

## *Prologue: Last Surprise*

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**W**ILLIAM 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 fireplace. 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 second-most-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

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.