

The Great Dissenter

William Brennan had a brand-new role as the Court moved rightward.

REASON AND PASSION

Justice Brennan's Enduring Influence.

*Edited by E. Joshua Rosenkranz
and Bernard Schwartz.*

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By Alex Kozinski

IN his third of a century on the Supreme Court, Justice William J. Brennan Jr. laid down a jurisprudential infrastructure so solid that only paranoiacs can imagine its being dismantled. After all, *stare decisis*, the venerable principle that things once decided should be left alone, saved even *Roe v. Wade* from a conservative Court's backhoe. On that basis alone, the 1,360 opinions written by the liberal Brennan are bound to survive generations of detractors within and without the edifice at First and Maryland NE. Brennan — whose tenure stretched from 1956 to 1990 (during which he served with 22 of the 108 Justices whose robes have draped that bench) — was the driving force behind a quantum shift in the law from which turning back would be as difficult as, say, reforming campaign finance.

That, at least, is one view of Brennan, as laid out by the three dozen contributors to "Reason and Passion," edited by E. Joshua Rosenkranz and Bernard Schwartz. Another view — espoused by the same contributors — is that many of Brennan's greatest achievements already exist only in the past. Thus, the law professors Lani Guinier and Pamela S. Karlan describe the current Court's voting rights case law as "a cruel parody of Justice Brennan's noble vision." Derrick Bell sees the Court as having "dismantled" the wall of precedents Brennan "erected to protect black rights." Jerome J. Shestack, the president-elect of the American Bar Association, asserts that Brennan's vision of human rights as "based on individual worth and dignity" is "under siege" by his unworthy successors. Is there a cognitive dissonance, then, among Brennan's admirers, who believe that he built bulwarks of judicial achievement — yet at the same time insist that many of these structures are crumbling?

Perhaps this papering over is simply politesse. The contributors to "Reason and Passion," a project of the Brennan Center (founded by the retired Justice's 100-odd former law clerks and housed at the New York University School of Law), come not to worry Brennan but to praise him. This is a volume neither of criticism nor of debate. It is an oversize 91st-birthday card signed by the likes of Justice Ruth Bader Ginsburg ("Under Justice Brennan's skilled and sympathetic guidance the Supreme Court was at last becoming a place where the women of the country — and men ... who valued their life partners' work — could seek and expect gender justice") and Laurence H. Tribe ("Through a long series of decisions, involving a broad range of government beneficiaries, Justice Brennan articulated a set of basic principles that ... protects individuals and businesses alike from unjustified government encroachment"), plus an A-list of other jurists, lawyers, professors and reporters past and present (including The New York Times's own Tom Wicker, Anthony Lewis and Anna Quindlen). Perhaps the only wallflower among these revelers is Chief Justice William H. Rehnquist, who calls

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Brennan "the intellectual leader of those espousing his views during my time of service with him." His restrained praise hints at the divisions within the Court that forced Brennan, in his later years, to recast himself as its great dissenter.

To his supporters, Brennan was a man of the people. One study of 93 cases involving conflicts between the Government and individuals had him siding with the individuals every time. Yet the paradox of his career is that this man who so preferred the individual to the state may have done more than any other living American to enlarge the shadow cast by government over the governed.

It was Brennan who ushered in an era where you could fight city hall and win, with landmark decisions allowing victims of police misconduct to sue the cop — and while they are at it, why not the police chief and the mayor too? And then, in a decision that did as much to entrench the welfare state as any Great Society program, it was Brennan who extended the principle that government could not deprive its citizens of welfare benefits without due process. That decision — *Goldberg v. Kelly* — is important enough to warrant three essays (including one by Justice Stephen G. Breyer). Yet none of them fully capture its role in detonating an explosion in the size — and battle-readiness — of public institutions. *Goldberg* and its variations created a world where every civil service employee is a defendant-to-be, dividing his time between litigation and distracting efforts to avoid it. If, as it sometimes seems, legal process has invaded every sphere of modern life, Brennan's efforts to give Everyman his day (or month) in court must be held responsible. Think back to the time, not so long ago, when "Don't make a Federal case out of it" was a common rejoinder — and then try to imagine how the expression has come to mean nothing at all.

Recently, during a discussion of a difficult criminal case, one of my law clerks suggested a rule that might make sentencing, at least for some drug traffickers, more rational. After hearing him out, I responded, "That might be a good rule, but where are you getting it from?" I meant, where in the Constitution, in statute or in case law? He had no source; that it was a good rule seemed to him sufficient. It is unlikely Brennan asked many of his law clerks, "Where are you getting it from?" That it was a good rule was, to him, sufficient. Thus one professor recently wrote — in praise of Brennan — that the due process revolution of *Goldberg v. Kelly* "blew in almost from nowhere." The trouble is that a revolution without roots can blow out as easily as it blows in — and leave much harm and disappointment in its wake.

If Brennan had been asked, in his peak years as a jurisprudential dervish, "Where are you getting it from?" he might have answered, "I'm getting it from my heart." (He said in a 1987 lecture that his jurisprudence preferred a "range of emotional and intuitive responses" to "lumbering syllogisms of reason.") The essays in this volume, by and large, seem to accept the premise that this is an appropriate basis for judicial action. None of the contributors ask hard questions about whether this kind of personal jurisprudence is legitimate or serves our best interests.

There certainly are at least two views of the matter, and one of Brennan's strong suits was in providing coherent, often compelling answers to those who challenged his jurisprudence. But no sparks generated by a clash of ideas fly from this volume; it serves less to illuminate than to inspire. A worthy goal, to be sure, but Justice Brennan, who never ran from a fight, might have been paid better homage by a polemic than a paean. □