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Justice Brennan and the First Amendment Minefield: In Respectful Appreciation

Ralph Michael Stein†

Justice Brennan's retirement has occasioned numerous tributes from academia and more will surely follow. The enduring worth of William Brennan's constitutional faith will be analyzed, discussed, debated and — as many of us hope — applied in the coming years. Although no area of the Supreme Court's caseload lacks the wisdom of Justice Brennan's insights, the area of protected expressive activity, a concept that to Justice Brennan meant so much more under the first amendment than the usually-applied term "free speech" would indicate, benefitted immeasurably from his long and devoted commitment.

It is a special privilege, and a personal joy, for me to have the opportunity to contribute a piece honoring such a revered figure. I make no claim to scholarly objectivity. My premise is simple: William J. Brennan has given us a legacy of first amendment decisions, concurrences, and dissents that reflect great honor on the jurist. My portion of this *Festschrift* provides selected examples of Justice Brennan's contribution, and concludes by thanking him for serving, through his opinions, as a mentor for me throughout my career as a teacher of constitutional law.

First amendment law is a constitutional minefield, with an array of unseen but inescapable problems, packed with present and future explosive issues. Certain attributes of expressive activity law, while seeming to establish principles that lend themselves to future application, actually create the basis for further conflict and litigation. The Supreme Court's decisions in the protected speech area incite partisan political attack and are perceived to create divisiveness rather than foster harmony. The constituency of the first amendment is broad in principle and

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fragmented in reality. Popular acceptance of and support for first amendment decisions hinge more on the facts of a particular case than on an ideological or doctrinal commitment to the amendment. While other areas of the law are fact specific, first amendment cases are especially dependent on specific fact situations.

Throughout his tenure on the Supreme Court, Justice Brennan more than trod on the constitutional minefield: he sought to defuse it with a reasoned, humane jurisprudence. His majority opinions enriched first amendment law and his dissents provided a continuous challenge to the majority's exposition of constitutional law. Near the close of Justice Brennan's judicial career, he authored two decisions that became the subject of national, acrimonious, and sometimes vicious debate.

In the first case, *Texas v. Johnson*,¹ the Court invalidated a Texas statute that prohibited the willful destruction of venerated objects, including, according to Texas authorities, the American flag.² Reversing Johnson's conviction, Justice Brennan wrote a typically cogent opinion that patiently detailed the statute's vagueness and overbreadth. As is both so common and so special with Justice Brennan's first amendment opinions, the *Johnson* opinion provides an almost palpably calming lesson in the value of protecting even the most loathsome expressive behavior.

If the *Johnson* dissent can be characterized as strong and personal, public and political reactions ranged from angry to abusive. With considerable public support and the backing of the President of the United States, Congress passed and the President signed into law the Flag Protection Act of 1989.³ The Act prohibited the destruction of the American flag while attempting to avoid the fatal deficiencies of the overturned Texas statute.⁴

The Act's constitutionality was tested in the flag burners' case, *United States v. Eichman*.⁵ The *Eichman* case drew great

1. 491 U.S. 397 (1989).

2. *Id.* at 399.

3. Pub. L. 101-103, §§ 2,3, Oct. 28, 1989, 103 Stat. 77718, (codified at 18 U.S.C. §700 (1988)) (hereinafter the "Act").

4. Tex. Penal Code Ann. §42.09 (1989).

5. 110 S. Ct. 2404 (1990).

publicity and loudly voiced demands for a constitutional amendment protecting the flag. The Court, which had decided the *Johnson* case by a five to four margin, again struck down a very popularly supported law.

Writing for the Court as a master of consensus, Justice Brennan explained why, despite the attempts at legislative leg-erdemain, the congressional response to *Texas v. Johnson*⁶ was at least as flawed as the state statute it attempted to replace. Justice Brennan's cogent statutory analysis detailed how the federal law reflected Congress' intent to punish specific communicative activities. His analysis can be rejected by emotion but not logic. Indeed, Justice Brennan appeared to gently chide Congress. In his view, the more effort Congress expended to make the statute appear content neutral, the more it reflected Congress' actual and forbidden purpose — to punish flag destroyers whose acts were not motivated by the age and deterioration of the particular flag but by the intended message of their actions.

The *Eichman* opinion could not have been easy for Justice Brennan to write. As difficult as it was to invalidate the statute in *Texas v. Johnson*,⁷ the flaws in the federal statute in *Eichman* were discernible even to opponents of the decision and, in any event, striking down a congressional act is not quite the same as invalidating a state statute. *Eichman* is a strong exposition of the first amendment architecture that Justice Brennan built throughout his decades on the Court. To Justice Brennan, the first amendment embodies the notion that the ability to communicate and persuade is the very hallmark of both our constitutional and our political concepts. The *Eichman* opinion is remarkable for Justice Brennan's sensitivity to the passions aroused by the case and his firmness in not allowing such passions to rule. As Justice Brennan wrote: "Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering."⁸

The roots of Justice Brennan's mature and reflective first amendment philosophy, exemplified by the two flag burning

6. 491 U.S. 397 (1989).

7. *Id.*

8. 110 S. Ct. at 2404.

cases, can be found even in his early years on the Court. When Justice Brennan joined the Court in 1956, the landmark desegregation decisions in *Brown v. Board of Education I*⁹ and *Brown v. Board of Education II*¹⁰ had already been decided. In the context of protected speech and expressive conduct, however, the Court was still very much in the thrall of the Cold War mentality.

Before Justice Brennan's appointment, the Court had either declined to review congressional and legal sanctions against persons suspected of disloyalty or sustained them. The general discrediting of professional "red hunters" had begun but was far from complete; both Congress and the States were involved in detecting and rooting out subversives. Given this political climate and Justice Brennan's junior status on the Court, it would not have been surprising if he had joined the existing majority. After all, Justices Holmes and Brandeis had done their share of backtracking and reversing previously stated positions as they explored the depth of first amendment challenges to government loyalty and security operations and practices. However, Justice Brennan made for himself a comfortable dissenting niche, and began to attract supporters of his views.

On June 8, 1959, the Supreme Court decided two internal security cases, *Barenblatt v. United States*¹¹ and *Uphaus v. Wyman*.¹² These cases illustrated Justice Brennan's purpose-oriented approach to dissent, an activity in which he would soon become a master.¹³ In *Barenblatt*, the Court sustained the petitioner's conviction for contempt of Congress, finding that the petitioner's interest in not revealing his past or present political associations was outweighed by Congress' need to investigate Communist subversion in the United States.¹⁴ Justice Brennan together with Chief Justice Warren and Justices Black and Douglas formed the dissenting bloc. Justice Black wrote the

9. 347 U.S. 483 (1954).

10. 349 U.S. 294 (1955).

11. 360 U.S. 109 (1959).

12. 360 U.S. 72 (1959).

13. *Barenblatt*, 360 U.S. at 166 (Brennan, J., dissenting); *Uphaus*, 360 U.S. at 82 (Brennan, J., dissenting).

14. *Barenblatt*, 360 U.S. at 127-129.

Barenblatt dissent¹⁵ to which Justice Brennan appended a one paragraph supplement.¹⁶ In that one paragraph, however, he stated a principle to which he would often return: "An investigation in which the processes of law-making and law-evaluating are submerged entirely in exposure of individual behavior — in adjudication, of a sort, through the exposure process — is outside the constitutional pale of congressional inquiry."¹⁷

The *Barenblatt* decision marked the beginning of Justice Brennan's skepticism of governmental intrusion into privacy and individuality. His skepticism was based on an ingrained distrust of governmental motivations and the deleterious impact such motivating factors had on the fabric of the first amendment.

In *Uphaus*, the same majority from *Barenblatt* upheld a New Hampshire statute authorizing state investigations of subversive activities.¹⁸ The petitioner, who had been convicted of civil contempt, challenged the statute on the grounds that federal law superseded it. The case had broad implications: the Court's finding that federal law did not supersede the state statute was a green light for similar activities by other states.

Justice Brennan wrote a dissent which was a mini-treatise on the balancing test he believed had to be applied between a government's duty to protect its citizens and the inherent and inescapable limitations on the exercise of that duty as defined and applied by rights-protective courts. Justice Brennan's dissent was free of both rhetoric and jargon. It illustrated his clear familiarity with the record and its logical dissection, the cogent use of past cases, the erudite exposition of principles, and — of great importance — an appreciation of the need to analyze and predict results, both doctrinal and pragmatic.¹⁹

Cold War battles over the extent of first amendment insulation from zealous government investigators evoked an increasing number of dissents from Justice Brennan. In *Communist Party of U.S. v. Sub. Act. Cong. Bd.*,²⁰ the Court, with Justice Frankfurter writing for the majority, upheld registration requirements

15. *Id.* at 134 (Black, J., dissenting).

16. *Id.* at 166 (Brennan, J., dissenting).

17. *Id.* at 166.

18. *Uphaus*, 360 U.S. at 81.

19. *Id.* at 81-82.

20. *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961).

promulgated by the government and directly applicable to the petitioner.²¹ The Communist Party of the United States was not a popular group, and in fact, the government's position was that it was not even a political party according to the accepted definition of the term. Justice Brennan's dissent is a craftsmanly amalgam of both substantive and procedural objections to the Court's direction and its disposition of the case.²²

Through the early 1960s, the pattern of Justice Brennan's first amendment dissents continued. Each opinion contributed to the shape of an evolving first amendment faith in which the judiciary was unambiguously cast as the constitutional cowboy riding in to save individuals and groups threatened with government trial by exposure.

In the middle 1960s, however, Justice Brennan's first amendment views began to command majority respect. The process of vindicating essential expressive speech and conduct rights was under way, implicitly contradicting relatively recent Court pronouncements.²³

As the years advanced, Justice Brennan was either in the majority or the author of decisions that restricted government intrusions on individual and group political activity under the rubric of safeguarding internal security. As with his earlier dissents, Justice Brennan's majority opinions invariably recognized the scope of legitimate governmental interest while finding the activity challenged to be overbroad, unsupported by the record, or inherently repugnant to the free exchange of thoughts and views.

Volumes will be written on Justice Brennan's first amendment jurisprudence, but I would like to outline a few other areas in which his perceptive view of the nation's crises contributed to his development of the law of free speech and protected expressive conduct. During the middle 1960s, Justice Brennan began to put his mark on the difficult area of libel law. Traditionally an area governed by state law, the law of libel increasingly impli-

21. *Id.* at 105.

22. *Id.* at 191.

23. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479 (1965). The Court, speaking through Justice Brennan, found that a Louisiana statute that created and authorized state internal security and investigations into subversive activities violated due process. *Id.* at 494.

cated first amendment values. If Justice Brennan had authored no other libel law opinion, his opinion for the Court in *New York Times Co. v. Sullivan*²⁴ would ensure his reputation as a defender of free speech. The *Times* standard of actual malice which emerged from Justice Brennan's opinion²⁵ has been the subject of hundreds of articles and a score of books, to say nothing of subsequent case law treatment. Its continuing bedrock importance is by itself a legacy to the Brennan years.

Justice Brennan has said that he can not name a favorite opinion, but one I especially regard is his dissent in *Hazelwood School Dist. v. Kuhlmeier*.²⁶ The *Hazelwood* Court denied first amendment protection to high school newspapers published by students as part of a curricular program. Justice Brennan's unsparing dissent went beyond doctrinal analysis to indict the Court for the far reaching and illogical harm the decision was capable of producing.²⁷ Justice Brennan stated that, by permitting censorship at the high school level, the Court allowed schools to evade the duty of preparing students to exercise the very freedom implicit in the journalism-free press marketplace.²⁸

During the Vietnam War, the Court considered numerous cases in which first amendment rights were claimed to have been subordinated to military requirements. In *Greer v. Spock*,²⁹ the Court upheld the exclusion of protestors from Fort Dix, New Jersey, a post that was open to the general public. Justice Brennan's dissent virtually accused the majority of disingenuousness in ignoring a trial record that showed that the post was no different from similar facilities that had been found to be public fora.³⁰ Justice Brennan's polite but nonetheless real impatience with poorly reasoned opinions is especially apparent here.

Justice Brennan was one of the most prolific writers of dissenting opinions in cases in which the Court denied petitions for certiorari. Most denials occasioned little judicial comment or criticism, but Justice Brennan was alert to point out what he

24. 376 U.S. 254 (1964).

25. *Id.* at 279-83.

26. 484 U.S. 260 (1988).

27. *Id.* at 277.

28. *Id.*

29. 424 U.S. 828 (1976).

30. *Id.* at 851.

viewed as missed opportunities to examine valid claims of constitutional rights deprivation. For example, in 1985, the Court denied a petition for certiorari in *Rowland v. Mad River Local School Dist.*³¹ As is usual, the summary denial by the Court yielded no clue as to what the case was about, much less the basis for declining review. In a lengthy memorandum dissent, Justice Brennan persuasively argued that the petitioner, a bisexual high school employee, was fired for revealing her sexual orientation.³² She prevailed at the trial level, but the Court of Appeals reversed,³³ finding that her statement about her sexual preference was not a matter of public concern which would implicate first amendment values.³⁴ Justice Brennan noted that the legal issues raised by the Court of Appeals were unsettled.³⁵ He noted that "this case starkly presents issues of individual constitutional rights Petitioner did not lose her job because she disrupted the school environment or failed to perform her job. She was discharged merely because she is bisexual and revealed this fact to acquaintances at her workplace."³⁶ Justice Brennan faulted the Court of Appeals' apparent disregard of clear evidence in the trial record which he thought should have mandated affirmance. He also was prepared to tackle what he viewed as an unresolved and pressing first amendment issue: "This case poses the open question whether nondisruptive speech ever can constitutionally serve as the basis for termination under the First Amendment."³⁷ I doubt that readers familiar with Justice Brennan's views wonder how he would have voted on the other merits eventually had his colleagues in the majority granted certiorari.

I suspect that most attorneys of Justice Brennan's generation are less than happy with the growth of attorney advertising, which has proliferated since the Supreme Court struck down barriers to the practice. Nonetheless, Justice Brennan did not view the first amendment as failing to protect an activity he un-

31. 470 U.S. 1009 (1985).

32. *Id.* at 1018.

33. *Rowland v. Mad River Local School Dist.*, 720 F.2d 444 (6th Cir. 1984).

34. *Id.* at 449.

35. *Rowland*, 470 U.S. at 1011.

36. *Id.*

37. *Id.* at 1013-14.

doubtedly would never have engaged in. In *Shapero v. Kentucky Bar Ass'n*,³⁸ his majority opinion upheld the right of lawyers to solicit business by writing truthful letters to potential clients. The letter that was the subject of the case would have resulted in instant disbarment a generation earlier, and reads much like a subway car advertisement today. Although the letter did not reflect Justice Brennan's personal view of the role and proper demeanor of lawyers, he felt that it deserved first amendment protection. In applying constitutional protection to the petitioner's solicitations, Justice Brennan demonstrated his understanding of the changing nature of the practice of law and his ability to objectively define rights based on long-articulated principles.

I conclude this tribute to Justice Brennan by reflecting on the role he has played in my development as a teacher of constitutional law. Justice Brennan's many opinions in all areas of the law have been my yardstick to measure other jurists' opinions. One of Justice Brennan's dissents, however, taught me much and I wish to highlight the case.

In 1972, while I was in law school, the Court decided the case of *Laird v. Tatum*.³⁹ It was not a case in which I had, have, or ever will have a totally objective viewpoint. The action was based on information that a colleague and I had publicly revealed regarding military intelligence surveillance of civilian political activity and the massive record keeping generated by that operation. I had worked extensively with American Civil Liberties Union's counsel in preparing for the case, and was slated to be a main witness before the hearing on the government's motion for summary judgment.

The district court judge did not permit me, or anyone else, to testify; he dismissed the action.⁴⁰ A divided Court of Appeals reversed and directed that an evidentiary hearing be held.⁴¹ The government appealed to the Supreme Court and under the cloak of determining that the plaintiffs lacked standing, the Court decided the case in favor of the government on the merits.⁴² It was

38. 486 U.S. 466 (1988).

39. 408 U.S. 1 (1972).

40. *Laird v. Tatum*, 444 F.2d 947, 949 (1971).

41. *Id.* at 958-59.

42. *Laird*, 408 U.S. at 10.

a bitter day for me and for many others who believed that we could clearly establish the existence of an ongoing and harmful civilian intelligence operation maintained by the Army if we had the evidentiary hearing we believed was minimally our due.

Adding to our anger and outrage was the fact that the Court's decision was a five - four split with the swing vote coming from the newest member, Justice William Rehnquist.

Justice Douglas wrote a strong and passionate dissent⁴³ which I then thought was just about the finest piece of judicial writing I had ever seen. It invoked history, tradition, and law, and it treated our case as virtually proven, a stand we could hardly take ourselves. Justice Brennan, by contrast, wrote a very short dissent,⁴⁴ two thirds of which was a direct quotation from the Court of Appeals' opinion overturning the trial court.⁴⁵ I was not impressed, and I remember remarking to classmates that Justice Brennan appeared to be a narrow proceduralist while Justice Douglas enunciated clear constitutional principles and a thorough understanding of our case.

Of course, I have discussed *Laird v. Tatum* in every semester of my constitutional law course, naturally with fair disclaimers about my lack of total objectivity. During my first few years of teaching, I recall emphasizing Justice Douglas' dissent while virtually ignoring Justice Brennan's. Then, about a dozen years ago, a student asked me why I was scornful of the Court's treatment on the merits of a case in which no evidence had been presented while being uncritical of Justice Douglas's acceptance of the plaintiffs' claims based on the same unsupported record. This observation led me to reappraise Justice Brennan's contribution. I have no doubt how he would have voted if the case had properly arrived before the Court on a full record. On the evidence, he would have been as outraged at the Army's activities as Justice Douglas had been without the benefit of evidence sifted and examined through the adversary process. I will not say that I was any less fond of Justice Douglas, a magnificent man. I finally saw, however, the wisdom of Justice Brennan's dissent which demonstrated his awareness that the lower courts

43. *Id.* at 16 (Douglas, J., dissenting).

44. *Id.* at 38 (Brennan, J., dissenting).

45. *Id.* at 38-40.

had said all that had to be said and that further comment was unnecessary and unwise.

The legacy of William Brennan will reach future generations of Americans. He was one of the few members of the High Court to whom the much-overused appellation, "great", is a true understatement.