

Our Association plays a dual role as the voice of the profession and the advocate for the public. Here are two important illustrations of each of these roles.

Voice of the Profession: Age Discrimination

“Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”

That compelling insight in defense of our civil liberties was written in 1928 by the great American jurist, Louis Brandeis, dissenting in the famous case of *Olmstead v. United States*, 277 US 438 (1928). *Olmstead* involved the admissibility of wiretap evidence. Forty years later, Brandeis’ dissenting view on that subject was adopted by the Supreme Court’s majority in *Katz v. United States*, 389 US 347 (1967). And today, 80 years after it was rendered, Brandeis’ dissenting opinion in *Olmstead* is as timely and on-target as the day it was written.

But if Brandeis sat on the highest court in New York, rather than the highest court in the United States, we would not have had the benefit of this wisdom. Brandeis was 71 years old when he wrote the dissent in *Olmstead*, beyond the age when New York Court of Appeals judges are sent out to pasture. As you of course know, our Court of Appeals judges must retire at age 70. New York Supreme Court justices also must retire at age 70, although their tenure can be extended up to age 76 if they meet some mysterious, undefined criteria.

We recently marked the sesquicentennial of the birth of Justice Brandeis, born on November 13, 1856. Brandeis had a brilliant career as a practicing lawyer and

advocate for important causes. He was appointed to the Supreme Court at the age of 60 - - not far from the age when many law firms today require their partners to leave the profession. He served on the Court for 23 years, leaving at the age of 83. Brandeis' career serves as Exhibit A in the case against mandatory retirement for lawyers and judges - - an issue high on my reform agenda.

Brandeis was on the Court when Franklin D. Roosevelt made one of his very few mistakes by launching his court-packing scheme. Roosevelt rationalized his proposal, in part, by arguing that the existing Supreme Court justices were too old. He offered legislation that would allow the president to appoint a new Supreme Court justice to serve in tandem with each incumbent older than 70 who refused to retire - - in effect, a minder for the presumptively senile. Six of the existing justices fell into this category; Brandeis, age 80, was the oldest.

Although a friend of Roosevelt, Brandeis was appalled, and worked behind the scenes to kill the measure. He dispatched his wife to convey his views to the wife of a key senator. What ultimately resulted from his strategy was a letter from the Chief Justice demonstrating that the Court was current with its work and that any increase in the number of justices would impair the Court's efficiency. The court-packing scheme failed.

Brandeis went on to author the seminal decision in *Erie Railroad Company v. Tompkins*, 304 US 64 (1938), the case we all studied in our early weeks at law school. Justice Brandeis was 81 years old when he wrote that decision. Computer studies reveal that it has been cited some 25,000 times. *Res ipsa loquitur*.

Unfortunately, New York continues to follow the policy that our federal government rejected. And so we have prematurely lost the services of some exceptional judges, including, most recently, Court of Appeals Associate Judge Albert M. Rosenblatt.

The theme of my presidency is: Strengthen and defend core values, while promoting needed reform. One area that very much needs reform is the treatment of gray lawyers. I have spoken and written about this often, and it has been widely covered in the media. I have appointed three new committees to examine various aspects of this issue:

- ◆ The Task Force on the Mandatory Retirement of Judges, chaired by Hon. Leo Milonas, which is examining and will make recommendations on New York's archaic judicial retirement policy.
- ◆ The Special Committee on Age Discrimination in the Profession, chaired by Mark Zauderer, which is examining and will report on practices and policies that adversely impact lawyers because of their age - - too old, too young, too in-between - - including policies that force lawyers to retire from practice at increasingly early ages.
- ◆ The Senior Lawyers Committee, chaired by Justin Vigdor, that will provide professional, educational, public service and social opportunities for gray lawyers.

The Special Committee on Age Discrimination has already issued its report condemning mandatory retirement in the profession. The other reports are expected soon, and all will be considered at the spring House of Delegates meeting. I look forward to the discussion with great enthusiasm.