

**REMARKS ON THE JUDGE
MATHEW O. TOBRINER MEMORIAL LECTURE
UNIVERSITY OF CALIFORNIA HASTINGS COLLEGE OF THE LAW**

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Law Clerk, 1971-1972

Attorney at Law, San Francisco; Lecturer, U.C. Berkeley School of Law (Boalt Hall) President Barak; Justice Grodin and Members of the Court; Dean Kane and Hastings colleagues and students; Chairman Marcus; and Ro, Michael, Steven, and other members of our Tobriner family:

Thirty years ago this summer I came to this street, entered building number 350, and began my profession in the service of the California Supreme Court and Mat Tobriner. Three decades later the task is now mine to provide remarks on the Judge - continuing a tradition of reflecting not so much on his reported jurisprudence, which all students, lawyers, and jurists can read, but on our own observations that define the man.

This ongoing effort by us the Judge's law clerks seems especially compelling at this gathering, our first since the entire Tobriner Court is gone. Now that the lion in winter, Stanley Mosk, has also come to rest, let us pause in this tribute to Justice Tobriner to recall that part of his greatness was the greatness of his Court, just as the Court's greatness was so clearly defined by the Judge. The California Supreme Court in Mat Tobriner's service was the outstanding Court in the nation, without qualifier. Many people in this room fondly remember Governor Pat Brown, and all of us have benefited from his political leadership, clarity of vision, and loyalty to his worthy colleagues. All his successors cite Governor Brown's fostering of our University (of which this School is an important part), our State Water Project, and our freeway network. The Governor himself, however, often claimed as his greatest legacy the California Supreme Court to which he had appointed Ray Sullivan, Stanley Mosk, and Mat Tobriner.

In my brief 16 months of service I witnessed the central role that Justice Tobriner played in the Court's jurisprudence, in ways that would not be reflected in the Official Reports. I think of the cases that are not regarded as Tobriner opinions, but of which the Judge emerged as the silent co-author; within the 1971-72 term alone, at least *Friends of Mammoth v. Board of Supervisors*, *Marks v. Whitney*, and *People v. Anderson*.

But one case, the name of which has eluded prominence because it ended in an order "hearing denied," to me revealed the most about Mat Tobriner's vibrant and open mind. It was a labor case, seeking to invalidate a Depression-era statute that set different working conditions for women as a means of protecting them. While the Judge was considering his own view of this case, the wives of his then-

all-male-staff entertained the Judge at lunch, suggesting that the law designed as a shield for women had become a sword against them. In the end Justice Tobriner voted to grant, but uncharacteristically was not able to garner the fourth vote.

The remarkable thing about the statute that Mat Tobriner voted to invalidate is that more than 30 years earlier he had drafted the measure in question, and secured its enactment by the Legislature.

So the Judge was never out of date. He stood at the forefront of judicial thought and action, but did not confine his freshness of spirit to his professional discipline. Art, music, movies, California places and history - all of these became topics at staff meetings or individual conversation. To my observation, the Judge was inflexible on only one score, food. As one who had lived in Japan before law school I repeatedly but unsuccessfully recommended my discovery of an authentic sushi and tempura bar on Market Street. The Judge, however, navigated food by a fixed constellation, the polestar of which was chocolate. The fact that the Judge once in chambers consumed all the brownies that one of my predecessors had left with him, whose ingredients unknown to the Judge included what the Health and Safety Code identified as a "controlled substance," says nothing about the Judge's interest in marijuana (but see *In re Higbie*) and everything about his fondness for chocolate. It was meant to be consumed in all its forms. Thirty years on I now confess my error: failing to produce chocolate-dipped sashimi.

That the Judge could follow this diet and maintain his trim physique bespeaks yet another aspect of a youth that belied chronological age. During my tenure the Judge approached the eighth decade of his life, a life that continued to include daily swims at the Concordia Club and weekly hikes on Mt. Tam with Ro and Ray and Winnie Sullivan. His fondness of Greek culture, so evident in the concluding paragraphs of *Curtis v. Board of Supervisors*, embraced a vigor of body and mind.

Attempting in a more serious vein to define the man who was Mat Tobriner, let me relate a personal experience that was likely unique, since none of my predecessors or successors, as far as I know, had preceded their clerkships with naval service. The story actually begins much later, at the annual dinner of the California Law Review not too many years ago. When a colleague there learned that I had clerked for Justice Tobriner, she remarked, "He was a great man, but wasn't he naïve?" That remark has haunted me ever since, and this afternoon let me finally respond to it.

Thirty years ago, my Boalt colleague's remark had been my own reaction when the Judge called me into chambers one afternoon, visibly upset. Apparently he had just been visited by a member of the Naval Investigative Service who was

conducting a routine background investigation to maintain my security clearance as a reserve officer. Since my active service included electronic intelligence and communications security, I had been through several of these "BI's" and considered them routine. The Judge, however, was offended by the visitor's questions, particularly those that inferred that he would have selected a law clerk whose loyalty to the Nation could be questioned, and the investigator's request that the Judge keep his responses and indeed the fact of his interview confidential.

Some months later I participated as a member of the Vietnam Veterans Against the War in a noontime rally in Union Square protesting the mining of Haiphong Harbor. Before I returned to my office at the Court, a message was waiting for me from the CO of my reserve unit at Treasure Island. One of my fellow officers in the unit, the security officer at Macy's, had apparently assigned himself the regular lunch time duty to monitor subversive activity in Union Square; and thus within a matter of minutes my participation had been reported up the chain of command and across the bay. The ultimate outcome was an adverse fitness report that questioned my loyalty to the Navy and the Nation.

So to answer my colleague at Boalt, the Judge was not naïve, he was right all along. Mat Tobriner was not a cynic and he did not see "conspiracies." But the Judge keenly observed human nature, and with particular sensitivity perceived the mechanics of institutional conduct. He knew the risks, and that malice was not needed to create them; ignorance or negligence provided sufficient causation. But if he was the Judge, he was not judgmental. In his daily life as well as his judicial writing, Mat Tobriner addressed the inherent frailties of human institutions with calls for accountability and intellectual honesty. But in chambers we generally heard empathy for both parties, and when the occasion demanded, compassion. In public as well, the Judge's call was never mean-spirited, founded instead on a conviction that by persuasion and example he could appeal to reason and the inherent goodness in each individual whose case came before him.

The high esteem that the Judge earned from his colleagues, his supporters, and those who disagreed with him attest to his success in fighting darkness with light, in not responding in kind to those who wronged society's standards. The quality of Mat Tobriner's life is not naivete, but one terribly in need at this our own hour of darkness. Half a century ago I was taught in Sunday School to aspire to the standards of the Sermon on the Mount. Five decades later they still seem to make sense, not because of doctrine but experience. That's the way the Judge would look at it, convinced as I remain that no man or woman I have known, in public or private life, lived closer to those standards than Mathew Tobriner.