

Justice Brennan's Supporting Role

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JUSTICE BRENNAN'S SUPPORTING ROLE

HONORABLE RAYMOND C. FISHER*

First of all, this conference is quite timely, even though it is 30 years after *Terry*.¹ In my more recent incarnation, before I became a member of the Justice Department, I was serving as President of the Los Angeles Police Commission, which has jurisdiction over the Los Angeles Police Department. I was being briefed as a Commissioner by the head of the anti-terrorist division, which, as its name implies, engages in domestic surveillance of alleged terrorist groups. It has been a very controversial division in Los Angeles. It had been accused of spying against political figures and the like, and its ability to engage in undercover operations and the like had been litigated and constrained by a consent decree. The consent decree had expired and we, as Commissioners, were being asked to liberalize the conditions under which the LAPD could send in undercover officers or engage in wire taps or the like. Not having done any criminal law since I left the Court, I was wondering, what are the restraints in criminal procedure these days on engaging in this kind of activity? I was told by the City Attorney, "Oh, don't worry. You can do this under reasonable suspicion. That's *Terry v. Ohio*."² That was a bit of a flashback. As Earl said, I didn't remember "reasonable suspicion" as the standard that came out of that case, but I had not looked at it recently.³ My actual reaction, though, was surprise: "Is *Terry v. Ohio* still the law?!"

Interestingly enough, there's another side of the equation that's still being litigated quite aggressively in Los Angeles and relates to the issues we're talking about today. There is a con-

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¹ *Terry v. Ohio*, 392 U.S. 1 (1968).

² In fact, the precise holding of *Terry* was somewhat more narrow than the City Attorney urged. See *id.* at 30.

³ See Earl C. Dudley, Jr., *Terry v. Ohio, The Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891 (1998).

roversial special investigative unit in Los Angeles, which consists of a highly trained group of officers who are charged with the surveillance and arrest of allegedly heavily armed bank robbers and criminals. There's a civil rights lawsuit pending in federal court where there is a serious issue of whether the squad is violating the civil rights of the bad guys by waiting for the crime to happen before the squad intervenes. Often, the crime happens and as the bad guys leave the scene, usually a bank or a business establishment, the squad then engages in fairly aggressive arrest techniques. The argument that is being made by the plaintiffs is that the police officers should be able to intervene much earlier in the process. That is, they ought to be able to, either under a doctrine of probable cause or even reasonable suspicion, intervene and stop these events before they happen. The police officers are arguing that if they do so, they will not get convictions, and the cases will be tossed for lack of probable cause. So, it is a very live and heavily debated issue. I find it somewhat ironic that 30 years after I had a modest role in the *Terry v. Ohio* discussion of probable cause and reasonable suspicion, when I was only one-and-a-half years out of law school with absolutely no knowledge of what really went on in the streets, I was confronting these same issues 30 years later with a lot of real-world experience to inform my judgments. And that leads me to talk a little bit about process.

What you've heard today, and certainly what I've heard today, from the lawyers who actually tried the facts of the case and saw the participants, is a much fuller discussion of what happened in *Terry v. Ohio*, in the actual event and in the litigation of the case. By the time a case gets to the Supreme Court and falls into the hands of the Justices and the law clerks, it gets very abstracted; not away from the facts entirely, because as you'll see from the opinion, there's a very careful recitation of the facts.⁴ But at least in the cases I had the opportunity to work on, you wind up dealing with a record that is a cold record. You're reading the transcript and you do not get the nuances. You never see the people, the real people involved, and you only get a sense of what the facts were generally about. And as a law clerk, it often bothered me that we were trying to deal with making law based on what was a very abstract record.

⁴ See *Terry*, 392 U.S. at 4-7.

Now that is the nature of the appellate process, understandably, but when one practices and goes out and tries cases, one realizes how much the facts matter and as Judge Juviler was saying, how much juries can be influenced by what the nuances are and by what goes on in the real world. So there is that disconnect.⁵ As Earl was saying, the Justices in *Terry v. Ohio* were attempting to deal with major, major principles of law, namely, the evolution of search and seizure and the exclusionary rule, based on a record that was presented to them through argument, through the transcripts, and the like, but which was fairly abstracted.⁶ And the Justices were, as they did throughout the Term in a number of different kinds of cases, trying to articulate principles based on what they believed the real world was all about. That is a very human process and can frequently be flawed. Not necessarily in a bad way, but certainly as to certain aspects of decisions which those of us who later have to go out and practice under, these standards may cause us to wonder, what the heck were they thinking about? Where are they getting their information?

The law clerks in the Supreme Court play an important role. The law clerks in chambers follow different procedures according to their Justices. Justices have their own way of doing things, but the law clerks, nonetheless, are the ones who contribute a tremendous amount of research and do a lot of drafting of preliminary opinions. The Justices then, of course, do what they individually care to do in terms of turning out their own product.

In regard to *Terry*, the notes of the conference that John just read are not notes I was aware of. I do not know if Earl was aware of all those debates. I certainly was not. Both of us had a role in putting some words down on paper to carry out the general directions of what we were told by our respective Justices, but basically we were writing as research assistants, and again, working with the materials that were given to us, which were not as complete or as nuanced as we're hearing this morning. I say that because one parses opinions and looks for meaning in the words and in the phrases, and in the debate between concurring, dissenting, and majority opinions, to find some window into the dynamics of what goes on within the Court.

⁵ See Honorable Michael R. Juviler, *A Prosecutor's Perspective*, 72 ST. JOHN'S L. REV. 741 (1998).

⁶ See Dudley, *supra* note 3.

When I was there, Justice Brennan was in his heyday. Justice Brennan and Chief Justice Warren were the closest of friends and the closest of colleagues. Justice Brennan played a very powerful role on the Court. He was someone who was extremely collegial, both in his personal dealings and in his professional dealings. He made it a point simply to embrace all members of the Court, and he, as part of his development of the jurisprudence of the Warren Court era, played an enormous role which has been recognized many times over in many forums, and I will not belabor the point. But this case, *Terry v. Ohio*, was a classic example of how Justice Brennan worked. As Earl said, there was a draft opinion circulated by the Chief Justice. Justice Harlan had weighed in with a different viewpoint, a different approach, and I was not much paying attention to it. It was not my job as a law clerk to pay much attention to opinions I was not working on, so I have a very, very sketchy knowledge of what was going on during the time when, as Earl indicates, the draft opinions were sitting out there. All I remember is that one day Justice Brennan popped into our chambers and said, "Here's an approach that I think we can try that may move this along." He had talked to the Chief Justice, apparently. I do not know who else he had talked to, whether he had talked to Justice Douglas, whether he talked to Justice Harlan, or to any of the other swing votes or swing opinions within the Court, but in any event, what he asked for was a draft of an approach which he then forwarded on to the Chief Justice. And that is typically how Justice Brennan would work. He would be very concerned about how doctrine was being developed by the Court through the various opinions, and even if he was not the author of the opinion, he was quite willing to work with other Justices who did have the opinion writing assignment. He would work with those Justices in terms of providing drafts of memos or whatever could help those Justices break through any log jams.

Justice Brennan was quite adroit at going around and personalizing his approach with the other Justices to find out what was bothering them, and to try to arrive at some principled consensus. An example that I can cite that he, himself, has made public was in the school desegregation cases, the freedom of choice cases that also came up in that Term. Justice Brennan was determined that those opinions, which were the implemen-

tation of *Brown v. Board of Education*,⁷ had to be unanimous. This was the follow-up to the implementation of *Brown*, making sure that de jure segregation in the schools, particularly in the South, was removed.⁸ But it was not going fast enough, and freedom of choice was viewed as a way of simply delaying and deferring the process. Justice Brennan felt it was important politically, and for all the reasons that Earl has pointed out in terms of the context that was existing in 1967, that those opinions be unanimous. So he worked with every member of that Court to deal with reservations individual Justices had to the opinions he was circulating in draft, and at the end of the day those opinions were unanimous.⁹ But they were only unanimous because Justice Brennan worked the chambers of the Supreme Court to arrive at a principled decision, one that accommodated the conflicting views of different Justices, including some of his strongest allies like Justice Douglas and Justice Black.

So, it is an interesting process how the Supreme Court goes about its business. Whole political science courses are taught about it. Some of them are right on and some of them are a little off the mark, because until you've been there, it is hard to understand all of it. I do not mean to be patronizing about that. I have no idea, to be honest, how the Justices and their clerks work in the current Court, but in 1967 it was a Court that was, even with its philosophical divisions, a very collegial Court. There was a great effort to arrive at principled decisions in an era when it was clear that the Supreme Court was making profound changes in the criminal law context. The whole incorporation of the Bill of Rights through the Fourteenth Amendment was in

⁷ 347 U.S. 483 (1954) (hereinafter *Brown I*).

⁸ See *Brown v. Board of Educ.*, 349 U.S. 294, 300-01 (1955) (promulgating factors that lower courts should consider in implementing *Brown I*); see also *Goss v. Board of Educ.*, 373 U.S. 683, 689 (1963) (holding that a Tennessee free transfer public school desegregation plan was insufficient under *Brown I*); *Bush v. Orleans Parish Sch. Bd.*, 364 U.S. 500, 501 (1960) (per curiam) (refusing to stay an injunction compelling the state to comply with the Court's desegregation decisions); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (asserting that the Court's school desegregation decisions were binding on the state government of Arkansas).

⁹ See *Green v. County Sch. Bd.* 391 U.S. 430, 441-42 (1968) (holding that a Virginia desegregation plan was insufficient under *Brown I* and the Court's other school desegregation decisions); *Monroe v. Board of Comm'rs*, 391 U.S. 450, 458-59 (1968) (holding that a Tennessee desegregation plan which essentially allowed two junior high schools to remain segregated did not meet the Court's standards as set forth in *Brown I*).

full swing.¹⁰ It was a very exciting time to be there. It is, I think, a testament to the way those opinions were put together that 30 years later, as my City Attorney in Los Angeles told me, *Terry v. Ohio* is still the law.

Thank you for letting me share this time.

¹⁰ See, e.g., *Street v. New York*, 394 U.S. 576, 593-94 (1969) (holding that a defendant's conviction under a New York statute for desecrating an American flag in public could not be permitted to stand under the Fourteenth Amendment); *Sibron v. New York*, 392 U.S. 40, 63-66 (1968) (applying the *Terry* standard to a New York "stop and frisk" law); *Cooper v. California*, 386 U.S. 58, 61-62 (1967) (holding that a warrantless search of an impounded vehicle was reasonable under the circumstances, where the vehicle was used as "evidence in a forfeiture proceeding").