"PERHAPS THE BEST **IUDICIAL BIOGRAPHY** EVER WRITTEN" - Washington Post



# JUSTICE BRENNAN



🐉 LIBERAL CHAMPION 🐇



SETH STERN & STEPHEN WERMIEL

# JUSTICE BRENNAN

· LIBERAL CHAMPION

常州大字山书仰 SETH S F 第 本章 章 STEPHEN WERMIEL



UNIVERSITY PRESS OF KANSAS

#### Copyright © 2010 by Seth Stern and Stephen Wermiel

#### ALL RIGHTS RESERVED

Reprinted by special arrangement with Houghton Mifflin Harcourt Publishing Company

Published by the University Press of Kansas (Lawrence, Kansas 66045), which was organized by the Kansas Board of Regents and is operated and funded by Emporia State University, Fort Hays State University, Kansas State University, Pittsburg State University, the University of Kansas, and Wichita State University

Library of Congress Cataloging-in-Publication Data

Stern, Seth (Seth Ross), 1975– Justice Brennan : liberal champion / Seth Stern and Stephen Wermiel. pages cm

Includes bibliographical references and index.
ISBN 978-0-7006-1912-2 (paperback)

- 1. Brennan, William J. (William Joseph), 1906–1997.
  - 2. Judges—United States—Biography.
  - ${\it 3. \ United \ States. \ Supreme \ Court-Biography.}$

I. Wermiel, Stephen. II. Title. KF8745.B68S745 2013 347.73´2634—DC23 [B] 2012046458

British Library Cataloguing-in-Publication Data is available.

Book design by Victoria Hartman

Printed in the United States of America

10 9 8 7 6 5 4 3 2 1

The paper used in this publication is recycled and contains 30 percent postconsumer waste. It is acid free and meets the minimum requirements of the American National Standard for Permanence of Paper for Printed Library Materials Z39.48-1992.

# JUSTICE BRENNAN

#### To Claire

#### SETH STERN

To Justice Brennan, Abner Mikva, and Seth Stern, who made this book possible

To my wife, Rhonda Schwartz, and my daughter, Anne Wermiel, who never stopped encouraging the effort

STEPHEN WERMIEL

# List of Illustrations

#### FOLLOWING PAGE 178

Wedding portrait of Justice Brennan's parents. Courtesy of the Brennan family

Campaign ad for William J. Brennan Sr.'s first reelection. Courtesy of the Brennan family

William J. Brennan Jr. at age seventeen. Courtesy of the Brennan family

William J. Brennan Sr., Newark's commissioner of public safety. Courtesy of the Brennan family

Harvard Legal Aid Bureau. Notman Photography Co./Courtesy of the Collection of the Supreme Court of the United States

Marjorie Brennan. Courtesy of the Brennan family

Major Brennan, World War II. Courtesy of the Collection of the Supreme Court of the United States

New Jersey Supreme Court in conference. The *Saturday Evening Post* magazine © 1957. Saturday Evening Post Society

Brennan and President Eisenhower in the Oval Office. AP/Wide World Photos

Brennan family at home in Rumson, New Jersey, 1956. AP/Wide World Photos

Brennan, seven-year-old daughter Nancy, and Marjorie. AP/Wide World Photos

Brennan in his judicial robe. Robert Oaks, *National Geographic*/Courtesy of the Collection of the Supreme Court of the United States

Brennan before the Senate Judiciary Committee. AP/Wide World Photos

#### x · LIST OF ILLUSTRATIONS

Justice Brennan and Chief Justice Earl Warren and family. Time & Life Pictures/Getty Images

The Warren Court. Harris & Ewing/Courtesy of the Collection of the Supreme Court of the United States

Lunch group at the Milton Kronheim liquor warehouse, late 1960s. Courtesy of the Collection of the Supreme Court of the United States

#### FOLLOWING PAGE 450

Justice Brennan receives the Laetare Medal, 1969. Catholic News Service Justice Brennan and Marjorie at a Nantucket cottage, 1975. Photograph by R. Rhodes

Justice Brennan and Marjorie on a Nantucket sand dune. Courtesy of the Brennan family

The Wharf Rat Club, Nantucket. Photograph by Anne Wermiel

The Burger Court meets President Ronald Reagan. The White House/ Courtesy of the Collection of the Supreme Court of the United States

Justices Marshall and Brennan at a courthouse dedication, 1985. Ray Lustig photograph © 1985 *The Washington Post* 

Justices Brennan and Blackmun on their way to justices' conference, 1983–84. Courtesy of Jeffrey B. Kindler

Justice Brennan and his second wife, Mary Fowler. Courtesy of the Collection of the Supreme Court of the United States

Brennan speaks at Loyola Law School graduation, 1986. © Bettmann/Corbis

Justice Brennan, in retirement, with his successor, Justice David Souter, 1996. Lois A. Long/Courtesy of the Collection of the Supreme Court of the United States

Herblock cartoon, 1990. © The Herb Block Foundation

William J. Brennan lying in state in the Supreme Court's Great Hall, 1997. Time & Life Pictures/Getty Images

### Prologue: Last Surprise

TILLIAM J. BRENNAN JR. left his chambers as usual on the morning of June 27, 1990, when summoned by a buzzer to join his eight colleagues on the United States Supreme Court.

His first-floor chambers had remained largely unchanged since Brennan first arrived at the Court as a little-known New Jersey state judge thirty-four years earlier. Brennan had continued to work at the same desk, and the same wooden mantel clock still rested on the shelf above the fire-place. He preferred the old lamps to the fluorescent lighting other justices had installed. The only distinctive decorating touch in Brennan's chambers was the kelly green carpet covering the floor.

Stepping into the hallway, Brennan might have looked at the figures emerging from the neighboring chambers and thought for just a moment of his former allies Hugo Black, William Douglas, and Earl Warren, with whom he had transformed American constitutional law a quarter century earlier. All three had died long ago.

Brennan's closest remaining allies, Harry Blackmun and Thurgood Marshall, the nation's first African American justice, had, like him, grown old on the Court. Never a tall man, Brennan, now eighty-four, had shrunk as a result of age and illness. He shuffled when he walked the hallway toward the courtroom, and when he locked arms along the way with Black-

mun or Marshall, the gesture was as much about steadying his gait as making an intimate connection.

He joined his colleagues in a small room behind the ornate courtroom, where they donned their robes and shook hands as per tradition before walking through the two-story-high curtains into the Court Chamber. As he had done for the last fifteen years, Brennan took the seat to the immediate right of the chief justice, at center, the spot reserved for the longest-serving associate justice.

The Court followed its custom of announcing decisions in reverse order of the author's seniority. The first to speak that day was the secondmost-junior justice, Antonin Scalia, fifty-four, who had often sparred with Brennan since joining the Court four years earlier as its most conservative and youngest member. Scalia delivered an opinion severely restricting the ability of environmental and other citizen groups to challenge government action in federal court.

Justice Sandra Day O'Connor, President Reagan's first addition to the Court and the first female U.S. Supreme Court justice in history, followed with four decisions. Justice Byron White, who was the second-most-senior justice after Brennan and who had drifted to the right since President John F. Kennedy appointed him, then followed, with one. The six decisions announced by the members of the Court's conservative wing were a fitting finish to a term in which they had seemed to dominate.

Finally, Chief Justice William H. Rehnquist came to the last opinion of the day — and of the Court's term — and announced that Brennan would deliver it. Brennan leaned forward and pulled himself up in his high leather chair to make sure he could be seen above the raised mahogany bench. He spoke in a strong voice, although one slowed by age and more gravelly than usual due to a lingering cold. Brennan stated that the Court was upholding the constitutionality of two affirmative action programs in which the Federal Communications Commission gave preference to minority-owned companies to operate television and radio stations.

The import of the moment was lost on the crowd of tourists who packed the courtroom, but the handful of lawyers and reporters present were surprised by this unexpected outcome. Support for affirmative action had eroded on the Supreme Court in recent years. A year earlier Brennan had dissented when a majority had severely limited the ability of state and local

governments to assist minority-owned businesses. And yet in the FCC case, the Court, by a 5–4 margin, upheld — and even expanded — the legally acceptable justifications for such programs. Once again, Brennan had somehow managed to defy expectations and build a majority.

What no one — including Brennan — knew that day was that this opinion would be the last of the more than 1,350 opinions he delivered as a Supreme Court justice. Less than a month later, Brennan abruptly announced his retirement after suffering a stroke. His opinion in *Metro Broadcasting v. FCC* proved to be the final surprise in a tenure full of surprises, a tenure that spanned five decades.

Little in his career as a corporate labor lawyer and New Jersey state judge suggested that William Brennan would emerge as perhaps the most influential justice of the entire twentieth century. No one could have predicted that Brennan would become the most forceful and effective liberal ever to serve on the Court. In fact, few if any of the eight men who served as president during his tenure could claim to have had such a wide-ranging and lasting impact. Brennan interpreted the Constitution expansively to broaden rights as well as create new ones for minorities, women, the poor, and the press. His decisions helped open the doors of the country's courthouses to citizens seeking redress from their government and ensured that their votes would count equally on Election Day. Behind the scenes, he quietly helped craft a constitutional right to privacy, including access to abortion, and bolstered the rights of criminal defendants. In the process, he came to embody an assertive vision for the courts in which judges aggressively tackled the nation's most complicated and divisive social problems.

Few outside the Court had any idea during the 1960s of the extraordinary influence that Brennan exerted working alongside Chief Justice Warren. And no one could have predicted the success he continued to enjoy under Warren's two Republican-appointed successors, Warren Burger and Rehnquist, largely holding the line against a conservative retrenchment.

Although Brennan's decision in the *Metro Broadcasting* case was subsequently overruled, affirmative action, like much of Brennan's legacy, survives two decades after his retirement and more than a decade after his death. The Court—and all of American politics—is still roiled by the forty-year-long conservative backlash that his decisions about school

#### xiv · PROLOGUE

prayer, the death penalty, and affirmative action helped fuel. And while he remains a hero to two generations of progressive lawyers, including Presidents Bill Clinton and Barack Obama, he is also still the very symbol of judicial activism decried by conservatives. Each time a vacancy opens on the Supreme Court, conservatives vow never to repeat the mistake they say President Eisenhower made in nominating Brennan more than a half century ago.

# Contents

	List of illustrations	1X
	Prologue: Last Surprise	xi
	• PART I: 1906–1956 •	
1.	BILL'S SON	3
2.	Lawyer	26
3.	ASCENDING THE BENCH	48
	• PART II: 1956-1962 •	
4.	IKE'S MISTAKE	71
5.	JOINING THE COURT	96
6.	COLD WAR	132
7.	Irish or Harvard	162
	• PART III: 1962–1969 •	
8.	Тпимрнапт	195
9.	DISARMING THE SOUTH	209

#### viii · Contents

10. Crime & Criticism	230
11. ANGERING THE LEFT	249
12. PASSAGES	276
13. TUMULT	296
• PART IV: 1969–1982 •	
14. NEW CHALLENGES	327
15. FRUSTRATION RISING	350
16. PEDESTALS & CAGES	385
17. DEATH & DIGNITY	409
18. UNEXPECTED ALLY	434
19. Darkest Years	456
• PART V: 1983-1997 •	
20. Rebirth	485
21. TWILIGHT	508
22. "So Long, Bill"	536
Authors' Note	549
Acknowledgments	552
Sources	556
Notes	559
Index	650

· PART I: 1906—1956 ·

#### BILL'S SON

TEWARK, NEW JERSEY, seemed cloaked in mourning on May 16, 1930. The sudden death two days earlier of City Commissioner William Joseph Brennan Sr. had eclipsed even the economic disaster enveloping the city in the early months of the Great Depression.

Thirty-eight years had passed since Bill Brennan arrived by steamship in the United States at the age of twenty, just another poor, anonymous Irish immigrant. An estimated forty thousand citizens—equivalent to 9 percent of the city's entire population—lined up through the night for a chance to enter the rotunda of City Hall, where his body lay in state. Standing vigil nearby was an honor guard of labor, police, and firemen Bill had led as head of the stationary firemen's union and during four terms as city commissioner. The next morning, six police horsemen and a marching band led off the parade of two thousand political, business, and union leaders accompanying the hearse. Three New Jersey National Guard airplanes dipped low overhead, dropping flowers on the mile-long funeral cortege. Throngs of somber onlookers lining Broad Street lifted their hats as the hearse passed by on its way to St. Patrick's Cathedral.

Seated in a carriage behind the hearse was William J. Brennan Jr. The younger Brennan, twenty-four, had rushed home by propeller plane from Massachusetts, where he was finishing his second year at Harvard Law

School, when it had become clear that his father would not survive a sudden bout of pneumonia. But he had arrived too late to say goodbye to the man who, for decades to come, would dominate his view of the world and the course of his career.

In life, Bill, who stood nearly six feet tall, had overshadowed his still boyish-looking namesake, five feet eight, in every way. Brennan's classmates at Barringer High School teased in their yearbook that the commissioner's son got by thanks to "Dad's reputation" and predicted his ambition was "to follow dad." Brennan had dutifully taken his father's advice and enrolled at the University of Pennsylvania's Wharton School and then Harvard Law, an Ivy League pedigree that far outshone the six grades of school Bill had completed. Brennan, soon to begin his first summer job as a lawyer, probably could not have imagined as he looked out on the massive funeral procession the extent to which he would exceed his father's professional achievements as well. Bill, however, had always expected nothing less from his oldest son.

WILLIAM J. BRENNAN SR. had bloomed late, his first quarter century in Ireland and America filled with far more failures than successes. Born on December 26, 1872, in Roscommon, a poor rural county on the border between central and western Ireland, about fifty miles north of Galway, Bill was the oldest of six children of Patrick Brennan, an illiterate tenant farmer from the tiny village of Cloonshanville, and Elizabeth Kelley, of Leggatinty, an equally small nearby town. Patrick Brennan had "married into" the Kelley farm, moving there and eventually taking over the tenancy. Bill's grandparents likely made do with a couple of cows, sheep and pigs, and some hens, just enough for them to survive the Irish potato famine that devastated Ireland a quarter century before his birth. Bill's parents, born just after the famine, stuck it out in Ireland even as millions of others fled.

Life for Bill, as for his ancestors before him, did not extend much beyond the nearest town of Frenchpark, where farmers gathered on Friday market days to sell animals and produce and to exchange gossip. Bill, who attended primary school intermittently when he was not helping his father on the farm, decided he wanted out. At the age of sixteen he traveled to England to work as an apprentice in an uncle's pottery business at Longton, Staffordshire, near Newcastle. Bill lasted only three years in the position before concluding that neither England nor his uncle's business was