THE BRENNAN LECTURE

A BIT OF HISTORY

Judith S. Kaye

THIS BEING THE twentieth anniversary of NYU Law School's Brennan Lecture – with the coincidence of the first (March 31, 1995) and the twentieth (March 11, 2014) delivered by the Chief Judge of the State of New York – I write to add a bit of the history of that first lecture. And by the way, 1995 is also the year of the launch of the fabulous Brennan Center for Justice at New York University School of Law. There is a lot to celebrate as the year unfolds.

A proud graduate of the NYU Law School, after my service as a judge of New York State's high court began on September 12, 1983, I found especially vexing that my alma mater had the esteemed annual Madison Lecture focused on federal courts and federal law, but no comparable state law program, and I gently began tormenting then-Dean John Sexton about the gap. As I learned firsthand as a judge, gaps like that have significance in many ways, particularly with respect to state constitutions. Generally, law students learn that every state has its own constitution, but not much about them.

EARLY LESSONS

Significantly, while state courts are empowered, under their own charters, to raise the constitutional ceiling of rights above the Supreme Court-defined federal constitutional floor, those differ-

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ences must be raised and explicated if they are to be given effect by courts. Indeed, it was Justice Brennan himself who had, in 1977, issued a wake-up call to state courts to dust off their constitutions, and the movement quickly gained steam. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harvard Law Review 489 (1977). In early 1984, the National Center for State Courts sponsored a terrific program on state constitutions, which I had the good fortune to attend in Williamsburg, Virginia.

But I got my own direct lesson in my first year as a Judge of the Court of Appeals, in *People v. Class*, 63 N.Y.2d 491 (1984), where the Court – in a split decision – reversed a criminal conviction for violation of search and seizure protections. Fresh from the Williamsburg conference, in my writing for the majority, the Court cited both the Fourth Amendment to the United State Constitution and the identically worded Article 1, § 12 of the New York State Constitution.

The Supreme Court of the United States, in a decision written by Justice Sandra Day O'Connor, reversed and remanded "for further proceedings not inconsistent with this opinion." *New York v. Class*, 475 U.S. 106 (1986). Back in Chambers, I was teased that the "Grandmother of Justice" had just reversed the "Mother of Justice" (as a prisoner had referred to me in correspondence).

Fortunately for me, in these early days of the reinvigoration of state constitutional law, our Court escaped the barbs of Justice Stevens in his *Massachusetts v. Upton* concurrence, chiding the Supreme Judicial Court of Massachusetts for explicitly reserving the state constitutional issue, thus unnecessarily increasing its own burdens as well as those of the Supreme Court (466 U.S. 727, 735 (1984)). OUCH! I got the point.

Happily for me, on remand in *Class* the New York Court of Appeals unanimously stood by our reversal of the conviction, this time solely on state grounds. We noted that, although the Supreme Court in *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1981), held that state constitutional law decisions must rest on "an independent and adequate state ground" supported by a "plain statement," we could not disregard the fact that we had earlier concluded that our state constitution had been violated and should not reach a different result

"unless respondent demonstrates that there are extraordinary or compelling circumstances." 67 N.Y.2d 431 (1986). After *Michigan v. Long* and *Massachusetts v. Upton*, we were more careful in requiring of counsel, and ourselves, explicating reasons for a higher constitutional ceiling under our State Constitution.

Plainly, at the time, too little of the attention of the Bar was given to state constitutional law issues, resulting in a failure properly to present worthy state constitutional law issues. Unpreserved, state constitutional law issues are generally judicially unrecognizable.

Revisiting these events of the 1980s reminds me that the twentieth Brennan lecturer, my successor Chief Judge Jonathan Lippman, in 2009, authored *People v. Weaver*, 12 N.Y.3d 433, holding unconstitutional the surreptitious placement of a GPS tracking device on defendant's car, and then monitoring the car's location. Acknowledging that the issue remained open as a matter of federal constitutional law, the Court settled the issue under Article 1, § 12 of the State Constitution, noting the many occasions when the Court has interpreted our "own Constitution to provide greater protections when circumstances warrant and have developed an independent body of state law in the area of search and seizure." *Id.* at 7. Chief Judge Lippman then went on to make a persuasive case for independently concluding that the warrantless use of a tracking device is inconsistent with Article 1, § 12, whatever the Supreme Court might hold under the very same words of the Fourth Amendment. And indeed, in *United States v. Jones*, 132 S. Ct. 945 (2012), the Supreme Court later concluded that the warrantless placement of a GPS tracking device on defendant's Jeep, and monitoring over a four-week period, violated the Fourth Amendment. In her concurrence urging a broader interpretation of the Fourth Amendment than trespassory intrusions on property, Justice Sotomayor could not have better supported her argument than actually to quote from Judge Lippman's writing in *Weaver* (132 S. Ct. at 955).

The First Brennan Lecture

My reward for gently tormenting Dean Sexton about the need for programs focused on state law was the privilege of delivering

New York University
School of Law

New York University School of Law
in cooperation with
The Institute of
Judicial Administration
announces the celebration of the

Justice William J. Brennan, Jr.
Lecture Series on
State Courts and Social Justice

March 31–April 1, 1995

the very first Brennan Lecture, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 NYU Law Review 1 (1995).

I write to highlight several forever memorable parts of that glorious event. Fortunately, I have kept all the documents and photographs.

The invitation to that extraordinary two-day inaugural event was extended to a large audience, including state court Chief Justices throughout the country. Thirty-five state high court judges actually

attended. Our Law School's invitation also went out to the Supreme Court Judges of the State of New York, the assumption likely being that it was "my court." New York is one of three U.S. jurisdictions where the top appellate court is NOT called the Supreme Court – it's called the Court of Appeals (Maryland and the District of Columbia are the other two). In New York, the Supreme Court (Trial and Appellate Division) is the general-jurisdiction entry-level court, with hundreds of judges.

The response was huge. Indeed, on March 31, 1995, the Brennan Lecture audience filled the Tishman Auditorium. As photos of the evening show, Supreme Court colleagues (Trial and Appellate Division) from around the State were delighted to accept the Law School's invitation. I have photos, for example, with Judges Samuel Green and Betty Pine from Buffalo, and Judges Anthony Cardona, Howard Levine, and Karen Peters from the Albany area.

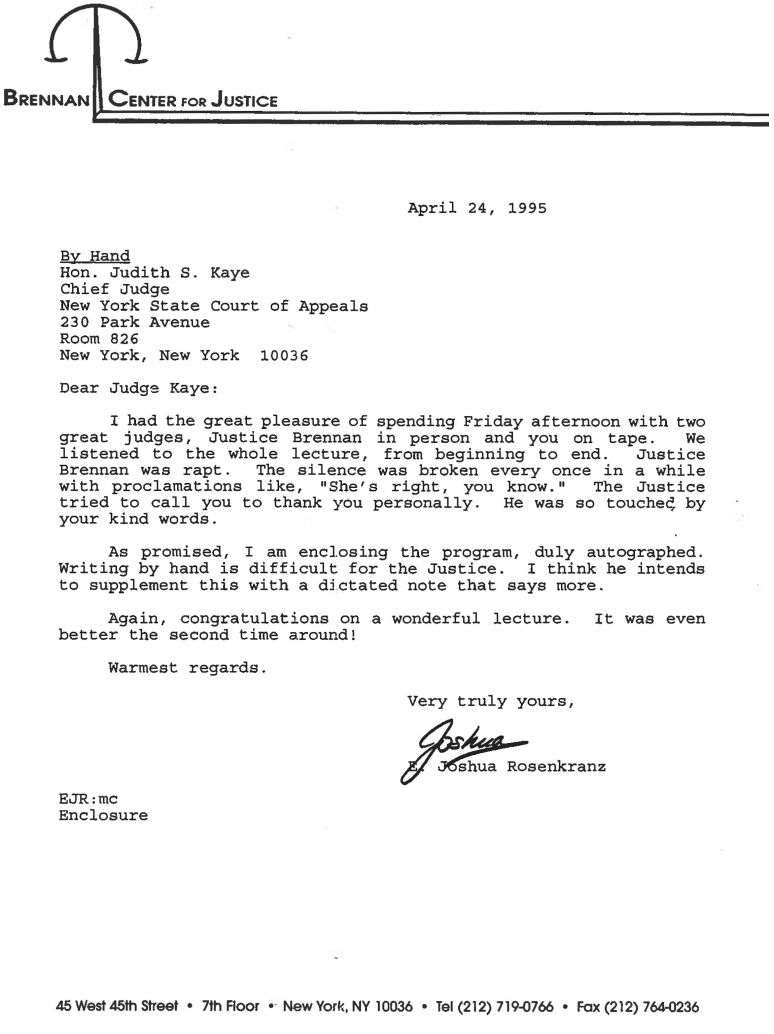
Perhaps most interesting of all was my name badge. Once the "Court of Appeals," not "the Supreme Court," was identified as the correct name for our state top court, here's how my badge read:

Hon. Judith S. Kaye, '62
Chief Judge
United States Court of Appeals
New York

I still have it! Yes, we definitely needed a state court initiative.

The event itself was great, with two special peaks. First, in 1995 the Brennan Lecture was a two-day event called the "Justice William J. Brennan, Jr. Lecture Series on State Courts and Social Justice." The lecture on Friday was followed by a Saturday symposium on "Social Justice and Statutory Interpretation," surely a key issue to this very day: what role, if any, should considerations of social justice play in the reading of statutes? An informal lunch at D'Agostino Hall followed a sparkling Saturday program, which included remarks from Justice Brennan himself, on videotape!

At the mountaintop of memorabilia were two letters I received from E. Joshua Rosenkranz, then of the Brennan Center for Justice. The letter of April 24, 1995, reads as follows:



BRENNAN CENTER FOR JUSTICE

April 24, 1995

By Hand
Hon. Judith S. Kaye
Chief Judge
New York State Court of Appeals
230 Park Avenue
Room 826
New York, New York 10036

Dear Judge Kaye:

I had the great pleasure of spending Friday afternoon with two great judges, Justice Brennan in person and you on tape. We listened to the whole lecture, from beginning to end. Justice Brennan was rapt. The silence was broken every once in a while with proclamations like, "She's right, you know." The Justice tried to call you to thank you personally. He was so touched by your kind words.

As promised, I am enclosing the program, duly autographed. Writing by hand is difficult for the Justice. I think he intends to supplement this with a dictated note that says more.

Again, congratulations on a wonderful lecture. It was even better the second time around!

Warmest regards.

Very truly yours,

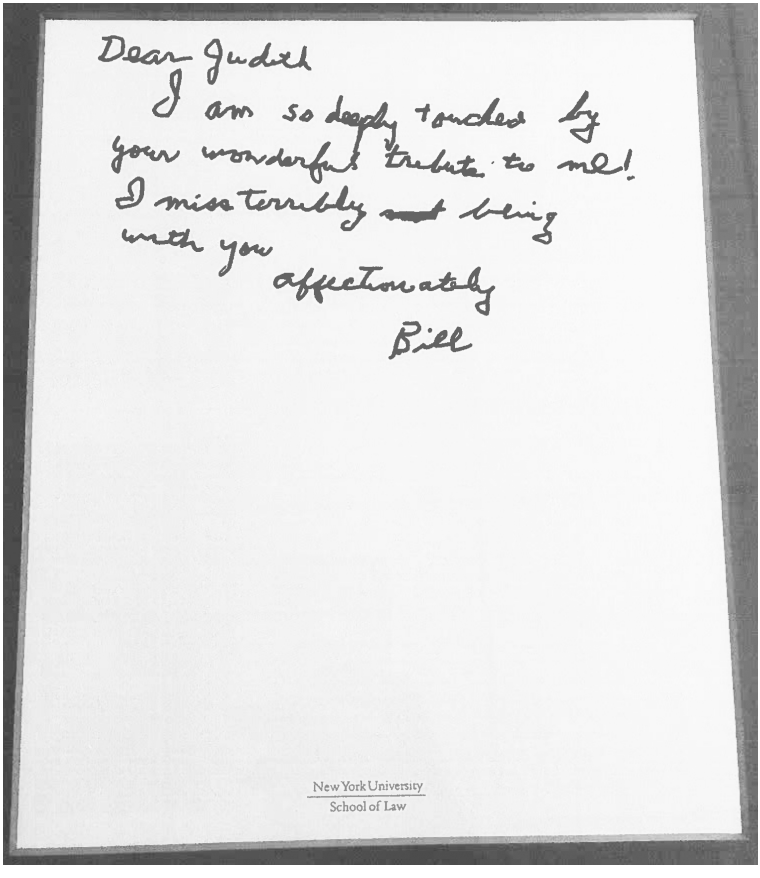
E. Joshua Rosenkranz

EJR:mc
Enclosure

45 West 45th Street • 7th Floor • New York, NY 10036 • Tel (212) 719-0766 • Fax (212) 764-0236

The enclosure, in Justice Brennan's handwriting, reads:

> "Dear Judith,
>
> "I am so deeply touched by your wonderful tribute to me! I miss terribly ~~not~~ being with you.
>
> Affectionately
> Bill"


Dear Judith
I am so deeply touched by
your wonderful tribute to me!
I miss terribly ~~not~~ being
with you
affectionately
Bill
New York University
School of Law

Among life's continuing perplexities for me is the question whether Justice Brennan correctly crossed out the word "not" in his handwritten message to me. "I miss terribly being with you," or "I miss terribly not being with you" – which is correct? Both were certainly true of how I felt about him.

I treasure the Brennan Lecture, and am thrilled that it continues so vibrantly and vigorously to this day. Congratulations to Chief Judge Lippman, to the Institute of Judicial Administration, to the Brennan Center for Justice, and to the NYU Law School.

GJB