



Justice Brandeis

Part of the personal tragedy inherent in President Roosevelt's suggestion to rid the Supreme Court of men over 70, part of the uncertainty with which liberals greet his plan, must arise from consideration of Louis Dembitz Brandeis. At 80, Brandeis is the oldest of the nine justices.

Liberals cherish him, conservatives respect him and the administration is grateful to him. Never quite so concerned with legal precedents as Sutherland, never so willing to compromise as Hughes, never so narrow as McReynolds, never so blustering as Butler, Brandeis is the economic intellectual of the High Bench.

The man on the bench most comparable to him in processes of thought is Benjamin Cardozo; in the past, it was the late Justice Oliver Wendell Holmes. But Cardozo is more the pure, detached thinker without Brandeis' leavening traces of emotion. And Holmes was more the cheerful philosopher, living zestfully and with a distaste for the complicated charts and statistics which are the mainstay of Brandeis.

At the core of Brandeis' being is a staunch, implacable hate. It is a hate of "bigness," whether corporational or governmental "bigness."

Before and after he was on the bench, Brandeis devoted his energies to protection of the small man, to prevent his being swallowed up by the ever-growing complexity of modern business. Lately, his eyes have been turned toward "bigness" in government, and there, too, he has not always liked what he has seen. In the NRA and the "Hot Oil" cases, he voted against too much size in government just as, years before, he had voted to restrain giant growths of business.

The same principle applies to his championship of labor and of the rights of working men to organize. His only dissent to that principle is his expression that "we gain nothing by exchanging the tyranny of capital for the tyranny of labor."

Besides a firmly-held belief in freedom of expression and in civil liberties, another Brandeis tenet is that lack of precedent for an action does not necessarily disqualify an attempt

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at such action. In one of his famous dissenting opinions from the majority ruling, in the 1932 Oklahoma ice case when the majority invalidated a law which sought to regulate competition in the ice industry, Brandeis said:

"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation . . . If we would guide by the light of reason, we must let our minds be bold . . ."

His willingness to permit such experimentation has been observed in his dissents, along with Cardozo and Stone, to the majority decisions which threw out the AAA, the first Guffey Coal act, the railway retirement law and the Municipal bankruptcy law. In the TVA and gold clause cases, both permitting new powers to the Federal government, he voted with the majority to sustain the laws.

In the years before Brandeis was born, in the flight of his parents, Adolph and Fredericka Brandeis, from Bohemia, the story of the oldest Supreme Court Justice begins. As a son of Jewish exiles, he learned quickly that life could be harder for some people than for others. But the direction he was to take was not made apparent until much later.

Born in Louisville, Ky., Nov. 13, 1856, the boy grew up in comfortable circumstances while his father prospered as a merchant. Schooling was confined to Louisville until he was sent to the University of Dresden in Germany. The panic following the financial collapse of 1873 took the fortune of Adolph Brandeis. The youth returned to this country and he worked his way through Harvard University to finish his studies.

With a law degree and a free hand, he reflected on the possibilities offered by a growing country. He selected St. Louis but soon changed his mind, and with a classmate, Sam Warren, he moved to Boston.

In Boston, Brandeis made money but he also made enemies. At first, as a corporation lawyer, the fees were fat and Brandeis was regarded approvingly by the big business interests. But, once, he was asked by a now-forgotten employer to handle a wage dispute. Brandeis, in studying the background of the case, became interested in labor unions and began to favor them.

Then, to the growing horror and discomfort of the Boston corporations, disturbed not because of Brandeis' altruistic motives but because of the point of view with which he came to be associated, he began taking numerous labor cases without fees. His philosophy of anti-bigness was anything but theirs. So great became the number of free cases he handled that he is reported to have paid his own firm of Brandeis, Nutter and Dunbar \$25,000 so that his partners would not suffer from the stoppage of income formerly supplied by him.

More and more, he came to be known as an attorney "for the people." In 1896, he forced a 20-year franchise

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on Boston traction interests who had sought to tie up their hold on the Hub subways with a 50-year lease. In 1897, he represented consumers groups at Washington tariff hearings. Back in Boston again, he fought "for the people" against the financiers pressing for control of the New Haven railroad.

On Jan. 28, 1916, President Wilson sent to the Senate the name of Brandeis to succeed Justice Lamar who had died. The corporation enemies Brandeis had made did not forget. So vicious and bitter was the outcry from conservatives that the European war was almost lost to sight as the newspapers devoted columns to the domestic row over the appointment.

On Feb. 9 of that year, the Senate Judiciary committee opened hearings. Not until June 1, after some 1,600 pages of testimony had been taken, did the Senate confirm the appointment. Opposition to Brandeis ranged from charges that he was a dangerous "radical" to broad hints that he had no place on the High Bench where no Jew had ever sat. Six ex-presidents of the American Bar Association, including William Howard Taft, denounced the selection.

After three months of this bombardment of vilification, Chairman Culbertson of the committee addressed an appeal to Woodrow Wilson. Why, asked Culbertson, had the President appointed Brandeis?

Wilson's answer was on the tip of his tongue. The same day that he received the request he shot the answer back. It said in part: "I cannot speak too highly of his impartial, impersonal, orderly and constructive mind, his rare analytical powers, his deep human sympathy, his profound acquaintance with the historical roots of our institutions and insight into their spirits . . ."

Within less than four weeks after the reading of the Wilson letter, Brandeis was confirmed. Wilson, from the liberal view of him as an unfortunate idealist, had achieved something adding luster to his idealism. Mr. Wilson's unfortunate aspects, these liberals thought, had been sufficiently illuminated by his earlier appointment of McReynolds.

In the often mentioned Carroll case (PATHFINDER, Presenting, March 27), Brandeis crossed the liberals by concurring with the majority that an automobile could be searched for liquor without a search warrant, but dissented in the Olmstead case in which the majority maintained that it was legal for a prohibition agent to gain evidence through telephone wiretapping. In a sense, however, Brandeis remained true to form. In each case, he was on the opposite side of the fence from McReynolds.

Veteran court spectators like to hear Brandeis deliver decisions. He is lucid, patient, and has a mastery of words which depends for effect on simplicity and not on torturous legal language. He makes his points slowly and frequently he leans forward to give a broad sweep of his arms for emphasis.

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In action, he is a thorough but friendly cross-examiner. In repose, he is a tranquil, even-spirited man but his repose is not relaxation. He rarely goes to bed later than 9 p. m. He never starts his working day later than 5 a. m.

His face and demeanor have been compared to Lincoln's. With high cheekbones, wiry, white hair and a lined, thoughtful face, the Lincoln resemblance is an apt one. Like Lincoln, he has a brooding, melancholy humor. Lean and slightly bent, he is impressive not for bulk but for what might be described as an emanation of thought.

Like others, like Holmes, he realizes the hope of the future is in youth. For this reason, he is gentle with the nervous yearlings who plead for the first time before the highest tribunal. For this reason, he breaks in a new, young secretary each year although he merely says that "it keeps me from getting lazy." For this reason, at Sunday afternoon teas, when he entertains young liberals, he often gives the advice which he has followed. It is: "Live austere."

He was married in 1891 to Alice Goldmark of New York City and has two married daughters. His wife, like himself, was a child of German Jewish exiles. This bond between them has been a bond he has extended to all Jews and beyond them, to a broader field, displaying a vast sympathy for all humanity. It is a sympathy that has been expressed in his belief that facts and figures on health and hours of work are more important than legal considerations.

A story is told which should be true if only because it is such a pleasant story. It relates that on a rainy night in Washington, a lean man collided with a portly gentleman. Both muttered hasty apologies. Then the stout gentleman stopped short and said, "Oh, Mr. Brandeis." The thin man replied, "Yes, Mr. Taft." The stout man, who had been President of the United States and opposed to Brandeis' appointment to the Supreme Court, held out his hand and said: "Once, some time ago, I did you a great injustice. I am sorry." Brandeis smiled and shook hands.

Mr. Taft was not the only one who came around to admiration for the man who spent most of his career as a lawyer battling "for the people" and who continued on the same path after his appointment to the Supreme Court. Bankers, industrialists, conservative newspapers may have disagreed with his findings but many times since 1916 they have praised his integrity and keen mind.

To the liberals he is still a tower of strength. That is why the administration turns its head away from the thin man who sits two seats away from the right hand of Chief Justice Hughes. Proponents of the President's Court plan can only say that if Brandeis must go, it is for the greater good. To build its edifice, the administration must topple this tower along with the ones the President sees as

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viewing events through “old glasses, fitted as it were for the needs of another generation.”

The most faithful followers of the President would be the last to say this applies to 80-year-old Justice Brandeis.