1974

Mr. Justice Douglas

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MR. JUSTICE DOUGLAS

The American people are always interested in record-breakers, whether it be in the field of sports, politics, economics or any other phase of American life. In sports, it might be a Babe Ruth or a Hank Aaron; in politics, a Lincoln or a Roosevelt; in economics, a Rockefeller or a Ford.

And so it is in the judiciary, whether it be a Marshall, Hughes, Holmes or Brandeis. Most of their records in some respects are related to longevity, but the thrust of our admiration stems not from that fact but from some great contribution to the affairs of their day.

Now we have a new name to add to that galaxy of noted Americans, Justice William O. Douglas, Associate Justice of the Supreme Court of the United States. On October 29, 1973, he broke the record of Stephen J. Field by serving 34 years and 196 days on that Court while still as vigorous in writing for a majority or in dissent as at the time of his induction on April 17, 1939.

His opinions to date are to be found in Volumes 306 through 414 of the United States Reports, covering the most changing and epochal times in our national history. If it is true, as said by de Tocqueville almost a century and a half ago, that in a period of time every public problem in American life eventually reaches the Supreme Court, certainly Justice Douglas has served through such a period, and he has written on every one of those problems without reservation or equivocation. He has been the most avid protector of individual rights, particularly in relation to minority and otherwise underprivileged groups. He has been an enemy of monopoly and a champion of the free enterprise system. Above all, he has been a protector of all the rights guaranteed by the Bill of Rights.

His interests have encompassed the preservation of both our human and natural resources. He has written extensively on both in a score of non-judicial publications.

I have often wondered what extracurricular contribution he would have made had he been appointed at the time of Stephen J. Field, whose long record he surpassed. His interest in both human and natural resources in what is now the Ninth Circuit—an area of more than a million square miles—at a time when the calendar of the Supreme Court was not as pressing as it is today would surely have caused him on his circuit riding to do scouting in the way of Kit Carson, mapping as did Lewis and Clark, historical writing as did Hubert Howe Bancroft, and engage in humanitarian activities like those of Henry David Thoreau and Helen Hunt Jackson. His far-reaching mind and his great physical endowment would have impelled him to do all of these things for the enrichment of life in the United States as have his activities in this day and age.

I congratulate the *Columbia Law Review* on this recognition of his distinguished career.

EARL WARREN

Chief Justice of the United States (Ret.)

MR. JUSTICE DOUGLAS

October 29, 1973, marked an important anniversary of Mr. Justice William O. Douglas. Thirty-four years ago last April he took the oath of office as an Associate Justice of the Supreme Court of the United States, and on that day we took official note of the occasion from the Bench so as to reflect it in the permanent Journal of the Court. He surpassed the record of Justice Stephen J. Field, who served from May 20, 1863 to December 1, 1897; and now he has completed thirty-five years of service. In his long career on this Court, Justice Douglas has been a strong, articulate individualist willing to blaze new trails, whether in the majority or in dissent, but also willing to tread ancient paths of the law. This is a facet of the total man often glossed over by those who are prone to deal in stereotypes and who are annoyed by facts that impair the precast image. He is at once a doubter and a believer.

Several qualities distinguish Justice Douglas from many of the other 91 men who preceded the nine who now sit. He is possessed of a restless, questing mind and spirit not only in the law but in relation to the world around him and in the events of his time. His respite from judicial work is to climb mountains, visit strange parts of strange lands and obscure peoples, and he has written and lectured extensively about his travels and his observations. He has also spoken and written of current developments on the social, economic and political scene. For all of his life he has been devoted to nature and the outdoor life. He was an ardent student of ecology before the word had currency, and in his lifelong concern for man's environment he was far ahead of his time. His services on the Court span the tenure of five Chief Justices; by the end of the 1972 Term of Court his opinions appeared in 103 volumes—more than one-quarter of all volumes of reported cases of the Court.

Those who see Justice Douglas as nearing the end of his career overlook the fact that there are yet many mountains to climb—in the law and elsewhere—and he will never cease to do just that.

WARREN E. BURGER

Chief Justice of the United States

MR. JUSTICE DOUGLAS

On April 7, 1973, I was privileged to present our Medal for Excellence to William O. Douglas and to introduce him to the 1,500 students, faculty and alumni who overflowed the auditorium to hear him deliver our Harlan Fiske Stone Centennial Lecture. I feel now the same frustration I felt then—no tribute to his extraordinary achievements is fully adequate; no description of his immense range encompasses enough. In the months since, Justice Douglas' service on the Supreme Court has surpassed that of all of his predecessors. His thirty-five years on the Court are literally without parallel in American history. But far more important than his remarkable length of service has been the intellectual vigor with which he has brought the law to bear on practically every problem the nation has faced in more than a generation.

He is the author of an impressive array of constitutional law opinions forcefully defending the liberty of the individual against the power of government. His forthright protections of the freedom of speech and thought and his elaboration of an evolving constitutional guarantee of personal privacy are examples of his enormous impact on our fundamental law. Many other examples could be cited. But beyond his impact on substantive doctrine, Mr. Justice Douglas has been the supreme expositor from the bench of the philosophy of legal realism—the view, in the words of Roscoe Pound, that law is "a means toward an end, it must be judged by the results it achieves . . . not by the beauty of its logical processes or the strictness with which its rules proceed from the dogma it takes for its foundation."[1] For Mr. Justice Douglas, it has never been enough simply to discover the law and leave it where he found it. He has projected our law into the future, insisting, with Holmes, that the law must be shaped to bear witness to the moral development of society. Avoiding the recondite and esoteric, he seeks instead a simple and uncompromising focus on basic values. As a judge, Mr. Justice Douglas has joined the courage and bluntness of the frontier with the intellectual power of the academy. The result has been an original and profound vision of the role of law in society.

The penetrating legal intellect of William O. Douglas was apparent in the early years of his career. An outstanding member of our Class of '25, he taught at Columbia until 1928, then became a member of the Yale faculty from 1928 to 1936. He served his country with distinction in a number of federal posts, including the chairmanship of the Securities and Exchange Commission. In 1939 President Roosevelt nominated, and the Senate confirmed, William O. Douglas as an Associate Justice of the Supreme Court.

But these are only a few of his careers. The uncommon breadth of

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1. Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

William Douglas' interests have affected many aspects of American life. He is a well-known naturalist and an early advocate of conservation, a crusader for keeping unspoiled what is left of our national wilderness. In this role, he continues to be an active botanist, camper, fisherman, hiker, horseman, and mountain climber. He has been a world traveler and unofficial ambassador to the peoples of Asia, who have found him a warm and understanding friend. He is the author of widely read books that range in content from the Bill of Rights and the meaning of democracy, through probing analyses of history and global politics, to fascinating volumes on travel. He has, moreover, not been content to speak only from the bench and through books. He has spoken with simplicity, candor, and high intelligence in forums and from platforms throughout this land.

All these accomplishments spring from a complex of human qualities that can never be articulated fully. To his analytic and immensely learned legal mind must be added his human directness and his deep vital impulses. The man, in a word, breaks through the borders of a verbal frame.

With each new day, Justice Douglas creates a fresh record of unprecedented service. For myself and for all of us at Columbia, I wish him many, many more records.

MICHAEL I. SOVERN

Dean of the Faculty of Law
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MR. JUSTICE DOUGLAS

In America, as in most societies, age tends to engender respect and longevity inspires veneration. Increasingly, we confuse statistical measures with qualitative standards. A new "record" is greeted with hurrahs, and a "milestone" is an occasion for celebrations.

Mr. Justice Douglas has now sat—restlessly, outspokenly and with great distinction—on the bench of the Supreme Court longer than any of the other ninety-nine Justices who have served,[1] and the tributes that have come to him are a genuine expression of the affection and regard in which he is so widely held. It is, of course, not the time of his service that counts, however, but the quality of his judgments, and what he has done with his life.

William O. Douglas is not a venerable elder statesman. He is a most remarkable man who has been continuously active both on the Court and off. And, in spite of an attempt to silence him a few years ago, he remains the foremost and most vigorous proponent of individual and civil liberty in the country today. Individualistic as well as controversial, obdurate rather than doctrinaire, he has for many years been a symbol and a figure of great meaning to American life.

He was President Roosevelt's fourth appointment to the Court. It was an era that was marked by an expansion of social responsibility and great changes in the balance of economic forces. Roosevelt, who had fought a monumental battle with the Court over its challenge to New Deal legislation,[2] sought for

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1. Seventy-eight individuals had served on the Court prior to Justice Douglas' appointment. Since taking his place on the bench, thirteen additional Justices have come and gone. Thus, including the eight Justices currently sharing the bench with Douglas, there has been a total of ninety-nine other Justices; and, counting Douglas, there have now been one hundred members of the Court since its establishment. *See* G. GUNTHER & N. DOWLING, CONSTITUTIONAL LAW: CASES AND MATERIALS 1455 (8th ed. 1970).

2. Between 1934 and 1936 the Supreme Court, in twelve decisions, nullified the bulk of the major New Deal legislative program. The roots of the Court's use of the fourteenth amendment to protect the "liberty" of property rights went back to 1897 when, in Allgeyer v. Louisiana, 165 U.S. 578 (1897), the Court adopted Mr. Justice Field's dissent in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). After Lochner v. New York, 198 U.S. 45 (1905), it was abundantly clear that the Court would exercise a judicial veto over social welfare statutes that, in its opinion, were not reasonably attuned to its own laissez-faire, free enterprise conceptions. Between 1890 and 1937 the Court overturned 55 federal laws and 228 state laws.

President Roosevelt's efforts to deal with the economic distress of the early 30's thus ran smack into the barrier erected by the Supreme Court. The Court reached its high-water mark in opposition in 1936 when, having already invalidated the National Industrial Recovery Act (N.I.R.A.) and the Agricultural Adjustment Act (A.A.A.), it set aside a law regulating the bituminous coal industry on the ground that mere manufacturing or mining did not fall within the intendment of the commerce clause. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

In 1937 the Court majority, reflecting a remarkable shift by Chief Justice Hughes and Mr. Justice Roberts, swung completely around and began to sustain New Deal legislation (the "switch in time that saved Nine" wrote a contemporary observer of the Court). It is perhaps too easy to ascribe the Court's reversal entirely to the "Court-Packing Plan" but, whatever the reason, the Court thereafter began to accept federal efforts to regulate economic affairs.

judges who were "New Deal Liberals" and who, in the context of those times, would share his belief in the expanding powers of the Presidency and the Congress. Thus, when Mr. Justice VanDevanter retired in 1937, Hugo L. Black was nominated to replace him; and in 1938 Stanley Reed was nominated to take the place of Mr. Justice Sutherland. When Mr. Justice Cardozo died in July of 1938, Felix Frankfurter was put on the Court.

Then on February 13, 1939, Mr. Justice Brandeis retired. From President Roosevelt's point of view, there were then four "liberals" on the Court—Justices Black, Reed and Frankfurter and, frequently but not always dependably, Mr. Justice Stone. To get a majority of five, Roosevelt needed another "liberal." The criterion to be applied in the search for a successor to Justice Brandeis was the same as for the first three of his appointments, except that this time geographical considerations took on an added significance. Someone from the West was needed, especially after the "Western" seats of VanDevanter and Sutherland had gone, respectively, to the South (Alabama) and to a border state (Kentucky).

There were many candidates, but Brandeis himself let it be known that he preferred William O. Douglas as his successor, and when Senator William Borah, the great Western liberal, announced his approval of Douglas, the matter seemed settled. On March 20, 1939, Roosevelt sent Douglas' name to the Senate for confirmation.

Other than his outlook on economic liberalism, little, it was said, was known of Douglas' philosophy at this time.[3] His views were clear as to his belief in government regulation of business practices. He had worked, as a law professor at Columbia and at Yale, and later as a New Deal Administrator, largely in the areas of private finance and public utilities. He had exposed dishonest management practices, both in connection with his investigation of Protective and Reorganization Committees and with regard to the operation of the Stock Exchanges. His economics were closely akin to those of Brandeis. Like Brandeis, he was deeply concerned with the problems of monopoly and restraints of competition,[4] and he had manifested his distaste for absentee con-

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3. While it may be true that Douglas was best known at that time for his views on corporate economics, it is not entirely accurate to assume that he had not yet developed an outlook on libertarian issues. The economic liberals of the New Deal were almost invariably also political liberals and were as much concerned with civil liberty as with economic inequality. But the emphasis of the early Rooseveltian days was on the latter. Furthermore, it must be remembered that Douglas came from a pioneer community in the Far West that highly prized such values as individualism, privacy and personal rights.

4. For a recent statement of Douglas' views, see his opinion, concurring in part, in United States v. Falstaff Brewing Corp., 410 U.S. 526, 538-45 (1973). The continuing influence of Brandeis is markedly clear in Douglas' opinion, which expresses once again his characteristically strong views on monopoly and competition in general, his antipathy to the "efficiency" argument, and his concern with " 'local control' over industry and the protection of small businesses" under section 7 of the Clayton Act and the Celler-Kefauver Act. *Id.* at 543, *quoting* Brown Shoe Co. v. United States, 370 U.S. 294, 315-16 (1962).

trol of corporations, abuse of stockholders' and bondholders' interests, and manipulation of the securities markets. Not much else was publicly known of him.

Indeed, although the nomination was generally well-received, some fears were expressed on the left as well as on the right about his social and political outlook. Shortly after his nomination, *The Nation,* in a somewhat less than enthusiastic comment, questioned "how hardy Mr. Douglas's liberalism would prove to be in the cold isolation of the Supreme Court."[5] Equally, Senator McCarran of Nevada, a pillar of the conservative wing of the Senate, objected to the nomination from his point of view, protesting also that Douglas was not a true "Westerner."

Senator Ashurst, Chairman of the Judiciary Committee, appointed a subcommittee to hold hearings; but the nomination, once made, appeared to excite no great public controversy. No witnesses appeared at the hearing, and both the subcommittee and the parent Judiciary Committee voted their approval unanimously. On April 3, 1939, the nomination was placed before the Senate,[6] which confirmed Douglas the next day by a vote of sixty-two to four,[7] the only negative votes being cast by two highly conservative Republicans, Senators Reed of Kansas and Lodge of Massachusetts, and two Farmer-Labor liberals from North Dakota, Senators Nye and Frazier. Frazier, a rather eccentric populist, alone took the floor to oppose the nomination.[8] His opposition to Douglas was twofold: first, Douglas had "intimate connections with the Stock Exchanges and with Wall Street" (he had been Chairman of the SEC for almost two years);[9] and second, nothing was known of the candidate's views on labor, agriculture and especially civil rights and civil liberties.[10] Thus, with publicly expressed doubts about his liberalism, and opposition imputing to him a lack of concern about civil liberties, Mr. Justice Douglas took his place on the Court on April 17, 1939.[11]

Almost from the beginning, Justice Douglas showed a quick and deep sensitivity to those problems which arise out of the Bill of Rights and the fourteenth amendment. The bulk of his early writing on the Court, however, tended to center on what was believed to be the field of his special expertise, cases dealing with the administrative agencies and with government regulation of business. To a certain extent, this was undoubtedly due to the fact

5. THE NATION, March 11, 1939, at 278.
6. 84 CONG. REC. 3706 (1939).
7. *Id.* at 3788.
8. *Id.* at 3706-13; 3773-88.
9. Douglas was named a Commissioner of the Securities and Exchange Commission in February, 1936. In September, 1937, he was appointed Chairman of the Commission and occupied that post until he took his seat on the Court on April 17, 1939.
10. Senator Maloney (Connecticut) and Senator O'Mahoney (Wyoming) both took the floor to defend Douglas, 84 CONG. REC. 3782-88, and with the overt support of Senators Borah and Norris, the nomination had smooth sailing.
11. *See* 306 U.S. iii n.4 (1939).

that Chief Justice Stone, his former dean at Columbia, tended to assign to him—more than to any other justice—the writing of cases that generally fell within that area. But certainly by the early 1940's, and increasingly thereafter, the protection of individual freedom and the concerns of the fourteenth amendment had begun to claim a major share of his judicial attention; and he quickly became, together with Mr. Justice Black, the leading spokesman for an expanded view of most of the first ten amendments[12] and for the "absorption" doctrine of the fourteenth amendment.

There were differences between Douglas and Black. Justice Black tended to take a more literal view of the "clear" language of the Bill of Rights[13] while Douglas, in his more freewheeling style, found greater comfort and scope in some of the broad generalized phrases of the Constitution.[14] But their fundamental agreements outweighed their differences, and their deeply shared values and concerns tended to bring them together more often than not on most issues—especially on those involving questions of individual freedom.

Douglas' dissents, from the beginning and on for several decades, became a recurrent invocation that inspired and uplifted lawyers, old and especially young, from that time to this. And although he reaped an ample share of disagreement and criticism along the way, he has never been deterred by his critics and has gone his unyielding way.

There is not much point to reviving here the disputes on the Court among the various justices and their coteries at the various law schools. I leave to others the arcane discussions about "judicial activism and judicial restraint."[15] Like Black, Douglas questions the reality of an alleged antithesis between judicial activism and restraint, fully realizing that such language has too often been nothing more than a way of rationalizing other values and expressing other disagreements. He believes that the function of a judge is to judge, and he has not cowered from the duty of confronting difficult decisions. He refuses to be deterred by abstract inhibitory concepts from the obligation of applying and re-applying constitutional doctrine.

He believes in *stare decisis* but recognizes the historical fact of movement and flux in Supreme Court adjudications. He understands that the logic of the law is not the inexorable logic of classical usage but really a kind of reasoning

12. Not only does Justice Douglas stand for a liberal construction of the first ten amendments, but he has also urged an enlarged version of the Bill of Rights. *See* Douglas, *The Bill of Rights is Not Enough*, in THE GREAT RIGHTS 117 (E. Cahn ed. 1963).

13. *See* H. BLACK, A CONSTITUTIONAL FAITH (1968).

14. *See* Yarborough, *Justices Black and Douglas: The Judicial Function and the Scope of Constitutional Liberties*, 1973 DUKE L.J. 441.

15. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); A. Bickel, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971). *See also* Ackerman, *Law and the Modern Mind by Jerome Frank*, DAEDALUS, Winter, 1974, at 119, 123-24, for a brief comment on "The Legal Process," which seems to be a close relative of the Frankfurterian "Judicial Restraint" orthodoxy.

by analogy,[16] and he reflects in his decisions not only the rule-skepticism of the legal realists but the fact-skepticism of Jerome Frank.[17] He sees the eternal problem of the law—the reconciliation of permanence and change—as mirrored in the dilemma of Supreme Court justices who must apply a Constitution written almost two hundred years ago to a nation that has always been characterized by a high velocity of change.

Douglas belongs to no "school," and he fits no mold. Indeed, he has cast his own mold. But, if he can be said to represent a legal tradition, it is the functionalism and realism that flowered at Yale in the late 1920's. This was the legal tradition that characterized the world of Walter Wheeler Cook, Underhill Moore, Thurman Arnold, Karl Llwellyn and all of the other adventurous spirits who rose up in opposition to the scholasticism of the German metaphysicians, and then to the rigidity and conceptualism of Roscoe Pound and his followers.

Douglas' personal philosophy, as he has expressed in his numerous books and public statements, marks him as a skeptic, suspicious of absolute truths[18]

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16. *See* E. H. Levi, An Introduction to Legal Reasoning (1949).

17. For the classic statement of Judge Frank's fact-skepticism, see J. Frank, Courts on Trial 42-48 (1949); J. Frank, Law and the Modern Mind 74-80 (1930). *See also In re* J.P. Linahan, 138 F.2d 650, 652 (1943); Aero Spark Plug v. B.G. Corp., 130 F.2d 290, 292, 295-99 (1942) (Frank, J. concurring); Repouille v. United States, 165 F.2d 152, 154 (1947) (Frank, J. dissenting); Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 60-66 (1948); Cahn, *Jerome Frank's Fact-Skepticism and Our Future*, 66 Yale L.J. 824 (1957); Cahn, *Fact-Skepticism and Fundamental Law*, 33 N.Y.U.L. Rev. 1 (1958).

18. His judicial opinions, however, reflect an acceptance of some absolute rights, stemming mainly from the first amendment. For example, in a concurring opinion in the recent abortion cases, Doe v. Bolton, 410 U.S. 179 (1973), and Roe v. Wade, 410 U.S. 113 (1973), Justice Douglas took the position that rights springing from "the autonomous control over the development and expression of one's intellect, interests, tastes, and personality," *id.*, at 211 (italics omitted),

> are rights protected by the First Amendment and, in my view, they are absolute, permitting of no exceptions. The Free Exercise Clause of the First Amendment is one facet of this constitutional right. The right to remain silent as respects one's own beliefs is protected by the First and the Fifth. The First Amendment grants the privacy of first-class mail. All of these aspects of the right of privacy are rights "retained by the people" in the meaning of the Ninth Amendment.

Id. (citations omitted).

With regard to two other categories of basic rights in the area of privacy, however, Douglas' concurring opinion recognized the state's regulatory authority under the police power, in some cases, *id.* and upon a "showing of 'compelling state interest,'" in others, *id.* at 213.

And in his dissenting opinion in Roth v. United States, 354 U.S. 476, 508 (1957), joined by Justice Black, Douglas wrote:

> The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing the values of speech against silence. The First Amendment puts free speech in the preferred position.

Id. at 514.

For a contrary expression of his views on the dangers of granting absolute discretion to government officials, see his dissenting opinion in United States v. Wunderlich, 342 U.S. 98, 101 (1951);

> Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of

and dubious about inevitability in human affairs, a rationalist, devoted to reason as an instrument in the search for belief, and yet almost religious in his convictions about humanism and his concern for the environment. He understands that justice is a kind of equality, and he has grappled with the highly complex problems of equalizing freedom without sacrificing liberty.

There remains, finally, one aspect of Douglas' career and his position in American life that should be noted. While some national leaders have pandered to narrow interests and turned public life into a game of craft and cunning, he has expressed his clear ideas and his high values without hesitation, equivocation or qualification. Although he *is* controversial, no one has doubted the honesty of his impulses or his courage under pressure.

For almost forty years he has criticized the politics or repression and self-interest. He has goaded our conscience and has challenged us to seek the relevancy of law as justice and politics as morals. He has, in a sense, been the great teacher of our times, and the lessons he teaches will stay with us far longer than the false bromides of those who flaunt their patriotism in their lapels and temper their beliefs to fit the season. In an age of spuriousness, he remains genuine and true. At a time when utterances from the highest sources are frequently met with disbelief and derision, he is proof that public life can still be occupied by men of honor. He speaks for unambiguous values and a single standard, for the belief that liberty must be based on law, and law on liberty. And he has articulated and reasserted the ardent strain of individual freedom that is at the base of American constitutionalism.

Mr. Justice Douglas has grown older, but he is not old. He continues, as he always has been, to be the most active member of the Court, producing his characteristically unorthodox, sharp and terse opinions at phenomenal speed. He is a most extraordinary man for these most unusual times. As long as Mr. Justice Douglas sits on the Court, and writes books, and lectures to those who come to hear him, the voice of freedom will still be heard and the cry for justice will not be stilled.

SIDNEY DAVIS

Member, New York
and District of Columbia Bars

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movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.

Id.