

## Inside the Court: Eyewitness Accounts

### *Justice Stephen Breyer*

---

#### **Breyer's Act of Listening Will Pave the Way to a Healthier Democracy**

*By Neal Katyal The Washington Post – January 26, 2022*

*Neal Katyal, who clerked for Justice Stephen G. Breyer, is a former acting U.S. solicitor general.*

In the days to come, there will and should be a lot of pieces written about Justice Stephen G. Breyer's brilliance and influence on the Supreme Court. This is not one of them.

Of course, the justice is brilliant; his opinions will have a deep impact on our democracy for decades to come. But his execution of those rulings, and the way he carried himself on the court, may stand as an even greater legacy still. At this tense moment in our history, where the mere act of hearing someone out is considered betrayal, Breyer points the way to a healthier democracy.

I had the privilege of clerking for Breyer in his second year on the court, in 1996-1997. The justice clearly did not want to appear to be like Felix Frankfurter, another Harvard law professor turned justice. Instead, he tacked in the opposite direction – becoming a listener instead of a pontificator.

I remember a case that had me worked up over a constitutional matter – an issue that, I believed, with all my 26 years of wisdom, represented a deep infringement on individual rights. I produced a 40-page memo to that effect, exhaustively researched.

The justice read it, down to the footnotes, then asked: "Who am I to make such a decision for the entire American people?"

To be sure, the justice wasn't shy about enforcing the Constitution when the circumstances called for it –

## Inside the Court: Eyewitness Accounts — *Justice Stephen Breyer*

---

protecting any number of marginalized groups over his long tenure. But that spirit of humility informed everything he did. In one of the cases he heard last year, the case of the cursing cheerleader, he openly worried at oral argument about how to write a workable rule for the case. “How do I get a standard out of that?” Breyer asked. “I’m frightened to death of writing a standard.”

Times have changed since Breyer joined the court in 1994. We now live in a world of know-it-alls, catalyzed by a social media engine that brings these forces together. The centrifuge extracts a tribal purity, where if you believe one thing you must necessarily believe 10 others, and those 10 lead you down another 10, and so on.

Instead of learning from those outside this closed universe, you have to stay in it or face attack. And within it, because everyone is egging each other on, facts start to lose their salience. Instead, passion and purity become the new currency.

Enter Breyer. His life’s work stands as a counterpoint to this: that one can hold strong views, and yet retain nuance and the capacity to listen and learn from one another.

His best friend for many years on the court was Justice Sandra Day O’Connor. At first, they appeared quite an odd couple. She, an unreserved Arizona legislator who carried the spirit of the West with her everywhere. Breyer, reserved and Bostonian. Some thought the friendship was strategic, but that’s doubtful — anyone who knew O’Connor understood she wasn’t going to be bamboozled by friendship. It was a true, genuine relationship, forged by people who had mutual respect for each other’s differences.

The same was true with Justice Antonin Scalia, who became Breyer’s frequent debating partner. Scalia and Justice Ruth Bader Ginsburg may have had the famous friendship, but it was Breyer with whom Scalia conducted many public debates on matters of constitutional philosophy and statutory interpretation.

## Inside the Court: Eyewitness Accounts — *Justice Stephen Breyer*

---

At every turn, Breyer remained civil and respectful, even when Scalia went after him hard. I remember after one set of insults hurled by Scalia, I urged Breyer to say something back. He just ignored it, saying he wasn't going to play that game.

There was, in short, a constitutional humility about Breyer. He didn't pretend to know the answer to every question. He paid attention to what the other side was saying, and was charitable in listening instead of impugning motives.

But that wasn't where his listening stopped. A deep part of his listening practice was to pay attention to experts in the field. He often said federal judges are not experts on national security, or the environment, or the economy, and that a deep part of wisdom was deference to expertise. Breyer's path was to triple check his personal impulses, and particularly so if they conflicted with the views of true experts on the question before him.

Consider just how different that is from the political debates today, where extremist ideology has attacked things that should be noncontroversial, from wearing masks to taking vaccines, from addressing global warming to protecting voting rights.

America stands at a crossroads. On one path is more toxic extremism, the culmination of which we witnessed on Jan. 6. Despite that armed insurrection, the path remains just as seductive as ever to many. The other path is quieter and more difficult to practice. It is a path forged by Breyer: respect for others, reverence for the law, and most of all, a commitment to listening to and learning from one another.

SOURCE : <https://www.washingtonpost.com/opinions/2022/01/26/katyal-breyer-legacy-listening/>