

Buffalo Law Review

Volume 23
Number 4 *Commemorative Issue: John Lord
O'Brian 1874–1973*

Article 8

8-1-1974

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Whitney North Seymour

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Recommended Citation

Whitney N. Seymour, *John Lord O'Brian*, 23 Buff. L. Rev. 17 (1974).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol23/iss4/8>

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JOHN LORD O'BRIAN

Whitney North Seymour*

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. He was recognized in even rarer company as the dean of the Supreme Court Bar by Chief Justice Burger, who stated upon Mr. O'Brian's death that "he epitomized the highest standards of the legal profession." A few years before, in 1962, when O'Brian rose in the Supreme Court, in the formal clothes he always wore there out of respect for the Court, to move an admission to the Bar, Chief Justice Warren noted that it was the fiftieth anniversary of O'Brian's own admission to the Supreme Court Bar. He added, "[f]ew men in history have had a longer or more active practice before the Court. During all these years you have served the Court in the highest sense."

On his death the Washington Post concluded its editorial about him by saying:

John Lord O'Brian was genuinely a man for all seasons—cultivated, sensitive, wonderfully quiet and sweet and gentle, yet magnificently strong. He understood the full import of the term "national honor." It is in the capacity of this country occasionally to produce such a man that the best hope for the future is to be found.¹

Mr. O'Brian represented not only the public and private service of his profession at its best, but he was a model of the citizen who cared deeply for the best traditions of our institutions and the ideals of those who made the country great. He was a charming, witty companion, at home everywhere. Small, active, sprightly, with a quizzical smile close to the surface, one noticed him in any group. He knew all the leading judges, lawyers and most of the American statesmen of his time and they delighted in his company. A fine advocate and cultivated gentleman who made an art of quiet understatement, he knew and savored the great moments but did not overlook the small comical ones. He enjoyed the occasional absurdities of Washington social life. He once told this writer of a dinner party where he was happily seated far above the place where

* Member, New York Bar. A.B., University of Wisconsin, 1920; LL.B., Columbia University, 1923.

1. Washington Post, Apr. 12, 1973, at 18, col. 2.

protocol dictated because of a misplaced comma on his placecard, which read "John, Lord O'Brian."

He loved young people and they him. This writer's lawyer son remembers a delightful trip on the train with him from Washington to New York when he was nine. One of the most touching tributes to him was delivered by one of his charming granddaughters, Mrs. Sally Lord Ellis, who, as a pleasant family duty, helped to keep an eye on him in recent years. She treasures, among many other things, memories of his always courtly Victorian manners. Once they went to the movies together and a lady with an enormous flowered hat sat down in front of Mr. O'Brian. Turning to his granddaughter, he said in a quiet but clearly audible voice, "What a beautiful hat that lady is wearing." Without a word, the lady removed her hat. She also remembers one of his favorite stories, about a visit to see his wife and daughters in Paris, where he was delayed in French customs trying to explain suitcases full of corn flakes and children's shoes. When he said they were presents for five daughters, the customs men passed him at once.

Brought up in Buffalo, he entered Harvard College at 17, where he was exposed to William James and Santayana. He was "hypnotized" by Theodore Roosevelt when he met him in his senior year. He studied law at Buffalo Law School and ultimately was regarded as Buffalo's First Citizen, an honor he retained until his death. He practiced law there for a few years, and was elected to the State Assembly when Charles Evans Hughes became Governor. During his tenure he worked diligently as a member of the Ways and Means Committee and the Citizens Committee; the Citizens Committee's leading Democrat, Alfred E. Smith, became a close friend. In 1909, President Roosevelt appointed him United States Attorney for the Western District of New York. He filled that office with great distinction through the Taft administration and into the Wilson administration. Then he ran as an unsuccessful candidate for Mayor of Buffalo but, even though he lost the election, the reforms he advocated largely came to pass. Upon return to private practice, he also served in many public positions including, by Elihu Root's appointment, a leading role in the Constitutional Convention of 1915. They became fast friends. He helped to persuade Hughes to run for President in 1916 and campaigned for him in Western New York.

The Democratic Attorney General called him to Washington in 1917 to take charge of the civil administration of war statutes, including problems of internment. He turned down many offers of appointments to courts and administrative bodies while he was in Washington and after his return to Buffalo in 1919. He came back to Washington again when President Hoover appointed him as head of the Antitrust Division in the Department of Justice in 1929. There he applied the law as he saw it without fear or favor. He established a fine record during a notable administration of the Department, where this writer came to know him. A happy memory is when Mr. O'Brian first took this writer to call on Justice Holmes in 1931 and, fortunately, carried the burden of the conversation in that charming but awesome presence. It seemed only fair

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reciprocity when, a few years ago, Mr. O'Brian drafted this writer to raise the fund to provide a fine bust of Justice Holmes for the Hall of Fame, done by the noted sculptor, Joseph Kiselewski.

A lifelong Republican, Mr. O'Brian never was blinded by partisanship. He served under Presidents of both parties and in both World Wars. When the Tennessee Valley Authority, one of the great innovations of the New Deal, was threatened by a vigorous attack on its enabling act, Mr. O'Brian was retained to defend the act's constitutionality, which he did with brilliant success, through the Supreme Court. While working on this case in 1938, Governor Dewey called him to say that he was about to be nominated as the Republican candidate for Senator against Senator Wagner. Although he first tried to get out of it, O'Brian threw himself into the campaign and this writer recalls the universally high quality of his presentation. Despite New York Times support he lost to Wagner, although he carried all the counties not dominated by Democratic city machines.

He served for many years on the Board of Regents. He was a devoted Overseer of Harvard and aspired to be the oldest living Harvard alumnus but never quite made it, Harvard men being notoriously tough and long-lived.

As we approached World War II, he was drafted as General Counsel of the Office of Production Management, which was in charge of our industrial mobilization. He served for four years and recruited for government service an extraordinary group of talented younger lawyers, who, like the group drafted by Secretary Stimson, represented the flower of the bar of the country. For many years the alumni of his able staff gave him an annual dinner which he greatly enjoyed. The Buffalo Evening News, in a feature article about Mr. O'Brian's ninetieth birthday in 1964, described the proceedings at these dinners:

In the course of the evening, Mr. O'Brian would "have some words to say about the moralities of public life and he will not hesitate to speak in terms that have become embarrassingly old-fashioned—about honor, loyalty, fairness, integrity, trust, wisdom and even kindness." It will be accounted a privilege to hear them again from a man who has lived by their meaning.²

When he left this service he joined the prestigious firm of Covington & Burling in Washington, of which he remained a valued member until his death. He rendered other public service too numerous to list here.

Rising above these significant achievements was his monumental devotion to our institutions and their essential character as bulwarks of liberty. He emphasized this in repeated bar association addresses. The occasional fevers of our system were tested by his cool hand and viewed with his steady, wise, sharp eyes. His long perspective enabled him always to detect false weights in the

2. Buffalo Evening News, Oct. 14, 1964, at 55, col. 1.

balance and he did not mince words about them. He epitomized these qualities when he joined Charles Evans Hughes in his attack, for the Association of the Bar of the City of New York, on the ouster of the Socialist assemblyman in 1920.

He capsuled the reflections of a lifetime in his Godkin Lectures at Harvard in 1955 under the title of *National Security and Individual Freedom*, which won many awards and much acclaim. Here is expressed his deep concern that pre-occupation with security was leading to deep erosion of personal liberties. He characterized his approach in the Lectures as being like that of Mr. Justice Holmes, who asserted that the best service we can do for our country and ourselves is "to see as far as one may, and to feel, the great forces that are behind every detail—for that makes all the difference between philosophy and gossip, between great action and small."³ One of his conclusions was that:

[I]n a democracy, there is always latent the cancer of indifference and apathy. . . . But what is significant above all other developments is that whenever political or social issues are clarified and take on the aspect of a moral issue, the American public react promptly and powerfully.⁴

It is not too much to say that Mr. O'Brien's Godkin Lectures and the Report of Judge Dudley B. Bonsal's Special Committee of the Association of the Bar of the City of New York, "The Federal Loyalty-Security Program," played a major role in eliminating most of the abuses of that program and in restoring individual liberty to its historic place.

In the same general vein, Mr. O'Brien participated in the historic conference at the Harvard Law School in 1955, celebrating the 200th anniversary of Chief Justice John Marshall's birth. In informal remarks, after his formal paper, he said, "we progress as a race only as we consciously increase the intensity of our sense of injustice. This, then, is my faith." The editor of the Marshall volume observed: "When he came to his conclusion, by a common impulse the assembly stood and applauded long beyond the time required only for a generous salute to an old friend."⁵

He was a member of the Metropolitan Club in Washington for 56 years. There is a long table there, where one can hear good talk and learn what is likely to happen next in and out of government. John O'Brien was a familiar figure there for many years. More recently, he lived at the Club for a time, the period far exceeding the usual two weeks permitted ordinary members. He explained this to the writer, with some pride, as due to the fact that the Club's by-laws

3. J. O'Brien, *National Security and Individual Freedom* 2 (1955) (footnote omitted).

4. *Id.* at 81-82.

5. O'Brien, *The Value of Constitutionalism Today*, in *Government Under Law* 540-41 (A. Sutherland ed. 1956). See p. 103 *infra*.

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had been amended so that the limitation on residence was not applicable to former Presidents of the Club (of which he was one) over the age of 90. This appealed at once as an obviously reasonable and sensible classification, involving little danger of imposition.

It is good to know that he will be remembered, outside the hearts of his friends, in the John Lord O'Brian Chair of Divinity at the Harvard Divinity School, which he served long and well, and in the John Lord O'Brian Hall, the new home of the State University of New York at Buffalo Faculty of Law and Jurisprudence.