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THE COURT YEARS 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS

New York: Random House, 1980.
Pp. 434, \$16.95.

Reviewed by Ralph S. Tyler*

Few Americans would claim objectivity on the subject of William O. Douglas. He inspired powerful reactions. I start by stating my deeply held admiration for Justice Douglas, a respect nurtured at a distance and from his writings. His writings brought Douglas the man and Douglas the Justice close to many who never met him. His words show him to be a man who cared profoundly about the world, its people, his country, and the law. Decades of American law students, particularly those like me who studied law in the 1960's and 1970's, listened to Justice Douglas, whether he was in the majority or, as often was the case, in dissent. As an admirer, I read and now review his account of life as an associate justice of the Supreme Court of the United States.

The judicial career of Justice Douglas began late in the New Deal and extended beyond Watergate. His story of this unprecedented tenure is rich in the personalities who touched his life and heavily laden with the strong views of a strong man. The prose is unmistakably that of the same prodigiously productive man who in a lifetime produced some thirty books on subjects ranging from travel to political theory, many articles in popular magazines as well as legal journals, and hundreds of pages in the volumes of the United States reports. Thus, the voice heard through the pages of *The Court Years* is familiar: "Big Brother can be concerned only with men's actions, not with their ideas."¹ That succinct summary of the Justice's views on the scope of an individual's intellectual liberty appears as part of his criticism of the loyalty-security program of the late 1940's and early 1950's.

The mystique and mystery surrounding the Supreme Court makes life inside the Court the subject of considerable curiosity, both lay and professional. Woodward and Armstrong, in *The Brethren*,² capitalized on this

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1. W. O. DOUGLAS, *THE COURT YEARS 1939-1975*, at 65 (1980) [hereinafter cited as DOUGLAS].
2. B. WOODWARD & S. ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979).

rather vast reservoir of unsatisfied interest. Justice Douglas provides yet another perspective on the subject. In part because the material for this fine book comes from one who was there, rather than from unidentified and unidentifiable sources,³ *The Court Years* merits special attention.

A major and unresolved theme of the book is the proper relationship between a Supreme Court justice and the world of politics and politicians. These were among the great forces which pulled on Justice Douglas throughout his years on the Court, and he writes of them at certain points with relish and joy and elsewhere with some pain, if not disgust. In both his personal and professional personae, Douglas was the opposite of a remote "ivory tower" figure. Likewise, his story is that of an active life in the rough and tumble at the top of the Washington, D.C. political world. He thrived in that highly charged atmosphere every bit as much as he thrived in the clean air and cool streams of remote wilderness areas. As he makes plain at the outset, going to the nation's highest court did not remove him from politics: "It seemed to me that I had barely reached the Court when people were trying to get me off. Most of them saw a political role for me starting, perhaps, in the executive branch; some were promoting me for the presidency."⁴

Justice Douglas gives many examples of exactly how, throughout his judicial career, he was closely involved with politics and its practitioners. Franklin Roosevelt, an early patron, remained a dear personal and professional friend until Roosevelt's death. In the White House, Roosevelt and Douglas discussed the nation's preparedness for war, and then subsequently the shape of the post-war world.⁵ Douglas remained equally close with Joseph Kennedy, another lifelong admirer and supporter. Through the senior Kennedy, he became close with Kennedy's children. His involvements with the Kennedy family were many, including his presence at their home in Palm Beach as plans for the first congressional campaign of young Jack Kennedy were discussed.⁶ Douglas nearly became the

3. Compare *id.* with DOUGLAS, *supra* note 1.

4. DOUGLAS, *supra* note 1, at 3.

5. *Id.* at 273-77.

6. When Jack went to Choate, he was a most attractive chap but rather scatterbrained. When he finished Harvard, he had all the earmarks of a playboy. I was with him at Palm Beach when he decided he would run for Congress and I sat in on the Kennedy family discussions concerning the strategy

I was again with him at Palm Beach when he decided to run for the Senate. He asked me what I thought and I told him I was for anything he wanted to do, but the first thing I thought he had to do was to establish some solid record of achievement in the House. Despite my advice, Jack went into the campaign and won handily. As a senator, he was as nondescript as he had been as a congressman.

Id. at 302.

Democratic candidate for Vice President in 1944⁷ and, if he had done so, would have become President when Roosevelt died.

In a different type of political involvement, Douglas saw several of the justices serve in various capacities in the executive branch while remaining on the Court. He criticizes Justice Robert Jackson for not resigning from the Court when Jackson served as chief prosecutor at the Nuremberg trials.⁸ He saw Justice Abe Fortas, his friend and former student,⁹ denied confirmation as chief justice in part because Fortas continued to advise Lyndon Johnson on the Vietnam war and other matters after joining the Court.¹⁰ He doubted the wisdom, although certainly not the motive, of Chief Justice Warren's acceptance of President Johnson's urgings to head the commission to investigate the assassination of President Kennedy.¹¹

Regrettably, Justice Douglas states the facts of the problem of justices in politics without subjecting these facts to much analysis. Indeed, the incidents which he relates contradict some of his conclusions. For example, the statement that he "felt there was no room for a Justice in the executive branch"¹² is followed closely by vivid accounts of intimate evenings of serious talk with FDR. Douglas proudly accounts that at these sessions he expertly mixed martinis as the two discussed the leadership capacities of the nation's wartime generals,¹³ the need for a United Nations to tame a bellicose nuclear world,¹⁴ and the possibility of naming a non-lawyer to the Supreme Court.¹⁵ Douglas does not seem to recognize the possibility that he may have served the executive without formally

7. *Id.* at 281–84.

8. *Id.* at 28.

9. The depths of their long and mutual friendship are suggested in Fortas, *William O. Douglas: A Eulogy*, 89 *YALE L.J.* 613 (1980).

10. DOUGLAS, *supra* note 1, at 252–55.

11. *Id.* at 315.

12. *Id.* at 268.

13. *Id.* at 276–77.

14. *Id.* at 275–76.

15. FDR did have a lingering grudge against the Court as an institution. He never really got over the defeat of his Court-packing plan. He mentioned it again when I proposed that the Court move to Denver. This time he asked why lawyers were so conservative, why they turned out to be stodgy judges. He mentioned no names, but he obviously had been disappointed at some of his own judicial appointees. I told him that there was nothing in the Constitution requiring him to appoint a lawyer to the Supreme Court.

"What?" he exclaimed. "Are you serious?"

I answered that I was.

He lit a cigarette, leaned back and after a moment's silence said, "Let's find a good layman." He became expansive and enthusiastic and held forth at length, going over various names.

"You'll have to pick a member of the Senate," I said. "The Senate will never reject a layman as a nominee who is one of their own."

His face lit up and he said excitedly, "The next Justice will be Bob La Follette." There was no vacancy then, and none occurred before FDR died. But a plan had been laid to shake the

joining the executive branch. The analysis of such coziness between a justice and his overtly political Washington colleagues is limited to the obviously true statement that “[t]he norm is not necessarily a true separation of powers, for every Justice is part of the town, of the nation, of the world, and is bound to play more of a role than that of a passive on-looker.”¹⁶ Yes, but the reader wants to know, how much more of a role does Justice Douglas think it is proper for a justice to play?

In a broader sense, the fault for the thin analytical treatment which these issues receive in *The Court Years* does not lie with Justice Douglas alone. The complicated grey-area ethical problems are treated superficially by most lawyers, judges, and law teachers. Most members of the profession are involved in complex, if unrecognized, problems of a conflict of interest. For example, lawyers, including judges and legal academics, represent ongoing economic, social, and political perspectives as well as representing the transitory client or deciding the individual case. Most lawyers practice an astute and obviously self-serving myopia about the existence and depths of such conflicts, and few of us are willing to sound the alarm about a problem in which the entire legal fraternity is involved. Justice Douglas sincerely regrets his approval in *Korematsu v. United States*¹⁷ of the government’s evacuation of Japanese citizens from the West Coast during the Second World War. This regret is made all the more poignant by the absence of any recognition that Justice Douglas may have been prepared to accept the government’s highly speculative national security arguments through his late night chats in the oval office with the war Commander in Chief.

A combination of ambiguous ethical principles and a history of close relationships between sitting justices and elected officials have blurred the boundaries of propriety in this area. High political office, including appointment to the Supreme Court, rarely comes to the political virgin. Generally, such office comes as a reward and recognition of success in the fray. The important symbolic act of donning the robe is intended to change a person’s life, but that act does not eliminate a past. Fair questions for both the citizenry and the justice to ask and attempt to answer are how much of a change in personality and associations is required when one becomes a judge of the highest court, and how much of a change is it reasonable to expect?

pillars of tradition and make the Establishment squirm by putting an outstanding, liberal layman on the Court.

Id. at 281.

16. *Id.* at 268.

17. 323 U.S. 214 (1944). See DOUGLAS, *supra* note 1, at 38–39, 280.

The relatively easy ethical case is judicial disqualification in a matter in which the judge has or had a financial or personal interest.¹⁸ A Supreme Court justice giving advice to a political figure is a far harder case. Justice Douglas, for example, discussed with Robert Kennedy whether Kennedy should become Attorney General.¹⁹ Kennedy's acceptance of his brother's offer would, of course, make him the chief executive of the Department of Justice, the most frequent litigant before the Supreme Court. Admittedly, Robert Kennedy was a friend of long standing, one who had enjoyed the company of Justice Douglas on a trip to the Soviet Union years before.²⁰ In spite of all of this, should a justice of the Supreme Court be advising the likely next head of the Justice Department? Alternatively, having discussed the matter, if the friend accepts the appointment, should the discussion disqualify the justice from hearing Justice Department cases while "his candidate" is Attorney General?

These problems are complicated, and cannot be solved by declarations of absolute principle. Difficult ethical questions are inevitably matters of degree and close judgments are required. In this area, the contribution of *The Court Years* is its measure of candor in shedding some light on Justice Douglas' approach to this issue. The lesson here is that separation of powers is both fiction and reality. The fiction, however, is substantially larger than is often acknowledged by a profession which draws power from the preservation of the separation of powers. There is an interlocking legal-political directorate as well as a noble and principled tradition of judicial independence.²¹

18. DOUGLAS, *supra* note 1, at 254.

19. I came to know Bobby intimately . . . when he attended law school at the University of Virginia and induced me to come down and give a talk or two to student groups. Once he had entered the stream of the law, he kept rather close contact with me.

He threw himself with great vigor and intensity into the 1960 campaign on behalf of his brother. And when victory came, he had an important decision to make. I remember the lunch that he and I had at the Supreme Court, when he was debating whether or not to join the Cabinet as Attorney General. I told him I thought he would make a fine Attorney General, but that at some juncture in his life he should start a course that was wholly independent of Jack. While he had made an enduring contribution to Jack and Jack's future, my thought was that it was now time to think of himself. We reviewed at length various possibilities open to him. He did not want to practice law. Business had no appeal to him. He had no desire to teach law. He thought he might perhaps be happy heading up some foundation, but about that he was not sure. So by the time he left my office, he had made up his mind to be Attorney General.

Id. at 305-06.

20. *Id.* at 306-07.

21. Douglas gives the example of Justice Holmes' famous dissent in *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting), an antitrust case of great importance to President Theodore Roosevelt, the man who appointed Holmes. DOUGLAS, *supra* note 1, at 242. The independence shown by President Nixon's appointees to the Court in voting against the President's position in *United States v. Nixon*, 418 U.S. 683 (1974), would be another example.

Politics was involved in another highly publicized effort to remove Justice Douglas from the Court. An understandable sense of pain pervades the chapter on the politically motivated Nixon-Agnew-Ford impeachment attempt. While Douglas does not seem to be a man who was particularly preoccupied with being loved,²² as he says Lyndon Johnson was,²³ he valued respect and was hurt by the unjustified impeachment attempt. He had committed no impeachable offenses. His "offense" was holding and stating opinions not shared by his attackers. The irony, of course, is that in time the tables would be turned and charges of criminality and impeachable offenses would be made with great force and effect against two of the leaders of the impeachment pack.

It would be a mistake to draw much comfort from the relative ease with which Justice Douglas defeated the attempted impeachment. The constitutional guarantee of life tenure is weakened whenever a judge is called upon to defend his words. Preservation of the always fragile constitutional balance of powers demands of politicians that they carefully wield the impeachment weapon just as much as it demands of justices that they maintain a respectful distance from politics.

There are a number of statements in *The Court Years* which suffer from over-breadth and under-explanation. Lyndon Johnson's appointment of Thurgood Marshall to the Court is explained in terms unfair and almost slanderous to both Johnson and Marshall: "Marshall was named simply because he was black, and in the 1960's that was reason enough."²⁴ That characterization of Marshall's "qualifications" totally disregards his extensive prior experience as an appellate advocate, both on behalf of private parties in civil rights cases and on behalf of the United States as Solicitor General, and his service as a judge of the United States Court of Appeals for the Second Circuit. A similarly unfair and inaccurate statement can be concocted about Douglas: "Douglas was named simply because of his friendships with FDR and Joseph Kennedy, and in the 1930's that was reason enough." Neither statement adequately acknowledges the skills and experience of the respective appointees, nor explains the obviously complex set of factors which combine to produce an appointment to the Supreme Court.

Douglas is more candid in sharing glimpses of his life outside the Court than he is in revealing the substance of his life in the Court. I wanted to know more about the content of discussions among the justices, how decisions were reached, and when and why compromises were made. He

22. Former Justice Fortas would probably disagree with this conclusion. See Fortas, *supra* note 9, at 614.

23. DOUGLAS, *supra* note 1, at 319-33.

24. *Id.* at 251.

names the outstanding advocates without detailing what distinguished the great advocates from the journeymen. On all of these matters, Douglas makes general statements, but omits the persuasive details.

Unfortunately, some of Douglas' descriptions of important events which took place near the end of his career are at best opaque, a loss no doubt attributable to advancing age and declining health. The statement that he would have denied certiorari in *United States v. Nixon*²⁵ "because the legal and constitutional claims were 'frivolous' "²⁶ is less than self-evident and needs explication. The characterization of the brief filed on behalf of Nixon is highly intriguing but again only conclusory: "When the briefs were filed and I studied them, it was plain that the Nixon lawyers were angling for us to muddy the waters so as to slow down the impeachment procedure."²⁷ This statement is not inconsistent with much of what we know about Richard Nixon, but without the substantiating evidence from the brief the reader is left wondering about the basis for the conclusion.

These and other possible criticisms of *The Court Years*, however, are minor and do not detract from the value of the book. A measure of the worth of an autobiographical account by a person who has been in the center of great events and made momentous decisions is its contribution to an understanding of power and the powerful. How self-conscious of power are those who exercise it? What do they see as the sources of their power? Is the person with power more aware of the extent or the limits of his power? As to these questions, Justice Douglas is informative.

Despite deeply ingrained and frequently espoused democratic instincts, Douglas believed that the exercise of power was the exclusive province of a well-educated intellectual elite. He praises intellect while sharply disparaging wealth, the Establishment, and the Establishment's legal mouthpieces. He suffered fools not at all. There is in this attitude something of an intellectual social Darwinism. His caustic remarks about the capacities of some of his brethren on the Court and lawyers who appeared before them²⁸ are more than merely individual criticisms. Douglas is also saying

25. 418 U.S. 683 (1974).

26. DOUGLAS, *supra* note 1, at 140.

27. *Id.*

28. In the sixties and seventies, more and more women appeared as advocates. Their average ability and skill were the same as the male advocates and their presence was no cure for the mediocrity of most arguments before us. I remember four women in one case who droned on and on in whining voices that said, "Pay special attention to our arguments for this is the day of women's liberation." Several of us did express the view that any law which drew a line between men and women was inherently suspect. That view had not prevailed over the majority saying a discrimination classification in sex would be sustained if "reasonable."

During this argument by the four wondrous Amazons, I sent a note along the bench saying

that these individuals, unlike himself, did not belong in the revered chamber of Marshall, Holmes, and Brandeis. Every man is to be free from governmental interference with his private thoughts and life,²⁹ while the responsibility of public decisionmaking belongs as of right to those intellectually qualified and prepared for the task. While Douglas was a life-long democrat in both the capital and small "d" senses, New Deal democracy was a democracy by and from the top. He has no dispute with this approach.

As in other countries, an aspect of elite life in the United States is that it tends to be self-perpetuating. Justice Douglas provides some additional interesting evidence of this pattern of self-perpetuation. In an appendix, he lists the names, dates of service, and law schools of his law clerks from 1939 to 1980.³⁰ During this period he had fifty-four clerks drawn from a total of only ten law schools.³¹ And fifty of his law clerks were drawn from a total of seven schools.³² There are some prominent names on the list: C. David Ginsburg, clerk in 1939, managed Hubert Humphrey's campaign for President in 1968; Vern Countryman, clerk in 1942-43, went on to be a distinguished professor at the Harvard Law School; and Warren M. Christopher, clerk in 1949-50, became a partner in the Los Angeles law firm of O'Melveny & Myers and represented his country in the negotiations to obtain the release of American hostages in Iran while serving as Deputy Secretary of State. These men are more than just "the best and the brightest." They are among the best connected.

Inadvertently perhaps, *The Court Years* is a first-person study in how power is exercised and perpetuated. The central nervous system of the

that I was about to change my mind on sex classification and sustain them if they were "reasonable."

Id. at 185.

Truman's appointees to the Court were Fred Vinson, Tom Clark, Sherman Minton and Harold Burton. Under Truman the Court sank to its lowest professional level until the Burger Court arrived. I speak, of course, from the viewpoint of one who believes that the judiciary should be alert to construe the Constitution and laws of the United States as providing a strong arsenal for protection of the individual, whatever his place in the spectrum of ideas may be. Most of the Truman appointees reflected the small-town attitudes of conformity more than the emerging urban consciousness of the need for diversity. Tom Clark was different in the sense that he . . . grew in stature and expanded his dimensions.

Id. at 245. See also *id.* at 178, 182, 248-49.

29. See text accompanying note 1 *supra*.

30. DOUGLAS, *supra* note 1, at 415-16.

31. In descending order of representation, the schools were University of California, Berkeley (14), Stanford (9), University of Washington (8), Harvard (6), University of California, Los Angeles (5), University of Southern California (4), University of Arizona (4), Yale (2), University of Texas (1), University of the Pacific (1). The seeming over-representation of western law schools is attributable to Douglas' usual practice of selecting clerks who graduated from law schools located in the Ninth Circuit for which he was Circuit Justice. *Id.* at 170.

32. The list in note 31 *supra*, less Yale, Texas, and University of the Pacific.

process is a network of relationships. Contemporary American legal-political life is too diffuse to be explained accurately with the simple cliché that “it’s not what you know but whom you know.” While the truth is more complicated than the catchy cliché would allow, whom you know is going to influence strongly what you know and vice versa. Opportunity is a highly relative and differentially available commodity.

Justice Douglas was perhaps the most durable of the visible New Dealers. He remained faithful to a constitutional creed of congressional power to legislate extensively in economic matters and broad individual freedom in matters of civil liberties.³³ His passionate concerns included the primacy of constitutional principles and the fragile balance between human progress and man’s environment. He lived and loved a large life filled with large concerns. *The Court Years* is a gift to be treasured. The book cannot be read without feeling again how much vitality Douglas added to our national life and how irreplaceable is our loss.

33. For a warmly appreciative summary of the major themes to be found in the life and work of Justice Douglas, see Emerson, *Justice Douglas and Lawyers With a Cause*, 89 YALE L.J. 616 (1980).