s school prayer cases which prohibited state-written or compelled prayer in public schools. It is useful to think about the time Justice Brennan spent with liberal, progressive friends like Judges David Bazelon and Skelly Wright of the U.S. Court of Appeals for the District of Columbia and with other friends during nearly two decades of living in Georgetown.

There is also the question of a chronology versus a thematic approach, or a combination of both as Professor Jeffries has employed in his Powell biography. I have opted for chronology for a simple and very unprofound reason: it is easier.

Conclusion

Supreme Court biography presents myriad problems and challenges, many of them unique to this form of biography. In the end, while one aspires to capture the life of a subject, one cannot help nor should one avoid capturing the life of the Court as well. The standards in the field are high, and the stakes no less so. The high expectations were recently described with eloquence by Judge John Noonan of the U.S. Court of Appeals for the Ninth Circuit in praise of Professor Gerald Gunther's new biography of Judge Learned Hand. Judge Noonan wrote, "To write good judicial biography requires a lawyer's grasp of the law, a historian's exactness and circumspection, and a biographer's empathy and balance."
ability of the Marshall papers and sent a team of reporters to prepare a lengthy series on major cases that were chronicled in the papers. This brought an outcry from Chief Justice Rehnquist, members of Justice Marshall's family, and some others in the Supreme Court community that the papers should have been kept confidential for a longer period. The Library maintained that it was bound by the terms of Justice Marshall's gift letter and that he had been aware during his lifetime that the papers would be opened upon his death.

13 William P. Rogers later became Attorney General in the Eisenhower Administration and Secretary of State in the Nixon Administration.


15 This speech has been reprinted in a number of law reviews. One version is: Justice William J. Brennan, Jr., "The Constitution of the United States: Contemporary Ratiﬁcation," 27 S. Tex. L. J. 433 (1986).


17 Note 5, supra.
