Les Cahiers de droit

Of William O. Douglas, his Autobiography and Other Things

Edward G. Hudon

Volume 22, Number 2, 1981

URI: https://id.erudit.org/iderudit/042445ar
DOI: https://doi.org/10.7202/042445ar

See table of contents

Publisher(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (print)
1918-8218 (digital)

Explore this journal

Cite this article

Hudon, E. G. (1981). Of William O. Douglas, his Autobiography and Other Things. *Les Cahiers de droit*, *22*(2), 473–500. https://doi.org/10.7202/042445ar

Article abstract

Cet article porte sur la vie et l'autobiographie du juge William O. Douglas de la Cour suprême des États-Unis.

Le juge Douglas fut successivement, pendant sa longue carrière, professeur de droit, membre, puis président de la *Securities and Exchange Commission* et juge de la Cour suprême où il siégea plus longtemps qu'aucune autre personne. Il exerça une influence considérable sur le développement du droit constitutionnel américain.

Botaniste amateur, coureur des bois, écrivain et voyageur dans le monde entier, ses intérêts dépassaient de loin le droit. Les deux volumes de son autobiographie racontent les événements de sa vie pendant laquelle il connut aussi bien la pire des pauvretés que le plus fantastique des succès.

Of William O. Douglas, his Autobiography and Other Things

Edward G. HUDON *

Cet article porte sur la vie et l'autobiographie du juge William O. Douglas de la Cour suprême des États-Unis.

Le juge Douglas fut successivement, pendant sa longue carrière, professeur de droit, membre, puis président de la Securities and Exchange Commission *et juge de la Cour suprême où il siégea plus longtemps qu'aucune autre personne. Il exerça une influence considérable sur le développement du droit constitutionnel américain.*

Botaniste amateur, coureur des bois, écrivain et voyageur dans le monde entier, ses intérêts dépassaient de loin le droit. Les deux volumes de son autobiographie racontent les événements de sa vie pendant laquelle il connut aussi bien la pire des pauvretés que le plus fantastique des succès.

* Professeur à la Faculté de droit de l'Université du Maine, ancien bibliothécaire de la Cour suprême des États-Unis et ancien professeur à la Faculté de droit de l'Université Laval.

1. A Burr Under the Saddle

Altogether too often, those who start from scratch — from humble or disadvantaged circumstances — and then go on to achieve great success are much too anxious to close the door on the past and on those that they have left behind so that they may become a part of, and be accepted by, the so-called. Establishment. William O. Douglas was not such a person. On the contrary, throughout his life he remembered what it meant to be born on the wrong side of the tracks and to have to struggle not only to achieve success, but even to survive. This is reflected even in the memorial funeral service that he planned for himself before his death in which there was included Woodie Guthrie's "This Land is Your Land" [1], as well as The Lord's Prayer, readings from The Holy Bible, and The Twenty-Third Psalm. That is why if one reads *The Court Years* [2], the second volume of Justice Douglas' autobiography, without having read the first, *Go East, Young Man* [3], one gets an incomplete — perhaps even a distorted — picture of William O. Douglas, the man and the jurist.

It is in the first volume of this autobiography that one finds an explanation of much that is written about in the second. It is in the first volume that one finds a firsthand account of the poverty and of the struggles of Justice Douglas' early formative years and of the events that took place later during his life, before he was appointed to the Supreme Court, such as his battles with Wall Street and with other vested interests. It is in the light of these struggles and of these events that one must read the second volume. It was inevitable that what he wrote about in the first should have an effect and an influence on what he wrote about in the second because, like everyone else, Justices of the Supreme Court of the United States are human beings. That is why there are nine of them rather than just one. There is only the danger, and it is small, that all nine would be of the same mold and of a like mind, rather than of varied backgrounds and different outlooks with which to consider the myriad problems presented to the Court for resolution. Thus, it would not be healthy if there were nine William O. Douglases on the Court, but it is essential that there should be at least one. Without such a member, the Court tends to become somewhat bland and unimaginative.

---

1. See Order of Service, William Orville Douglas, October 6, 1908 — January 19, 1980, Memorial Service, Wednesday, January 23, 1980, Eleven O'Clock, The National Presbyterian Church, 4101 Nebraska Avenue, N.W. Washington, D.C.
2. *The Court Years, 1939–1975, The Autobiography of William O. Douglas*, New York, Random House, 1980.
3. *Go East, Young Man: The Early Years. The Autobiography of William O. Douglas*, New York, Random House, 1974.

Perhaps Justice Blackmun best expressed the value of having a William O. Douglas on the Court when he spoke as follows of the deceased Justice:

> Often he was a burr under the saddle, but the discomfort he produced usually resulted not only in the re-examination of principles too long assumed, but also for the good of the country and the Court as an institution.[4]

2. Go East, Young Man — The Years of Preparation

In the early chapters of *Go East, Young Man*, Justice Douglas wrote of the poverty of his youth. He wrote of his father, a Presbyterian minister, who died young leaving his mother with three children: his sister, seven; himself, six; and his brother, four. He also wrote of the 2,500 $ in life insurance that his mother was left with when his father died, 600 $ of which was spent to build a five-room house in Yakima. The balance was placed in the hands of his mother's lawyer who invested it in a highly speculative irrigation project of which he was a promoter, but the project failed and the Douglas family was left penniless. As Justice Douglas expressed it, his mother "knew poverty in the Middle Eastern, African, and Latin America sense of the word" (p. 8). After his father's death and the loss of the insurance money, it was nip and tuck for the hard-working Douglas family. Sometimes there was the feeling that they were born on the wrong side of the railroad tracks, particularly when they received a box of secondhand clothing at Christmas, which he resented; but there never was the feeling that they were underprivileged.

In one of these early chapters (chap. III), the Justice wrote of his battle with polio as a child. He recovered to walk again largely through the efforts of his mother who, for weeks on end, day and night, soaked his legs in warm salt water every two hours and massaged them as the doctor had told her to do. He also wrote of his skinny legs, the result of the polio, which caused him to be the subject of ridicule. It was because of this that he took up hiking and mountain climbing. He wanted to develop and strengthen his legs.

In another of these early chapters (chap. IV), he wrote of minorities —of the discrimination against the racial and ethnic minorities that existed even in Yakima as he grew up. He wrote of the unfriendliness towards the Italians, the Poles, and the Indians. He also wrote of the IWW's, the wanderers, and the hobos whom he encountered, came to know, and traveled with as he rode the rods — the hitchhiking of his day — to go wherever he thought he might find work. As he wrote about this he did not

4. For Justice Blackmun's and other tributes to Justice Douglas at the time of his death see "President Calls Douglas Shield of U.S. Liberty", *The New York Times*, Sunday, January 20, 1980, p. 29.

leave out the "bulls' who were hired by the railroads to get rid of this "unsavory" element of society. He always had an enduring affection for migrant workers since he had been one himself.

The chapters devoted to his college career at Whitman College and at the Columbia Law School (chapters VII and X) explain how, years later as an Associate Justice of the Supreme Court of the United States, he could write thirty or more books, author numberless articles on various subjects, and deliver innumerable addresses and lectures, at the same time that he carried his full share of the Court's work and then some. He was offered a full tuition scholarship at Whitman because he was valedictorian of his high school class, but he still had to earn his living expenses and he felt that he had to send his mother twenty dollars a month. He was able to do this by working at several jobs at the same time while he attended college full time — a janitor's job from 5:30 A.M. to 7:30 A.M., a job in the afternoon in a jewelry store (he started at .10 an hour), a waiter's job in a "hash house" that gave him his two main meals of the day, and whatever else he could pick up for work such as tending furnaces and mowing lawns.

Columbia Law School, which followed two years of teaching at the Yakima High School after he graduated from college, was a repetition of the breakneck pace that he had kept up at Whitman. When he left for Columbia in September, 1922, he had seventy-five dollars in his pocket. As usual, the freight trains provided his transportation. The first part of the trip was done in style in the caboose as he escorted two thousand sheep for a Yakima firm as far as Minneapolis, but for the remainder of the trip to New York he rode the rods, his usual mode of transportation. Indeed, William O. Douglas owed much to the railroads. One cannot help but wonder how far he would have gone in his career if it had not been for the cheap transportation that they unwittingly provided him at the start.

Describing his law studies at Columbia, Justice Douglas wrote that he got his law "pretty much on the run" (p. 145). When he arrived in New York he had only six cents left of the seventy-five dollars with which he had left Yakima. There was no scholarship or loan available, and it was only because he got a job preparing a correspondence law course that he was able to start law school. He spent the first six weeks of law school preparing the correspondence course and then worked feverishly to catch up with his classes. Soon he found what he called "big money" in tutoring and preparing students for college-entrance-examinations for Princeton, Yale, and Columbia. As he described it, to obtain his services "students had to be both stupid and rich" (p. 140). He also made the Law Review, learned how to smoke and drink, and helped Underhill Moore write a treatise for the cement industry, which was under fire for alleged antitrust violations.

Justice Douglas wrote of his classmates at Columbia, among whom there were such notables as Paul Robeson, the future opera singer, who worked his way through law school as a professional boxer, and Thomas E. Dewey, who worked his way through as a singer. But even more interesting is his account of his disappointment when, upon graduation, he was not chosen as a law clerk by Associate Justice, later Chief Justice, Stone, who was Dean of the law school during Justice Douglas' first year as a student at Columbia. Not very many years later the two sat together on the Supreme Court.

Equally interesting is Justice Douglas' account of his search for employment with a New York law firm when he decided to stay in New York for a year or so rather than returning immediately to Yakima to a waiting law partnership. He decided against one eminent New York trial lawyer because he smelled liquor on his breath during the interview which took place after lunch. He did not think that liquor and the serious business of law mixed. He decided against John Foster Dulles because he thought him too pontifical. Dulles' pomposity struck him so much that when Dulles helped him put on his coat as he left, Douglas gave him a quarter tip (p. 150). He signed up with Cravath, deGersdorff, Swaine, and Wood, the predecessor of the present Cravath firm, and, when asked, agreed to teach Bankruptcy, Damages, and Partnership at Columbia on a part-time basis.

Now it was teaching and practicing law on the run. He kept this up for a year during which his salary rose from 1,800 $ to 3,600 $ a year, and then refused an offer of 5,000 $ a year and a "future" with the firm to return to Yakima where the best that he could hope for was 50 $ a month. However, after a few months of country law practice he was back at Columbia as a fulltime 5,000 $ a year Assistant Professor of law.

It was as a law professor, first at Columbia and then at Yale, that for the first time in his life Justice Douglas had the leisure to reflect on his past and his future and to put current problems in perspective.

As he put it, from the first grade through high school he trotted while he learned; in college and in law school he never had more than an hour or two to prepare for classes; when he both practiced law and taught at the same time he lived "on an intellectual subway, racing from point to point as [he] tried to absorb a book on the way" (p. 159).

At Columbia he joined Underhill Moore, Herman Oliphant, Karl Llewellyn, and others, all considered renegades, who sought to discover whether the law in books "served a desirable social end or should be changed" (p. 160). He resigned from the Columbia faculty in 1928 after a year of full-time teaching because Nicholas Murray Butler, the President of

the University, appointed a Law Dean without consulting the faculty, but then he promptly joined the Yale Law School faculty when he was invited to do so.

As he wrote of his teaching at Yale, in retrospect he recognized that his teaching techniques which he brought with him from Columbia had a "rather hard-bitten" approach. As he expresse it, he "bore down hard, treating each student as if it were irrelevant that his father or grandfather was a 'great man'" (p. 164). When the students lodged a complaint with the Dean to have him fired and the complaint was passed on to him, his reply was that it was fine with him if he was fired. When he added that he was inclined "to bear down even harder on the spoiled brats", he was told that that would be "revolutionary and wonderful" (p. 165). So, he stayed at Yale. Years later at the Supreme Court, where he had the reputation of working his law clerks hard, when he was complimented on having the best crew of law clerks in the building he commented: "I keep a hot iron on them" [5].

In the first volume of his autobiography, Justice Douglas also wrote of such people as George Draper, who had much to do with convincing him that he belonged in the public arena and urged him to become involved in the Franklin D. Roosevelt administration. Draper had been FDR's personal physician at the time of the latter's polio attack. Draper taught clinical medecine at Columbia, and it was there that the future Justice met him and the two became close friends.

Justice Douglas also wrote of the fears of his youth — of his phobia of intestinal pains, of his fear of water, which was not helped any when he was pushed into a YMCA pool and nearly drowned because he could not swim, and of his fear of lightening and of the danger of forest fires. He related how he conquered most, if not all, of those fears, as well as how he recovered from a near fatal accident in 1949 when a horse fell on him and broke twenty-three of his ribs during a horseback ride in the Cascade Mountains. He recounted how he recovered from the fears produced by that accident and how, by hiking across the Himalayas in India, he proved that his doctors were wrong when they concluded that his mountain-climbing days and his days at high altitudes were over.

If he had fears, he also had pet peeves, many of which were related to his interest in conservation and to his love for the outdoors. He took a dim view of dams, and he had no use for lazy sheepmen who caused the destruction of meadows by keeping their flocks there too long. He also considered lumbermen a curse because they built roads across the land and clear-cut

5. Personal conversation between Justice Douglas and the author of this article who was then the Librarian of the Supreme Court.

entire sections. But he did more than just write about these pet peeves. He took part in, and led, crusades to save a river here, a lake there, or a bit of woods elsewhere. Indeed, in 1954 he saved the C & O Canal near Washington, D.C., from being turned into a freeway when he led an eight-day protest hike along the one hundred and eighty miles of the Canal from Cumberland, Maryland, to Washington. After that the hike became an annual affair.

He also had a list of nine government agencies that he considered public enemies because of what they did to the land. Number one was the Corps of Engineers because of its obsession with building dams, and number nine was the Forest service because, as he put it, "it listened attentively to the lumbermen's talk and cut, cut, cut for commercial purposes" (p. 215). In between there were such agencies as the Bureau of Public Roads, TVA, The Bureau of Reclamation, the Soil Conservation Service, the Fish and Wildlife Service, and the Park Service. Although these agencies were intended to be the protectors of the "public interest", because of their practices he considered them "great despoilers" (p. 215).

In the first volume of his autobiography he even wrote of himself as a parent. He started off the chapter in which he wrote about his children with the observation that few people he had known were competent to be parents (chap. XVII). He also wrote that he doubted that he rated high as a father although he had once received the Father of the Year award. He was proud of his children — of their ability to fish, of their ability to ride and handle horses, and of their ability to make their own way in the world.

For the most part, the last nine chapters of *Go East, Young Man* (chapters XVIII to XXVI) cover the period of time from 1934 when Justice Douglas joined the staff of the Securities and Exchange Commission to head a study of protective and reorganization committees, until 1939 when he was appointed an Associate Justice of the Supreme Court of the United States. And perhaps one of the most entertaining parts of the entire book is the Justice's account of his first encounter with Joseph E. Kennedy, the Chairman of the S.E.C., when he reported for work. When he asked what instructions Kennedy had for him he was told: "Instructions? If I knew what to do, why in hell would I get you down here?" (p. 259). When Justice Douglas expressed surprise that his budget was fifty thousand dollars rather than five hundred thousand Kennedy replied, "You heard me", and then added, "Well, what in hell are you waiting for? Get going" (p. 259). Later, after the Justice had hired Abe Fortas as his top assistant, when a newspaper reporter went to Kennedy for advice about an S.E.C. article that he was writing, all the advice that the reporter got was to be told: "I got a couple of goddam professors down on the fourth floor — Bill Douglas and Abe Fortas. Why not pick their brains?" (p. 259). That was the beginning of

William O. Douglas' career with the S.E.C., of which he later became a member, then Chairman, and which finally led to his appointment to the Supreme Court.

Justice Douglas owed his invitation to join the S.E.C. staff to the work he had done in the bankruptcy field at Yale. He had written articles on high finance, predatory practices, protective committees, and bankruptcy and receivership practices. The investigations that he had conducted for the S.E.C. involved endless hours of hearings and hundreds of witnesses, including Robert T. Swain, his old boss at the Cravath firm; John Foster Dulles who was on the stand for two days; and Samuel Untermeyer. The end result was eight reports that were submitted to Congress; Chapter X of the Bankruptcy Act of 1938 that he, Walter Chandler, and Abe Fortas wrote; and the Trust Indenture Act of 1939 that he and Abe Fortas wrote. There was also the warm friendship that developed between him and Joseph Kennedy. The end result of this was that when Kennedy left he got President Roosevelt to name Douglas a member of the Commission.

Justice Douglas served as a member of the Commission from January, 1936, until September, 1937, and as the Chairman of the Commission from September, 1937, until he took his seat on the Supreme Court on April 17, 1939, when he was barely 40.

There are fascinating accounts of, as the Justice expressed it, the "fine citizens as well as rascals" who visited his office during his S.E.C. days (p. 282). His description of Wendell Willkie's visits is particularly interesting. At the time Willkie, the future Republican Party nominee for President, was the head of Commonwealth & Southern which was not only fighting TVA but was also having a host of problems with the S.E.C. Whenever Willkie would come in Douglas would rise and offer him a chair which Willkie would refuse. Instead, Willkie would walk across the room, pull up a chair, sit with his back to Douglas, and bellow at him, all the time keeping his hat on as if to better show his contempt (p. 283).

Equally interesting is Justice Douglas' account of his friendship with James Forrestal, which started in 1937 when he consulted Forrestal, then a member of Dillon, Reed, for advice on a short-selling rule that he had to draft. The friendship became a close one that lasted until Forrestal's death. Yet, Forrestal's closest ties were, as Justice Douglas expressed it, "with the Establishment" (p. 287). For that reason, the Justice wrote, before the public eye Forrestal sought to disassociate himself from him.

Justice Douglas nerver had much use for government bureaucracy. It was his theory that the creative work of any federal agency had to be done during the first decade of its existence, if it were to be done at all. It was for that reason that time and again he told President Roosevelt that every

agency that he created should be abolished in ten years. Further, since Roosevelt might not be around to dissolve agencies that he created, he suggested that the basic charter of every agency should have a provision for its termination. His reason for this attitude was that agencies had a tendency to become too closely identified with interests that they were created to regulate.

He was also very conscious of the pressure that agencies are subjected to on occasion, as he was subjected to some of it himself as Chairman of the S.E.C. To illustrate his point he gave an interesting, as well as amusing, account of the tactics used to fend off such pressure when a New York Stock Exchange Committee went to see President Roosevelt at Hyde Park to have him fired. He was called in Washington the evening before the meeting was to take place by Missy LeHand, the President's Secretary, told about the meeting and its purpose, and asked to be present. He got to Hyde Park two hours early and so took a hike during which he found himself in a tunnel where he actually had to pull in his stomach to avoid injury from a passing extra-wide truck. When he walked into the President's office with the Stock Exchange Committee, he told of his experience and complained of the hazards of hiking in Hyde Park. Taking that as his cue, the President held forth for half an hour on the hazards of travel, tunnels, trains and automobiles. At the end of the half-hour the Secretary walked in and announced to the President that his next appointment was waiting. That ended the meeting without the Stock Exchange Committee members having had a chance to utter a word. As they all filed out of the President's office, Justice Douglas stopped by Missy LeHand's desk to tell her that the Committee had apparently changed its mind about having him fired.

One of the most interesting chapters in the book is the one on President Roosevelt (chap. XX). Entitled "FDR", it relates not only the development of Justice Douglas close friendship with the President, but it also gives a good account of the inner circle with which Roosevelt surrounded himself. It ranges over everything from the 1937 Court packing plan which Justice Douglas considered ill-advised, to the poker games — the "command performances" — that the President enjoyed so much and to which Justice Douglas was invited once he became a part of the inner circle. There is even mention of the dry martini, FDR's favorite cocktail, that Justice Douglas learned to perfect during the hours that he spent at Shangri-la, now Camp David. There is also an explanation of why Wiley Rutledge rather than Learned Hand happened to be appointed to the Supreme Court. Rutledge got the appointment to replace James F. Byrnes on the Court principally because, as the President put it, "Felix overplayed his hand" (p. 332). During one day after Byrnes had resigned from the Court the President received twenty calls urging him to appoint Hand. The President described these calls

as "every one a messenger from Felix Frankfurter" (p. 332). As he was telling Justice Douglas about this he added, "And by golly, I won't do it" (ibid). Instead, he appointed Rutledge who was recommended by Irving Brant of the *St. Louis Post Dispatch* whom Roosevelt admired.

Then there was President Roosevelt's speech-writing team, of which Justice Douglas became a regular member. Whenever a speech was to be given the team would gather in the Oval Room, the President would read a rough draft out loud, then each member of the team would hand over a partial draft which the President would also read out loud and then decide what to use and what not to use. The final draft was put together by Judge Samuel I. Rosenman. According to Justice Douglas, these speech-writing sessions lasted one hour or less (p. 335).

In Chapter XXI, Justice Douglas wrote about the New Deal — of the Big Depression, receiverships and bankruptcies that were rampant, of staggering unemployment, and of the measures that the Roosevelt administration used to combat the problems that beset the United States. He wrote of how the Establishment, as the Justice expressed it, considered Roosevelt a traitor because it considered that he had deserted the conservative cause in which his roots, his family, and his early associations were so deeply embedded. Actually, according to Justice Douglas, FDR never deserted the conservative cause but, instead, worked to clean up the established social and economical order, eliminate its excesses, and make capitalism respectable. To prove his point the Justice cited the NRA (National Industrial Recovery Act) of 1933, which, in effect, gave industry the power to make the rules governing competition and prices. In essence, the Act, which was declared unconstitutional by the Supreme Court in 1935[6], gave industrial associations or groups authority to establish codes of fair competition which would be binding on the particular trade or industry. According to Justice Douglas, any Supreme Court would have ruled just as did the Court on which Justices Brandeis, Cardozo, Butler, and McReynolds sat when it acted unanimously in striking down the law "because lawmaking under the Constitution is a matter for Congress, not for private parties" (p. 347).

Justice Douglas defended the Public Works Administration (PWA), the Works Progress Administration (WPA), the Civil Work Administration (CWA), and other such agencies that had been the subject of ridicule and laughed at. He defended these agencies because they put people to work. Whether it was raking leaves, digging ditches, building roads, planting trees, paving streets, erecting buildings, or writing books (The Federal Writers Project), a miserably unemployed people was finally back on a payroll. For,

6. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

as he pointed out, not only were brokers and bankers driven to suicide, but "so were penniless writers who were deprived of their work cards" (p. 352).

The chapter on "The Witch Hunt in the New Deal" covers the Post-World War II period, when lists of subversive organizations and blacklists were the order of the day. The Justice discussed his vote in the *Hiss* case, along with that of Justice Black, the two that favored granting *certiorari* for a review of the Alger Hiss perjury conviction. He also wrote about the *Owen Lattimore* case in which Lattimore was persecuted and prosecuted for having said that the Chiang Kai-Shek regime in China was corrupt and for having predicted a Communist takeover in China. There were also investigations of those who had produced motion pictures sympathetic to Russia during World War II, a time when that country was an ally rather than a dreaded foe. Indeed, that was a period when a governement employee hardly dared order Russian dressing for his salad in a restaurant.

The last four chapters (chapters XXIII–XXVI) of *Go East, Young Man* are entitled "International Outlook", "Friends and Acquaintances", "Brandeis and Black" and "Appointment to the Court." The first of these, "International Outlook", dissects President Roosevelt's views and speculates on what his views would have been on the Vietnam situation. He doubted that FDR would have swallowed the idea of justifying the Vietnam war as a countercheck to China. The next chapter (XXIV), "Friends and Acquaintances", is the story of the Washington social whirl — Evelyn Walsh McLean, Gifford Pinchot, Senator Borah, Sam Rayburn, Walter Chandler, Emanuel Celler, and all the others. But as Justice Douglas points out at the start of the chapter, "Unless they have a home somewhere else, and are well established there, people in Washington are rootless" (p. 405).

The chapter on Justices Brandeis and Black (chap. XXV) recounts Justice Douglas' relationship with the two Justices of the Court with whom he felt closest ideologically. Both Brandeis and Black's appointments to the Court were controversial. The former's because he aroused the ire of the Establishment with his espousal of public causes that touched to the quick; the latter's because of his rumored membership in the Ku Klux Klan, which was later proved to be true, and for ideological reasons. Indeed, when President Roosevelt nominated Hugo Black to the Court, his idea, as Justice Douglas explained it, was to throw a "tiger" into the Court — "an outstanding opponent of all that the old Court had done" (p. 457).

As for Justice Brandeis' nomination, that was opposed by no less than seven ex-presidents of the American Bar Association who, Justice Douglas wrote, had "the courage of their retainers" (p. 457). Justice Douglas characterized Justice Brandeis, whose place he took on the Court, as "a

modern Isaiah... a mighty man of action who, having found the facts and determined the nature and contours of the problem, moved at once" (p. 443). He characterized Justice Black as one "fiercely intent on every point of law he presented" (p. 450). However, this fierceness was not "directed to his opposition — only to their ideas" (p. 450).

In Chapter XXVI, the last chapter of *Go East, Young Man*, Justice Douglas wrote of his appointment to the Supreme Court. He wrote about the odds against such an appointment even for a male Caucasian — a million to one — and of what he told any young lawyer who asked him how to go about becoming a Supreme Court Justice. The advice that he gave was not to make it a fixation. Instead, he advised those who asked him such questions that they should stay in the stream of history and be in the forefront of events — that they should carve out a career that would "be satisfying in all other aspects" (p. 455).

In his case, when his name was put forward, he considered that there were two things against him : (1) his youth — he was barely 40 — and (2) the seat had been promised to the West. Although he was a Westerner by background and orientation, he was an Easterner in politics. Lewis Schwellenback, Senator from the State of Washington, was a serious contender for the appointment, but a series of forces were put into play that secured the appointment for Justice Douglas. There was the backing of the retiring Justice Brandeis who had talked to President Roosevelt about him, and the backing of Senators Maloney of Connecticut, LaFollette of Wisconsin, and Borah of Utah, as well as the calls that his backers made to the Chief Justice of the Washington State Supreme Court and to the Bar Associations in the State of Washington.

Justice Douglas concluded *Go East, Young Man* by expressing his ideas on the role of a Supreme Court Justice in society and the rules of disclosure of outside interests by federal judges. He considered that when he voted with a majority of the Court to uphold an Act of Congress that subjected to income taxes the salaries of all federal judges taking office after June 6, 1932, he voted himself first-class citizenship. That took place in *O'Malley v. Woodrough*[7], one of the first cases on which he voted. After that, he considered that he was free to vote, and to participate in local, state, and national affairs, if such affairs were not political or partisan in nature. As for the rules for the disclosure of outside interests by federal judges, he

7. 307 U.S. 274 (1939). Prior to that the Supreme Court had decided in *Evans v. Gore*, 253 U.S. 245 (1920), that the salaries of federal judges were exempt from federal taxation because of Article III, Section I, of the Constitution of the United States which prohibits the reduction of a judge's salary during his term of office.

considered them to be capricious because, for instance, though they required the disclosure of income from writing, lecturing, teaching, and speaking, they did not require the disclosure of income from investments. He concluded that though it produced a "peck of trouble" for him, *O'Malley v. Woodrough*, the decision that made him a taxpayer, saved him from a lifetime diet of the law alone which, he wrote, "turns most judges into dull, dry husks" (p. 469). And that he never was.

3. The Court Years, 1939–1975 — Keeping the Government off the People's Back

As the first volume of his autobiography idicates, Justice Douglas was very much his own man. He had known poverty, he had seen injustice, and he had no use for the Establishment. He knew what it meant to have to ride the rods, and, after he had achieved success at a comparatively young age, he did not forget nor turn his back on those who were not able to rise much above the bottom of the pile as he had. Indeed, *The Court Years* is, to a considerable extent, the story of the unpopular causes that he espoused without fear or hesitation and of the battles that he fought in behalf of the mavericks, the offbeats, and the nonconformists. It is also the story of the Court on which he sat during more than thirty-six years, some of which were turbulent due to his belief that it was the function of the Constitution and the Supreme Court "to keep the government off the backs of the people", a belief that he expressed on more than one occasion.

In the first chapter of *The Court Years*, entitled "Early years on the Court", he related how it took him some time to become accustomed to the Court's routine. Ever since he was a boy he had lived on the run, but now that was changed. It was now a routine of reading and research. Justice, later Chief Justice, Harlan F. Stone told him that it took some years "to get around the track". Once he had done that and became familiar with the fields of law that were new to him, he found that the job of an Associate Justice took four days a week.

In this first chapter he also wrote of the Justices who were on the Court at the time of his appointment (James McReynolds, Pierce Butler, Charles Evans Hughes, Harlan Fiske Stone, Hugo Black, Owen Roberts, Stanley Reed, and Felix Frankfurter), and of others who joined the Court within a few years as well as of former Justices. For instance, he wrote of former Justice Willis Van Devanter who wrote few opinions in his twenty-six years on the Court (346 majority opinions) because, though he could summarize an opinion orally at the end of an argument and state the pros and cons, his mind froze the moment he picked up a pen or pencil. He also wrote of Pierce Butler whom he described as gruff, large-boned, broad-shouldered, tall, and

very able; of Justice, later Chief Justice, Stone, his law professor at Columbia, whom he got to know quite well as a student because of his many personal financial problems during his first year of law school. He also wrote of others, but he reserved his best comments for Justices McReynolds and Frankfurter.

He wrote how Justice McReynolds — Old Mac, as he referred to him fondly — went out of his way to be nice to him. He also wrote how McReynolds would prevent any Justice from smoking in Conference by announcing, "Tobacco is personally objectionable to me" (p. 13). Had he known, he might also have written how Justice McReynolds' law clerks could not smoke in their offices — that they had to go outside to smoke, after having first taken the precaution of taking off their suit coats so that there would not be the telltale smell of tobacco smoke when they came back in. But as Justice Douglas expressed it, " 'Mac' had 'a kind streak' ". "He was extremely charitable to the pages who worked at the Court, and very tender in his relationship toward children" (p. 13). He also noted that in spite of his conservatism, Justice McReynolds was liberal on some issues. For instance, he wrote the opinion of the Court in the case that upheld the "liberty" of parents to send their children to parochial schools[8], and he found it unconstitutional for a state to punish a teacher for teaching the German language after it had been declared that only English would be taught[9].

As for Justice Frankfurter, Justice Douglas wrote of his histrionics in Conference, and of how he aroused people so that they either loved him or hated him. Justice Douglas wrote of what he considered to be Justice Frankfurter's basic weakness — a longing to be accepted. Though he was an artist "at teasing and taunting the Establishment and its advocates", and though he "loved to see the Dean Achesons of the world squirm", he needed to be accepted, honored, and admired by them (p. 23).

As he concluded this chapter, Justice Douglas deplored the custom that developed in the 1950's and the 1960's for the President to write to bar associations around the country for recommendations for nominees for judgeships. To him this reflected the status quo. He believed that the people deserved more than mouthpieces for dominant corporate interests. He thought that country lawyers were often closer to the hearts and dreams of America than prominent big-name lawyers. That is why he favored FDR's predilection for off-beat professors and lawyers.

8. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).
9. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

In his discussion of "Contending Schools of Thought" on the Court (chap. II), Justice Douglas wrote how, in retrospect, every Justice that he had known felt that he had made mistakes in his early years on the Court. As an illustration, he pointed to his votes in the two World War II Japanese-American detention cases in which he voted to uphold such detentions, votes which he later regretted [10]. It also happened to him in the first flag-salute case, *Minersville School District v. Gobitis* [11], in which he and Justices Black and Murphy followed the lead of Justice Frankfurter in upholding a state statute making compulsory the salute to the flag in public schools. Later he and Justices Black and Murphy changed their minds and, when the question was again before the Court, they abandoned the Frankfurter school of thought and voted differently [12].

Among other things, the Justice also wrote of the manner in which the narrow construction given the commerce clause of the Constitution in 1895 [13] to the effect that manufacturing is not commerce was not overruled until 1948 [14]. As late as 1918 this narrow 1895 construction given the commerce clause in *United States v. E.C. Knight Co.* [15] was said to deny Congress the power to ban from interstate commerce goods that were the product of child labor. That happened in *Hammer v. Dagenhart* [16] which was not overruled until *United States v. Darby* [17] was decided in 1941. And so it went with the Due Process Clause of the Fourteenth Amendment and making the Bill of Rights applicable to the States. That was a development that took place over the objections of Justice Frankfurter who termed such an idea heresy — a wrongful construction of history, a view also shared by Professor Charles Fairman [18], a Frankfurter disciple. Nevertheless, it happened, though gradually, once the logjam was broken by *NLRB v. Jones & Laughlin Steel Corp.* [19] which upheld the validity of the National Labor Relations Act in 1937.

---

10. See *Hirabayashi* v. *United States*, 320 U.S. 81 (1943), and *Korematsu* v. *United States*, U.S. 214 (1944), discussed at pages 279, 280.
11. 310 U.S. 586 (1940).
12. *Jones* v. *Opelika*, 316 U.S. 584 (1942); *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943).
13. *United States* v. *E.C. Knight Co.*, 156 U.S. 1 (1895).
14. *Mandeville Farms* v. *Sugar Co.*, 334 U.S. 219 (1948).
15. 156 U.S. 1 (1895).
16. 247 U.S. 251 (1918).
17. 312 U.S. 100 (1941).
18. See C. FAIRMAN and S. MORRISON, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" (1949-50) 2 *Stanford Law Review* 5.
19. 301 U.S. 1 (1937).

Only those who lived through the era of the Truman and Eisenhower Loyalty-Security Programs can fully understand what Justice Douglas was writing about as he discussed these programs. As he expressed it in this chapter of *The Court Years* (chap. III), when President Truman launched his program in 1947 the ground was laid "for the most intensive search for ideological strays we have ever known" (p. 57). The victims were the unpopular person, the offbeat, and the nonconformist. Then there were also the investigations of the Un-American Activities Committee in the House of Representatives and Senator Joe McCarthy's charge in the Senate of an "espionage ring in the State Department". The real heroes of this era were the Abe Fortases, the Thurman Arnolds, the Paul Porters and others who dared defend those like J. Robert Oppenheimer and John Paton Davies who were sent down the drain because of the hysteria of the times.

The most intriguing part of this chapter of *The Court Years* is Justice Douglas' discussion of the *Rosenberg* case in which he issued a stay of execution as a result of which, to use his own words, he "became temporarily a leper whom people avoided", and because of which a motion for his impeachment was introduced in the House of Representatives (p. 85, 86–88). He issued the stay because in 1946, during the period from 1944 to 1950 of the alleged conspiracy with which the Rosenbergs were charged, the death penalty provision of the Espionage Act of 1917 was changed to make it applicable only in case the jury recommended it, and there had been no such recommendation. Chief Justice Vinson convened a Special Term of the Court for the day following the issuance of the stay at which time oral arguments took place on the merits of the stay before a tense audience in a packed courtroom. The Court went into Conference immediately after the oral argument and the stay was vacated by a vote of six to three. The decision and the dissents were announced at noon the following day[20] and the Rosenbergs executed that night.

Justice Douglas was critical of the "Judicial Treatment of Nonconformists" (chap. IV). Whether dubbed anarchist, socialist, Bolshevik, or Communist, he pointed out that the radical has never fared well in American life and that the seed of Communist though has fallen on inhospitable soil in this country. It is for that reason that he condemned *Dennis v. United States*[21] as he did. Again he quoted what he had written in *Dennis* that "Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party..." [22].

---

20. *Rosenberg* v. *United States*, 346 U.S. 273 (1953).
21. 341 U.S. 494 (1951).
22. *Ibid.*, p. 588.

He was equally critical of *Scales v. United States* [23], a Smith Act case like *Dennis*, in which once more a Communist was convicted of violating the Act because of belief, advocacy in action, and teaching Marxism in practical operation. To Justice Douglas, these two cases marked the "greatest decline in free speech in the history of the nation" (p. 101). His most vivid memory of China was that one third of the inmates of a prison were there because of "counter-revolutionary" activities which turned out to be an espousal of the cause of capitalism. And that he considered on a par with what happened to the defendants in *Dennis* in spite of the First Amendment. Right or wrong, it is a startling comparison — one that not everyone would think of.

In the chapter entitled "Separate but Unequal" (chap. V) Justice Douglas gives an excellent account of the manner in which an unanimous decision was reached in *Brown v. Board of Education* [24], the school segregation case that overturned the separate but equal doctrine that was established in *Plessy v. Ferguson* [25] in 1896. The case was first argued on December 9, 1952, when only three Justices in addition to Justice Douglas (Minton, Burton, and Black) thought that segregation was unconstitutional. Had the case been decided then, the vote would have been five to four to continue the separate but equal doctrine. However, the case was ordered reargued. By the time the second argument took place Chief Justice Vinson, who favored letting *Plessy v. Ferguson* stand, had died and had been replaced by Earl Warren who was of the opposite view. Now it was five to four to overrule *Plessy v. Ferguson*, but that would hardly have been decisive historically and would have made filling the next vacancy on the Court "a Roman holiday" (p. 114).

At the first Conference after the second argument Chief Justice Warren suggested that the case be discussed informally without a vote being taken. Then it was suggested and agreed that the Chief Justice should make a first draft of an opinion, and that it should be circulated by hand without being printed as usual to avoid the possibility of leaks. The four who had originally favored overruling *Plessy v. Ferguson* stood fast. With Warren on their side they now were in the majority. Gradually the other four Justices changed their positions — first Justice Frankfurter and then the others one by one. Justice Jackson who was convalescing in a hospital from a heart attack finally made it unanimous after a visit from Chief Justice Warren. As a result of what Justice Douglas termed "a brilliant diplomatic process which Warren had engineered" (p. 115), on May 17, 1954, the Court could announce a unanimous opinion that overruled *Plessy v. Ferguson* and its

23. 367 U.S. 203 (1961).
24. 347 U.S. 483 (1954).
25. 163 U.S. 537 (1896).

doctrine of separate but equal[26]. However, the terms of the judgment and the question of relief were set up for further argument[27].

Once the question of relief had been reargued in April, 1955, and decided on May 31, 1955[28], the lower federal courts were told to require local school boards to "make a prompt and reasonable start toward compliance with [the Court's] May 17, 1954, decision"[29]. The cases were remanded and the District Court told to move « with all deliberate speed »[30], a phrase suggested by Justice Frankfurter and adopted because of his persuasion. However, as Justice Douglas pointed out, the phrase served more as a signal for delay than anything else. Indeed the fight over busing and integration in the public schools still goes on twenty-five years after *Brown v. Board of Education* was decided.

There is now also the question of reverse discrimination, which Justice Douglas touched on both under the heading of "Separate but Unequal" (chap. V) and under the heading of "Separation of Powers" (chap. VI). The issue was raised in the 1971 term of the Court in *Johnson v. Committee on Examination*[31] in which a white applicant for admission to the Arizona bar was not admitted because on three occasions he received grades of 68,3, 68,6, 69,5, which were below the passing grade of 70. The white applicant showed that Blacks receiving similar failing grades were admitted, and he claimed reverse discrimination. Justice Douglas, the only one to vote to grant *certiorari*, had urged the Conference that racial discrimination against Whites was as unconstitutional as racial discrimination against Blacks. According to Justice Douglas, Justice Marshall was the only one to reply, which he did by saying, "You guys have been practicing discrimination for years. Now it is our turn". Perhaps Justice Douglas summed up the situation better when he wrote that across the world "the dominant group shapes the laws to reflect its racial prejudices" (p. 149).

Then there was *DeFunis v. Odegaard*[32] which, though argued, was dismissed as moot. In that one the issue was whether admission requirements to graduate schools, law schools and bar associations could be kept high for Whites while Blacks were admitted with lesser credentials. Not only did Justice Douglas consider this inconsistent with equal protection, but also

---

26. *Brown* v. *Board of Education*, 347 U.S. 483 (1954).
27. *Ibid.*, p. 500.
28. 349 U.S. 294 (1955).
29. *Ibid.*, p. 300.
30. *Ibid.*, p. 301.
31. 407 U.S. 915 (1972), discussed at page 149.
32. 416 U.S. 312 (1974).

un-American. Indeed, he believed that such admission practices for professional schools could only lead to a worsening of the situation of minorities. For, such practices could not help but produce professional people of lesser ability who would find no place in society and would end up discredited (pp. 119, 120).

Perhaps nowhere in *The Court Years* is Justice Douglas' experience before he was appointed to the Court better reflected than in the chapter on "The Court and Big Business" (chap. VII). He knew the corporate set-up of this country thoroughly because of the studies that he did as a law professor and because of his experience at the S.E.C., first as a staff member, then as a member and later as Chairman of the Commission. He could and did write with authority on the subject. That is why it would have been inconsistent for him to do anything but dissent in *Wheeling Steel Corp. v. Glander*[33] when the Court once more held that a corporation is a "person" within the meaning of the Equal Protection Clause of the Fourteenth Amendment. That is also why he could criticize corporate mergers as a way of getting around the Clayton Act.

With respect to the antitrust laws, Justice Douglas wrote of himself, Chief Justice Warren, and Justices Black, Tom Clark, and Brennan: "We doubtless made many errors. But we never followed the funeral march that buried the antitrust laws and deprived them of vitality by making them mere husks of what they were intended to be" (p. 162). Yet, though the protection of the Fourteenth Amendment, an amendment originally adopted to protect Blacks, enabled corporations to reduce their tax burdens and escape a host of state regulations as well as wield enormous financial power, he wrote that during his time on the Court only once was there any semblance of improper action by a company with a case before the Court. Even in that one case in which all political stops were pulled to get the Court to reverse a decision, the company lost out (see pp. 167, 168).

In this second volume of his autobiography, Justice Douglas also wrote chapters on the Law Clerks to the Justices (chap. VIII), the Advocates who appeared before the Court (chap. IX), the Judicial Conferences (chap. X), and The Press (chap. XI). In the chapter on the law clerks he related how he chose his clerks. He took them from the law schools of the Ninth Circuit, the circuit to which he was assigned, rather than from the law school of which he was an alumnus. At first he interviewed applicants personally, then he had someone on the West Coast select them for him. He wrote of the increase in

33. 337 U.S. 562 (1949).

the number of clerks over the years from one for each Associate Justice and two for the Chief Justice to three for Associate Justices and four for the Chief Justice. Although he wrote his own opinions, he remarked that as the years passed it became more and more evident that law clerks were drafting opinions. He resisted Chief Justice Burger's idea of pooling law clerks to pass on petitions for *certiorari* and appeals by repeating his argument that the Court was overstaffed and underworked — that the job of a Justice did not require more than four days a week. Then he recounted the instance in which he not only wrote a dissent in a case but also the opinion of the Court in the case. It appears that the Justice to whom the case was assigned just could not get going on it. So, he offered to help the Justice and in a half hour provided a draft which became the opinion of the Court (pp. 173, 174).

It is in the chapter on "The Advocates" that he repeated the statement that he made in his 1949 Cardozo Lecture before the Bar of the City of New York to the effect that he "would rather create a precedent than find one" (p. 179). Later, that statement was criticized with the assertion that it was stability that was needed in the law, not new precedents. He refuted that assertion by pointing out that as technology changes, critical problems arise. Then he asked the question: "Should not the law keep up?" (p. 179)

He did not have much use for Judicial Conferences — too long and boring. However, in this chapter he did make some interesting comments on the growing tendency of federal judges "to ride herd on fellow judges" (p. 194). He objected to the idea of giving panels of judges authority to discipline "culprits." He considered that ominous because of the conservative leanings of most federal judges. Indeed, he attributed this growing practice as a development "of Presidents naming federal judges from lists endorsed by the American Bar Association" (p. 194). He admitted that the ABA has many fine credentials, but to him it represented the big corporate and financial interests of the country. "If we have corporate-minded judges," he wrote, "we shoudl also have sharecropper judges and labor judges" (*ibid.*). If Presidents are to continue making ABA appointments to the bench, the only hope that he saw for an independent judiciary is for Presidents to make "mistakes" such as Theodore Roosevelt's "mistake" when he appointed Justice Holmes to the Supreme Court and Woodrow Wilson's "mistake" when he appointed Justice McReynolds.

Justice Douglas always was a defender of the press, but he was not a defender of its quality. Indeed, for the most part, he considered it a mimic that depended on hand-outs rather than an original research group. He thought it as depraved as Jefferson did, and, like Jefferson, he thought it craven, abusive, and selfseeking, but he recognized that the only thing that

could result from governmental surveillance would be a worse press[34]. Like Jefferson, he had his heroes and his villains among the press, many of whom are named in his chapter on The Press. At one point in the chapter he comments that secrecy on the real authority of articles in the press "is not the monopoly of newspapers" (p. 199) — that even law reviews sometimes publish articles that professors and others are paid by vested interests to write. Had he known, he might also have added that yet unpublished articles are sometimes sent to the Librarian of the Court with the request that they be circulated to the offices of the Justices because of a pending case. In the past, the receipt of such articles has been acknowledged with the statement that they would be kept in the Library should they be asked for, which they never were.

Justice Douglas served under Chief Justices Hughes, Stone, Vinson, Warren, and Burger, and his chapter on the Chief Justices is as interesting as it is revealing. His admiration for the first, Chief Justice Hughes, was boundless. He considered Hughes one of the Great Chief Justices — an administrator who had few peers, an opinion shared by the supporting personnel of the Court. Though during his years of law practice Chief Justice Hughes was associated with and represented great wealth, he was not the prisoner of his clients. Justice Douglas described him as neither a liberal in the populist sense nor a reformer, but as a protagonist of individual rights who could sense when an injustice was being done. Under him, the work of the Court moved smoothly, efficiently, and on time.

Chief Justice Stone was not the administrator that Chief Justice Hughes was. The Saturday Conference that followed five days of oral arguments was never finished at four-thirty or five as it was under Chief Justice Hughes even though the starting time was moved from noon to eleven, and then to ten o'clock. It would not even be finished by six and would have to be resumed at ten on Monday and continued until five minutes before noon, just before oral arguments started. On occasion there would even be a Conference Tuesday morning just before oral arguments and another Tuesday afternoon after oral arguments. Or, as Justice Douglas expressed it, under Chief Justice Stone "we were... almost in a continuous Conference" (p. 223). The problem was that Stone was still very much the law professor and a stickler for detail. He believed in free expression for every Justice, including himself, and he was a prodigious worker. He set a grueling pace that eventually caused his death from a stroke that he suffered on the Bench.

---

34. See, for instance, Jefferson's letter to Governor McKean of Pennsylvania written in 1803, 9 *Works of Thomas Jefferson* (Federal Edition, 1904-04), pp. 449, 451, 452, in which Jefferson complained of the lack of credibility of the press and advocated a few prosecutions of the most prominent offenders to restore its credibility if possible.

Fred Vinson who was named Chief Justice to follow Stone was described by Justice Douglas as a warm-hearted, easygoing, happy party man who enjoyed bourbon and branch water, bridge, and all of the amenities of social Washington. Yet, in Conference he would filibuster for hours to have his way on a case. Doubtless one of the more humerous incidents recounted in the book took place when, at the end of the first day on the job, Chief Justice Vinson asked his secretary to send for the Court car when he was ready to leave the building. Justice Douglas, who was with him at the time, walked down to the garage with the Chief Justice knowing full well that there was no such thing as a "Court car". After a while a Ford pickup truck roared around the corner. When the Chief Justice asked what that was he was told by Justice Douglas, "The Court car". So, the Chief Justice of the United States who had perhaps thirty cars at his disposal, day and night, as Secretary of the Treasury, rode home in a Ford pickup truck (pp. 225, 226). Chief Justice Vinson tried time and again to have Congress authorize a limousine for his office, but never succeeded. That was left for his successor, Chief Justice Warren, to accomplish, and even he had to try twice before he succeeded.

According to Justice Douglas, Chief Justice Warren "was as nonchalant as Hughes was meticulous" (pp. 227, 228). Chief Justice Hughes never opened Court either a second early or a second late, Chief Justice Warren never opened it on time. He was always a few minutes late. He was concerned about such things as increasing the number of law clerks which brought about the existence of a typing pool, and having a steel plate put under the wood paneling at the front of the bench as a protection against gunfire. The latter was a hush-hush affair that was done during the summer recess. But he was also a stickler for proprieties and resigned from the American Bar Association when he did not like some of its policies.

On the other hand, as Justice Douglas noted, as Governor of California Earl Warren had supported the evacuation and internment of West Coast Japanese-Americans during World War II, had opposed the reapportionment of the legislature, and he was one of a three-man council that opposed naming Max Radin to the California Supreme Court. Yet, Justice Douglas ranked him with John Marshall and Charles Evans Hughes as our three greatest Chief Justices (p. 240). Perhaps the explanation for this is that he considered that Earl Warren had a capacity for growth, and that under the impetus of the judicial oath he grew and grew. Also, Justice Douglas noted that on July 9, 1974, when Earl Warren lay dying in the Georgetown hospital, huge billboards that read "Impeach Earl Warren", such as the one that he had seen outside Odessa, Texas, were no longer there. The public mind had changed and, as the Justice expressed it, Earl Warren had "outlived the bastards" (p. 241).

Justice Douglas and Chief Justice Burger never saw things eye to eye. Although Justice Douglas wrote that Chief Justice Burger was extremely personable, he also wrote that he seemed to prefer the Continential inquisitional legal system over our accusatorial system — that, "while he would not throw out the Fifth Amendment, he certainly would dilute it" (p. 230). Justice Douglas did not particularly care for the Chief Justice's "law and order" approach to things, nor for the vast increase in the Court's budget under him, and the beginning of a bureaucracy unknown in the Court's history. However, Justice Douglas thought it generous for Chief Justice Burger to propose and arrange for Chief Justice Warren's body to lie in state in the Grand Hall foyer of the Supreme Court building.

Perhaps Justice Douglas summed it all up when he wrote: "Each Chief Justice promoted friendly relations, even if he was never able to convince the irascible ones who often voted him down in Conference" (p. 237).

Justice Douglas points out in his chapter on "The Presidents and the Court" (chap. XIII), that there have been a few "non-political" appointments to the Court, such as Taft's appointment of Hughes in 1910 and Hoover's appointment of Cardozo in 1932. However, most Presidents appoint persons who they believe will vote the way they would. There are also ample instances of the appointment of friends and political cronies. FDR was noted for appointing off-beat men — "... someone who will upset the fat cats" (p. 246). That is how Justice Douglas explained the appointments of Hugo Black, Wiley Rutledge, and Frank Murphy, but his own appointment and those of Felix Frankfurter and Robert Jackson he attributed to personal friendship. President Kennedy's appointment of Byron White was, he wrote, in consideration for services rendered. And so it went, with LBJ appointing Thurgood Marshall because he was black and Abe Fortas simply because he wanted him there, although Fortas did not want the job.

Justice Douglas defended Justice Fortas who, while on the Court, was charged with having given advice to the President and with having been paid fees for lecturing at American University. He pointed out, among other things, that John Jay served as ambassador to England while he was Chief Justice, that John Marshall continued to serve as Secretary of State after he became Chief Justice, that Justice Roberts served as a member of the commission that investigated the Pearl Harbor attack, and that Justice Robert Jackson served as prosecutor in the Nuremberg trials. He also noted that in the early years some of the Justices served as lecturers on law faculties, and that hardly a Justice did not receive a fee for some lecture. According to Justice Douglas, Abe Fortas became a victim because of what he was, rather than because of what he did. He was a symbol of the Court

that was criticized for its libetarian philosophy and was a crony of Lyndon Johnson.

The longest chapter of *The Court Years* (88 pages) is chapter XIV in which Justice Douglas wrote about "Six Presidents", Franklin D. Roosevelt through Nixon, who occupied the White House while he was on the Court. He had praise for some and criticism — severe criticism — for others. Perhaps his high esteem for FDR is best summarized in one paragraph in which he wrote that there "never was a 'credibility gap' while FDR was in the White House" (p. 275). Instead, Roosevelt undertook to educate the people to the fact that we would be drawn into the European maelstrom. He never played tricks on them, "nor did he give them false figures or pretend one thing while doing another... he never manufactured facts, nor used verbal razzle-dazzle to create false issues and to utter half-truths" (p. 275).

Justice Douglas wrote approving words of Presidents Truman, Eisenhower, Kennedy, and Johnson, though he recognized the shortcomings of each. For instance, he knew Truman well and liked him, but did not consider him an idea man. He recognized Truman's genius at precinct politics but wrote that he shuddered when Truman was abroad meeting with the world's great conspirators. He dismissed Eisenhower as "the father figure that Americans seem to cherish in their President" (p. 301) and characterized him as "the average American raised to the nth power" (p. 293). But he considered Eisenhower a good President as he did Truman.

Justice Douglas knew the entire Kennedy family except Joe, Jr., and Joseph Kennedy had been his mentor, which he never forgot. Nevertheless he could not help but write that Jack Kennedy was nondescript as a Senator, as he had been as a Congressman. He saw much of Kennedy the President and, because of his own frequent trips to Vietnam, it bothered him that the President should have become more and more military-minded in his approach to that growing crisis.

Lyndon Johnson and Justice Douglas arrived in Washington at about the same time in the 1930's. There developed an instant friendship between the two that, with ebbs and flows, lasted until Johnson's death in 1973. The Justice considered Johnson a loveable, complex man, who was forever on the move and full of endless energy, but who had to be loved and had a passion for power, as well as a great desire to walk in the steps of FDR which he never succeeded in doing. Justice Douglas also pointed out the Machiavellian side of LBJ's character — the side that spotted every man's weakness and exploited it to his own political advantage.

As for President Nixon, suffice it to say that William O. Douglas had no use for the man.

At the start of the chapter on the impeachment proceedings brought against him in 1970 by Gerald Ford, Justice Douglas brings out a very interesting fact. The line of succession of those who occupied his particular seat on the Court includes Samuel Chase, the only other member of the Court against whom impeachment proceedings were ever brought. The proceedings brought against Chase failed as did the two brought against him. Although he did not attribute predestination to the line of Justices who will in the future occupy the seat that he did, he suggested that, if his record is to be broken, his successor will have to turn back three assaults. He reminded the future Justice that the cause — the independance of the judiciary — is great.

Justice Douglas attributed the effort to impeach him to the failure of the Senate to confirm Clement Haynsworth or Harrold Carswell to replace Abe Fortas who had resigned. Had the impeachment proceedings against him been successful, "there were indications", he wrote, "that Brennan would be next" (p. 359). Vice President Agnew fired one salvo on April 11, 1970, when, as Justice Douglas wrote, he said that the Administration should "take a good look" at what Justice Douglas was saying and thinking (p. 359). Gerald Ford fired another salvo in the House of Representatives on April 15, 1970, when, according to Justice Douglas, he spoke and said that an impeachable offense was whatever the House of Representatives considered it to be at a given time in history. Then Justice Douglas notes that on May 13, 1970, President Nixon wrote to the House Committee on the Judiciary that though the power of impeachment was solely entrusted by the Constitution to the House of Representatives, the Executive branch had the duty to supply all relevant information to the House before it reached a decision. As a consequence, Justice Douglas wrote, hundreds of documents about him were turned over to the House and some forty Federal agents assigned to investigate him (p. 362).

Justice Douglas was defended by a team of lawyers made up of close friends and former law clerks, and the impeachment effort failed. The irony of it all is that in 1974 Nixon was plagued by his letter of May 13, 1970, when Congress was seeking documents from the White House concerning his own impeachment. And, as Justice Douglas also notes, in 1974 Ford's April 15, 1970, statement concerning the meaning of an impeachable offense came home to roost. By then Vice President Ford's position was that an impeachable act only included criminal acts, not what a majority of the House of Representatives thought, as he had claimed earlier.

In the last chapter of *The Court Years* entitled "The End of a Cycle" (chap. XVI), Justice Douglas took a very strong stand against the repeated

assertion that the Court is overworked. He pointed out that under Chief Justice Hughes the Court sat five days a week two weeks a month, with the Conference held on Saturday ; that under Chief Justice Warren the Court sat for four days a week two weeks a month, with the Conference held on Friday ; that under Chief Justice Burger the Court sits three days a week two weeks a month with the Conference on Friday. Also, under Hughes most argued cases were on the regular calendar with one hour given each side. Only a few cases were on the summary calendar with each side given thirty minutes. By 1968, under Chief Justice Warren, most argued cases were thirty minute summary calendar cases. Under Hughes the average was 20 argued cases a week, or a possible 280 cases a term ; under Warren, an average of 16 argued cases a week or a possible 224 cases a term ; under Burger, 12 a week, or a possible 168 per term.

In the 1938 Term of the Court, Justice Douglas' first, there were 138 full-fledged opinions of the Court ; in the 1978 Term there were 130. In the 1940 Term the number of full-fledged opinions went as high as 165, and in the 1941 Term there were 151. He noted that under Chief Justice Hughes and Stone he and Justice Black wrote over 60 opinions a Term. Now the average is about 16, with few Justices writing more than 18 (pp. 384, 385). He discounted the effect of the fact that in the neighborhood of 4 000 cases are now filed per term by pointing out that approximately one-half of these are *in forma pauperis* cases, a large percentage of which present frivolous questions. Nevertheless, he also pointed out that processing these cases is an important function of the Court and that some of them, such as *Gideon v. Wainwright* [35], *Miranda v. Arizona* [36], and others have become "nuggets of history" (p. 386).

Justice Douglas ended *The Court Years*, the second volume of his autobiography, by again writing about his mother. He wrote about how, from his earliest years out of reverence for his father she had drummed into his ears the lines from Sir Walter Scott :

> And darest thou, then
> To beard the lion in his den,
> The Douglas in his hall ?

It was these lines that she had recited years before when she had seen him off to the freight yard to hop a freight to New York and Columbia Law School.

---

35. 372 U.S. 335 (1963).
36. 384 U.S. 436 (1966).

On that occasion she had taken his head in both of her hands, kissed him, recited the words from Scott and added:

> Go to it, son, you have the strength
> of ten because your heart is pure.

He went to "it" and achieved a record that few have matched.

4. And Other Things

Justice Douglas was a tremendously hard worker. For many years it was not uncommon for him to work from seven to seven, seven days a week, if need be. Perhaps that is why he could say that the work of a Justice of the Supreme Court was a four-day-a-week-job. But if for him it was a four-day-a-week job, the other three days of each week were not spent in idleness — thirty-one books on various subjects, innumerable articles on the law and other subjects, and countless speeches and lectures. There never was an idle moment and his interests ranged far and wide. Not only was he a man learned in the law but also one who had a deep interest in botany, a great love for the outdoors, and, oddly enough, he was a great professional football fan. Those of us who worked in the Library of the Supreme Court can attest to this wide range of interests. It was not a question of having one project going at a time but of generally having several. Even his lunch hours while the Court was sitting were spent in his office writing while he ate.

Not only did he work hard, but he also did his work fast. He had an uncommon ability to get to the root of things without bothering with trivia. When he talked about a bibliography, he did not mean a neatly typed list of books. Instead, what he wanted was a booktruck, usually a triple-decker, filled with books which he went through in short order, quickly selecting what he wanted and discarding what he did not want. That is why he could turn out his opinions as fast as he did and have so much time for other things such as writing books, climbing mountains, and what not.

Much has been said of how hard he was to work for [37]. The answer to that is that he never asked anyone to work harder than he did himself, and he never set standards for others that he could not live up to himself. For those of us on the staff of the Supreme Court Library who had the occasion to work for him over a period of years there never was an unkind word and nothing but appreciation for what we did. From the Library's point of view he was easy to work for because he knew what he wanted and doing work for

37. See B. WOODWARD & S. ARMSTRONG, *The Btrethren, Inside the Supreme Court*, New York, Simon and Schuster, 1979, pp. 240–244.

him for any length of time was an education. The only difficult part was deciphering his handwriting, but even that could be overcome with a bit of application. Indeed, after he was forced to retire because of the stroke that he suffered, things became quite dull.

He was a fearless judge who did more than pay lip service to the canon of judicial ethics which requires that a judge be unswayed by partisan interest, public clamor, or the fear of criticism. That is why he acted as he did in the *Rosenberg* case and in other similar cases. Whether or not one agrees with what he did on such occasions, the important thing is that he had the courage of his convictions and made the independence of the judiciary mean something more than just to go along to get along. So long as there are such individuals among the judiciary there is no need to worry, but should the judiciary ever lack such independent minded individuals there will not only be cause for worry but also for alarm.

5. Conclusion

William O. Douglas was not an ordinary man. He lived a lifetime of struggle during which he knew poverty as well as great success. At first the struggle was to escape the poverty of his youth, but later the struggle was to foster and protect the rights and privileges of those who were less fortunate than he was. Appointed to the Supreme Court of the United States at the age of 40, he lived to serve on that Court longer than anyone else in its history. But even as a member of the Supreme Court his interests were not limited to his work on that Court. He roamed the world over as a lover of nature and of the environment, as well as a seeker of information, even as he carried his full share of the work of the Court. On more than one occasion his actions were controversial, but, controversial or not, he had the courage to live up to his convictions. That is what *Go East, Young Man* and *The Court Years*, the two volumes of his autobiography, are all about. They are a chronicle of Justice Douglas' life of 81 years, during much of which he knew everyone on the national scene and many on the international scene. He spared no one, not even himself, as he recounted the events in which he participated as well as witnessed, either as a boy growing up in Yakima, Washington, or as a member of the highest court in the land.