8-1-1974

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JOHN LORD O'BRIAN

Manly Fleischmann*

Of course, the law is not the place for the artist or the poet. The law is the calling of thinkers. But to those who believe with me that not the least godlike of man's activities is the large survey of causes, that to know is not less than to feel, I say—and I say no longer with any doubt—that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere his thought may find its unity in an infinite perspective. . . .

John Lord O'Brian was not yet 12 years old when Justice Holmes thus described the opportunities and challenges of the profession of the law. It is therefore tempting but improbable to assume that Holmes had Mr. O'Brien's future career in mind when he spoke. It does seem likely that Holmes had specifically in mind a few lawyers whose professional and intellectual qualities he recognized as meriting these moving words. Those of us who were privileged to be admitted to the friendship of John Lord O'Brian, or who shared a professional or public responsibility with him in the 98 years of his extraordinary and rewarding life, will have no doubt that he was the living embodiment—indeed the very exemplar—of Holmes' thought and, in fact the proof positive of the truth of his theorem.

One other but related proposition may be advanced with some assurance, namely that the great Justice would himself have shared this estimate of Mr. O'Brien, since in later days they enjoyed a warm friendship, separated inevitably to some degree by the Bench between them, but united in their devotion to the concept of the law as an instrument of social justice, to the joys of the unfettered exercise of the human intellect, and above all to their beloved United States and its institutions.

Others have recorded in this appreciation the details of Mr. O'Brien's distinguished life and career, encompassing nearly a century of achievement and eminence in such varied fields as law, education, public service, politics, religion, philanthropy and legal philosophy. I shall confine my contribution to a few personal observations of this unique man based upon many years of a happy friendship and a close association in causes we both deeply believed in.

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* Member, New York Bar. A.B., Harvard University, 1929; LL.B., University of Buffalo, 1933.

Whitney North Seymour in opening his account of an even longer friendship and association with Mr. O'Brien justly observes: "When John Lord O'Brian died on April 10, 1973 at 98, he had been the acknowledged dean of the American Bar for many years."

To younger lawyers Mr. O'Brien must have seemed for many years a remote and somewhat legendary figure, known to them primarily for the frequency with which successive Chief Justices of the Supreme Court of the United States paid tribute to his distinguished career as an advocate before the highest tribunal in scores of cases extending over a period of at least half a century.

Indeed Mr. O'Brien did reach the very highest rank of advocacy at an early age, a distinction which he was never to lose and probably prized more than any other of the many honors that came to him throughout his life. The writer believes that Mr. O'Brien had only one unfulfilled ambition in his career—he would have enjoyed the post of Solicitor General of the United States more than any other (and how he would have ornamented it), but that was never offered him. Surely he would have agreed with the proposal recently advanced by Chief Justice Burger calling for a separate qualification for American trial lawyers similar to the training of English barristers.

It should be remembered, however, that Mr. O'Brien's preeminence as an advocate was a natural development of his earlier years as a practitioner in all of the courts of New York State, particularly in his native Buffalo, and in federal courts across the land. He is rightly known as the most distinguished graduate of the University of Buffalo Law School; the great building on the new campus which bears his name and the papers in this Review prepared by his friends are fitting memorials to a part of his life and career which remained precious memories to him until the very end.

What were the qualities that brought him to the very front rank of American advocates? I discern at least three in particular.

First, and most importantly, I think was his profound devotion to the Anglo-Saxon and American system of administering justice in the courts by means of adversary proceedings. Somewhat as a bird flies in the air or a fish swims in the sea, so Mr. O'Brien found his greatest fulfillment in the courts of law. At the apex of Mr. O'Brien's most deeply held convictions was what must be described as a reverence for the Supreme Court of the United States, not as a changing group of distinguished lawyers but as an institution. This attitude, expressed on countless occasions in his public and private careers, made it inevitable that he would react in outrage to President Roosevelt's "court-packing plan" and this he did.

2. See p. 17 supra.
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Mr. O'Brien's devotion to the courts of first instance and the intermediate appellate courts differed not in kind but only in degree from his appreciation of the highest tribunal. So, each time he climbed the courthouse steps he was in truth entering his chosen and favorite milieu. Small wonder that few lawyers of our time could match the ease of his presentation, the force of his persuasion or, it should be added, the extraordinary measure of success he attained in litigated matters of the highest import. To quote a recently popular song, Mr. O'Brien was simply "doing what comes naturally."

Second, I should put Mr. O'Brien's matchless powers of legal and factual analysis and his great skill in the organization of a litigated case or an argument on appeal. This combination can accurately be called a genius for preparation, and Mr. O'Brien possessed it to the full. Anticipation of questions from the bench was one of his fortes and he was seldom nonplussed during this customary and sometimes trying exercise in the courtroom. The facility of his presentation to the court became a natural end product of his native eloquence combined with months of the most diligent analysis and study which left him informed on every aspect of the matter to be litigated.

Finally on this subject, I must say something of the tip of the iceberg—Mr. O'Brien's actual courtroom performances, which delighted generations of judges, lawyers and perceptive observers in all walks of life. If I had to choose a single word to characterize his stellar style before judges or jury, the word would be "lucid." While he never appeared in court without a comprehensive grasp of the relevant legal precedents, I observed that his emphasis was primarily on the facts and the inherent justice of his cause. It was once said of Erwin Griswold's arguments before the Supreme Court in tax appeals that "when Griswold finishes stating the facts, the case is over." This too was the method of which Mr. O'Brien was a master. I once heard him argue before the Supreme Court for the respondent in an antitrust case. His opponent, famous for his self-appointed title as "the trustbuster," had opened the case with a rambling, confused, perjorative and noisy discourse. When Mr. O'Brien's turn came, he opened his argument in his customary quiet manner as follows: "May it please the Court, perhaps it would be useful to your Honors if I should first attempt to explain what this case is all about." To which the urbane Chief Justice (Vinson) replied: "Mr. O'Brien, I believe it would be most helpful."

There followed a comparatively brief, tightly organized and incomparable lucid description in Mr. O'Brien's matchless prose of the facts giving rise to the litigation, the proceedings below and a few applicable precedents; implicit in everything he said was his conviction of the justice of the cause presented. When Mr. O'Brien sat down, the case was indeed over.

The Public Man

The fame of an advocate is ephemeral. Only a handful of law students
could name more than a few of the great advocates of American and English legal history. So it will doubtless be with Mr. O'Brian's fame in this, his chosen field.

Fortunately, however, he was indeed, as the Washington Post put it, "a man for all seasons"; his accomplishments in fields other than advocacy were of equal brilliance and, I think, of considerably more lasting importance to the theory and practice of law which he conceived to be the pervasive and indispensable adhesive in the American form of government. Here again, I shall confine myself to areas in which I was privileged to work with him closely, since others have adequately portrayed the extraordinary diversity and accomplishments of his constantly recurring periods of public service.

First, let me point out the unique contribution made by this one man to the tradition of public service by the bar. Beyond most men he considered himself beholden to his nation, and that debt was repaid many-fold in his lifetime. Obviously, he found the practice of private law interesting but not fully satisfying to a man of his restless intellectual and idealistic concerns. Thus, all through his career, sometimes to the despair of his partners, he would hear the far-off trumpet, leave his profitable practice and emerge as a legislator, political candidate, constitution maker, United States Attorney, head of major divisions in the Department of Justice and finally as the central legal and policy figure in the organization and control of America's vast mobilization effort in World War II. Always, though, he would return to his first love where in fact he concluded his career as the senior partner of one of the great law firms in this country. Few lawyers, it must be admitted, have the talent to move easily back and forth between two such disparate worlds, but he had it and used it; by his example an untold number of the finest legal minds of his time were inspired to attempt similar contributions to the national good.

Mr. O'Brien became General Counsel of the Office of Production Management (later the War Production Board) in the early spring of 1941 at the request of senior members of the Cabinet and with the enthusiastic approval of President Roosevelt. Mr. O'Brien's reasons for accepting this onerous assignment were simple: he believed deeply in the justice of the allied cause; he was convinced that we must necessarily enter the war at an early date to prevent the triumph of totalitarianism; and he felt it his duty to put his vast experience and proven abilities at the disposal of his government in its hour of crisis.

It is not a simple matter, 30 years after those stirring times, to convey any adequate impression of the scope, size and complexity of the legal and policy problems that faced Mr. O'Brien and his staff during the four years of his leadership. Of that staff, united by a well-nigh fanatical devotion to Mr. O'Brien that remained unimpaired until the day of his death, Whitney North Seymour has been kind enough to say: "He served for four years and recruited for Government service an extraordinary group of talented young lawyers, who, like the group drafted by Secretary Stimson, represented the flower of the bar of the
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country."

The comparable accomplishments of Stimson and O’Brien were no happen­
stance, since they had similar abilities, ideals and leadership qualities. The writer
on more than one occasion heard Mr. O’Brien say that the two men he had
admired most in his lifetime were Elihu Root and Henry L. Stimson.

I have pondered the problem of how best to illustrate the massive problems
confronting the War Production Board in the years 1941-1944 and the manner in
which legal and administrative policies evolved under Mr. O’Brien’s leadership
which, in retrospect, appear to have been conducive both to a successful prose­
cution of the war and to the maintenance of priceless American institutions,
including due process of law. The method of exposition which I have selected,
has, I think, at least the advantage of novelty.

Late in the war, I was privileged to collaborate with Mr. O’Brien in writing
a reasonably complete account of these problems and the solutions. I have
decided to disregard any false modesty arising out of my joint authorship and to
quote freely from its text.

I do this for three reasons: first because I, of course, consider it a highly
accurate account of what happened and how it was brought about; second,
because no one will dispute the fact that I was unquestionably the junior partner
in the enterprise; and finally because, while I can no longer remember who wrote
the original draft of various portions of the text, veteran O’Brien watchers will
recognize the basic goals and ideas which we stated as genuine and even vintage
O’Brien.

Before quoting my favorite authors, however, I think it helpful to provide
a brief summary of the ideas held by Mr. O’Brien when he arrived in Washington
and which so decisively influenced the conduct of the American mobilization
effort.

First, it was essential that the war be won.

Second, major changes in the American industrial and economic organi­
zation were essential to accomplish the first objective; policies, legislation and
finally administrative procedures must be designed and prosecuted vigorously to
bring about such changes speedily.

Third, the war and its indispensable supporting regulatory system was not
to be used to bring about permanent social changes, however desirable.

Fourth, the actions proposed must be legal in the simplest sense, i.e., they
must be designed to stand any conceivable court test.

Fifth, while American industry was to be unavoidably regimented and
concentrated often to the damage of smaller and less essential units, these
changes were to be carefully scrutinized and hopefully made temporary, particu-

3. See p. supra.
4. O’Brien & Fleischmann, The War Production Board Administrative Policies and
larly when they involved conduct which might be considered violative of the antitrust laws in peace time.

Finally, and second only to the first in importance, we were to apply the concept of due process of law to the fullest extent possible, particularly in requiring an opportunity to be heard and in setting the highest possible standards of fairness which we considered appropriate to the exigencies of the time.

Let me now illustrate some of these points from our study. First, as to the enormity of the task and the measure of success which was achieved:

On January 1, 1941, the entire air strength of the Army and Navy of the United States consisted of something over 6,000 planes of all types. The Army owned 25 medium tanks and something more than 100 light tanks; but there was in actual production only a single producer of each class of tanks, and their capacities were approximately 25 light tanks and 15 medium tanks a month. We had virtually no anti-aircraft guns, and very little heavy artillery. We had a one-ocean navy, and the merchant marine had been deteriorating steadily since the World War.

By July 1, 1943, something like a miracle had taken place. Fully equipped American armies had been transported to the four corners of the earth. A gigantic and constantly increasing stream of war materials had flowed to our allies. Our monthly airplane production had passed 7,000. In the first six months of 1943 more than 16,000 tanks and more than 100,000 guns were delivered. The program for a two-ocean navy was far ahead of schedule, and during the same period our shipyards were turning out cargo vessels at the astonishing rate of 19,000,000 tons a year. In the ensuing period since July 1, 1943, all of the above figures have been greatly increased: but in a sense, it was the achievement of the earlier months of planning and converting industry that counted most. What was remarkable was not alone the volume of production at the end of two and a half years, but the rapidity with which the steadily increasing rate was maintained from the outset. 5

Next, as to the part played by governmental regulation:

Contrary to often expressed opinion, the wartime regulatory system under which American industry now functions did not develop through any hit or miss experimentation. To be sure, the system was an evolution as distinguished from a pattern of planners laid down in advance; but the system, as it operates today, is the result of many months of diligent and highly conscientious effort on the part of both the legal and administrative staffs which have shared the responsibility for its development. If the test for its justification is one of efficiency, the efforts of its designers have not been in vain; that is, the system has delivered the goods. A free economy was

5. *Id.* at 2-3.
changed to a regulated economy in the interest of the war effort with surprising speed and efficiency of operation. The system now in force regulates more than one hundred thousand transactions of the most diverse nature every week, controls the activities of more than 250,000 manufacturers, wholesalers and retailers, and has drastically altered the American industrial and distribution system.  

Concerning due process and fairness:

A word may well be said here on the subject of fairness in wartime. In such a context, the term acquires a meaning quite dissimilar from its ordinary understanding. Fairness in ordinary times has a judicial and moral connotation; it means that each man receives his just deserts. It is difficult to maintain such a standard in wartime. Obviously, it is not "fair" in the ordinary sense of the word that a manufacturer of ice boxes should be summarily closed down and in effect put out of business, while the manufacturer of airplanes is permitted to expand his plant 100-fold at the expense of the government. This is not fairness in the customary sense at all; it is simply an inescapable necessity.

What fairness must mean in wartime is avoidance of discrimination, bias or arbitrariness. In other words, it is possible to a very considerable degree to see to it that persons in the same situation are treated alike; that interests of individuals within a group are adequately presented and impartially adjudicated; that where an issue is sharply presented among a small number of individual interests, their views are heard, even though it may be only over the telephone; that remedial programs and policies are introduced to alleviate to some degree the harm caused to particular interests by the war program. To summarize, it is submitted that even in wartime in a democracy due process of law and sound government policy alike dictate simply that the government in attaining its paramount objective of self-preservation must be as fair as possible under the particular circumstances.

And, finally, the summing up:

The War Production Board is not a contract agency nor a procurement agency. The unique contribution of this war agency was that it devised and operated the vast system of controls which made possible the American achievement in the field of war production. The heads of this agency knew that the system could not succeed unless the public had at all times confidence in the integrity of the administration of its great powers. It is thought that the administrative procedures above described not only met the constitutional requisites of due process, but conformed generally to the principles and standards of the democratic process. At any rate the motive

6. *Id.* at 5.
7. *Id.* at 27-28.
which at all times dominated these policies and procedures was the
desire to insure the maintenance of the standards of fair play to the
fullest extent consistent with the requirements of all-out and ruthless
war.\(^8\)

I have not thought it necessary to describe, either by quotation or other­
wise, the elaborate mechanisms which were developed to supervise and grant
approval of temporary combinations and arrangements within industry essential
to maximize war production, but which would in other times have been con­
sidered of dubious antitrust legality. These were administered jointly by the
Attorney General and the General Counsel of the War Production Board under a
special statutory dispensation enacted for this purpose. Suffice it to say that
here, as much as in any other part of the effort, the policy control of the War
Production Board was in safe hands. Many years of experience as head of the
Antitrust Division and an equal experience as an advocate for the viewpoint of
American industry gave Mr. O’Brien unmatched qualifications to navigate these
uncharted seas.

Again, to recapture today the strenuous often combative atmosphere of
those days of ceaseless struggle is difficult; perhaps a single anecdote may help.
The upper levels of the War Production Board were staffed with the very
cream of American industry. These senior executives, accustomed to running
their own large enterprises without restraint or criticism, were amazed and
indignant that the same latitude was not permitted them in the government. One
major complaint was the requirement that every order or directive must be
approved in advance by the Office of General Counsel. Another was the require­
ment for record keeping and justification of expenditures, including minor ones.

When there was a particularly threatening challenge on the horizon, Mr.
O’Brien and I together would take on the complaining Division Director, or
Branch Chief as they were known. The charge of a maddened president of a large
corporation serving temporarily as a government executive (without pay) and
smarting under what he deemed foolish prohibitions created by “goddamn
lawyers” is an awesome spectacle. One memorable day Mr. O’Brien and I spent
two hours with just such a tycoon. No happy concord ensued; finally the
defeated challenger stormed out of the room with these memorable words: “All
right, godammit, we’re going to lose the war. But at least we’ll have the
satisfaction of knowing we did it legally, and we’ll know to a penny what it cost
us.”

The Man Himself

I have written at some length of what Mr. O’Brien did in his eventful
lifetime; I should like to close this rambling account by trying to convey at least

\(^8\) Id. at 60.
some slight impression of what he was. In fact, such an attempt is essential because what he accomplished was possible because of the kind of man he was; put another way, Mr. O’Brien lived greatly in the law because he was a great man who, fortunately for all Americans, happened to be a lawyer.

Here in the person of one man were combined qualities that often seemed greater than human. I have written of his marvelous skill as an advocate, of his penetrating intellect, of his unusual qualities of leadership, of his devotion to what he considered unchangeable American institutions. Whitney Seymour has aptly described other public accomplishments of Mr. O’Brien such as the preparation of the Godkin Lectures on National Security and Individual Freedom. This comprehensive study of the supposed eternal struggle between the need for national security and the indispensable maintenance of civil liberties is justly considered a landmark of American legal thought on a subject no less urgent and perilous today than it was in McCarthy times.

This brings me to the delightful paradox of Mr. O’Brien’s life. If you asked any one of the writers in this Review or any other of his legion of friends, in and out of the profession, what they valued most in their relationship with him, I doubt that any one would rank first his accomplishments as an advocate or his inestimable services to his country. Rather, we would all, I think, rate as most cherished the privilege of his friendship and the joys of companionship with this unique man. He was indeed one of the great personalities of our time—warm, wise, witty and above all, kind. These were the qualities that attracted men and women of distinction to him throughout his life; these the qualities that bound his associates to him with ties that only grew stronger with the passage of years. Thus it was that every year for almost 30 years the members of his WPB legal staff, themselves now grown grey, if not wise, journeyed to Washington, from all parts of the country, not only to pay homage to their revered leader, but also (and more importantly to him and to all of us), to share an evening of sheer delight with an old friend and boon companion.

These were indeed evenings to remember and treasure. The wine flowed freely and conversation more freely. There followed a few reminiscent remarks from such one-time staffers as Ambassadors Frederick Eaton and Milton Katz, Secretary of the Treasury Henry Fowler, Judge T. Munford Boyd and the inimitable Lawrence Lombard. It might be added that none of the speakers ever showed any reluctance to express our collective devotion to Mr. O’Brien—a custom which led him one year to a famous rejoinder: “I have never found adulation to be harmful unless it is inhaled.”

Finally came the climax of these memorable occasions: Mr. O’Brien was introduced to a rising ovation, then, again each year, we relived together the bright years of joint struggle in a high cause; we were reminded more often than not that no one had been wiser than Lord Acton when he observed: “Power tends to corrupt and absolute power corrupts absolutely”; it was made clear that service to our country and to the ideals and institutions which made it great was
our first and continuing duty; and no doubt was left of the remarkable level of common affection binding together what has been described as the world's most exclusive mutual admiration society. Then high spirits of every kind and good talk flowed on into the night.

Well, there can be no more of those magic evenings and we shall miss them. All of our memories of our companionship with Mr. O'Brian are happy ones. Those of us who were privileged to serve under his leadership in the great effort of the war years remain eternally grateful (to borrow again from Justice Holmes) that for at least a little time "our lives were touched with fire."