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# dossier on DOUGLAS

by

Allan C. Brownfeld

**The New Majority Book Club, Inc.**
Washington, D.C.

Chapter I.

# The Early Life and Career of Justice Douglas

As a man, William O. Douglas has played many and varied parts. His world travels have kept him in the headlines, he has matched drinks with Russians, climbed mountains in Asia, and taken controversial and unpopular stands at home. His annual hikes along the C&O Canal in Washington, D.C. have become a tradition, and his new role as hero to the young makes him at age 71, in the eyes of many observers, "the youngest man on the Supreme Court."

Yet, inevitably, those who are heroes to some become devils to others, and a life lived to the fullest becomes, in consequence, a life laid open to extensive examination. This, of course, is particularly true of men in public life. Men in glass houses must be prepared for repeated scrutiny by onlookers, and few men in public life, being men after all, have been adequately prepared. Still, some have been better prepared than others.

Today, it is the life and career of William O. Douglas which is under consideration by the House of Representatives as it considers an impeachment resolution brought against him. To understand all of the implications and ramifications of this investigation, a look at William Douglas, the man, his life, and his politcal and judicial careers, is essential.

It all began in the Far West, a land of mountains and rivers and valleys, far from the cities of the East where its final evaluation will take place.

William O. Douglas was the second of the three children of William and Julia Bickford Douglas, and was born October 16, 1898, in Maine, Minnesota. His father was a Presbyterian home

missionary who had come from Nova Scotia, Canada and was taken to the West Coast by his calling. As a result, Douglas spent his early years in a succession of small towns in California and Washington.

After the older Douglas died in 1904, Mrs. Douglas settled with her children in Yakima, Washington, where she had relatives. There, Douglas, his sister Martha, and his brother Arthur were reared. They all contributed to the family finances by earning money outside of school hours in odd jobs about the town and helping harvest the orchards in the district.

Douglas graduated from Yakima High School, where he was class valedictorian, and with a tuition scholarship he moved on to Whitman College in Walla Walla. There his student record included presidency of the debating team, and election to Phi Beta Kappa. In 1920 he received the B.A. degree, and then took a position teaching English and Latin in Yakima High School, where he also coached the debating team and taught public speaking.

In 1922, Douglas set out for New York to enroll in Columbia Law School. To pay for his fare he "herded" a carload of sheep bound for Chicago. He paid for his tuition at Columbia by tutoring and supplying cases to illustrate a law textbook for a correspondence course school.

He was graduated from Columbia Law School in 1925, second in his class and one of the editors of the *Law Review*. Writing in the book, *Ideas Are Weapons*, Max Lerner pointed out that during law school Douglas had been particularly interested in the study of the relation between law and business, and on graduating he joined the Wall Street firm of Cravath, DeGersdorff, Swaine and Wood "like an anthropologist" to "study the facts of law and life among the natives." There he had a chance to learn the intricacies of corporation finance under conditions of a boom market. Lerner points to Thorstein Veblen's *Absentee Ownership* and Louis D. Brandeis' *Other People's Money* as formulative influences on the young lawyer's thinking. In 1926 he was admitted to the bar.

From the time of his graduation Douglas lectured at Columbia Law School, and in 1927 left Wall Street to become assistant professor of law at Columbia. One year later he resigned when President Butler appointed a dean for the Law School without consulting the faculty. A chance meeting with Robert Maynard Hutchins, then dean of law at Yale University, brought the offer of an assistant professorship which Douglas accepted. Within a year he had been raised to associate professor; in 1931 he was made a professor, and in 1932 was appointed to the prestigious chair of Sterling Professor of Law. Hutchins, when president of the University of Chicago, was to call Douglas "the outstanding professor of law in the nation."

Discussing Douglas' early years, his good friend, Professor Fred Rodell of the Yale Law School wrote in *The Nation* of April 26, 1952:

> Born in Minnesota, the son of a poor itinerant Presbyterian preacher; reared in the state of Washington, where he helped support his widowed mother while working his way through school and college with a succession of jobs that ranged from newsboy to berry picker to window-washer to sheep-herder; graduated from Columbia Law School (after riding East on a freight car to get there). . number 2 in a class that included---much farther down in the ranking---Thomas E. Dewey---Douglas, aged 32, his own LL.B barely five years old, was named Sterling Professor of Law at Yale.

During his years at Yale, Douglas became known for his studies in bankruptcy. In 1929 he was special adviser to William J. ("Wild Bill") Donovan in a bankruptcy investigation in New York City, and during the next four years carried on, in association with the Department of Commerce, bankruptcy studies for the Yale Institute of Human Relations.

As a Yale professor, Douglas also was called upon during the period from 1930 to 1932 to be secretary of a committee on the study of the business of the Federal courts, an investigation undertaken for the National Commission on Law Observance and Law Enforcement. In 1934, Douglas was asked to direct a study of protective committees to be carried out by the Securities and Exchange Commission, and from that year until 1936, he held hearings, examined records, investigating those committees which are formed when business fails. His eight-volume report criticized the performance of bankers as bond trustees, and pointed out abuses on the part of protective and reorganization committees.

In 1936, Douglas was appointed a member of the Securities and Exchange Commission, and in 1937, was named its chairman. In the introduction to *Democracy and Finance*, a collection of

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Douglas' addresses and statements as chairman of the S.E.C. published in 1940, James Allen writes: "If the administration of William O. Douglas were to be characterized in a single word, the word would be action." Emphasizing the desirability of "simple honesty" and "social responsibility," Douglas conducted conferences and studies which led to a reorganization of the Stock Exchange. His contention throughout had been that the Exchange could and should formulate the plan for its own reorganization, and this it eventually did, voting in March, 1938, for reorganization along lines approved by Douglas. In his work with the S.E.C. he "succeeded in establishing many protections for the small investor," stated Jack Alexander in a *Saturday Evening Post* article titled, "Washington's Angry Scotsman."

President Franklin Roosevelt in March, 1939, nominated Douglas an Associate Justice of the Supreme Court to succeed Louis D. Brandeis, who had retired the previous month. With Senate confirmation, Douglas took his seat on the bench on April 17, 1939. It is reported that Brandeis said to Douglas on his appointment, "I wanted you to be here in my place." So wrote Arthur Schlesinger, Jr. in *Fortune* magazine of January, 1947.

Justice Douglas' career on the court has been a stormy one, and in the opinion of many he has been engaged during this period as much in partisan political activities as in the more normal judicial undertaking.

It has been reported widely that Douglas could have easily obtained the 1944 Vice Presidential nomination (which would have meant the Presidency on Franklin Roosevelt's death) had it not been for the aroma of radicalism which clung to him even then. Following Franklin Roosevelt's decision to exclude Henry A. Wallace at the 1944 Democratic National Convention, Douglas became the first choice of many Administration liberals. He was also said to have been the personal choice of Roosevelt himself, who had favored him in 1940 but was detoured to Wallace.

Douglas evidently was so confident that the nomination was his that he absented himself to an inaccessible fishing camp in Oregon during the convention period, there to await the summons with apparent reluctance. At this juncture, Roosevelt sent his message to Democratic Chairman Bob Hannegan eliminating James F. Byrnes and naming Douglas and Harry Truman as the two men whome he would accept. Douglas was in Oregon and Hannegan made certain that the nomination went to Truman.



Part of the reluctance to nominate Douglas derived from a split in the labor movement. Walter Reuther and James Carey endorsed Douglas, but William Green, Philip Murray, and Sidney Hillman supported Truman. Ever since 1944, in the opinion of many observers, Douglas has never been the same.

In 1948, when Truman seemed to be slipping, Douglas once again was discussed as a possible successor to the President. The boom never developed, but Truman took it so seriously that at one point he telephoned Douglas and offered him the Vice Presidency. The Justice, interested only in the top office, sent his refusal to Truman just before the convention. The nomination then went to Alben W. Barkley.

By 1952, Douglas' political glamour was fading to such a degree that only a handful of extreme liberals, grouped about Ted Thackery's *New York Compass*, seriously proposed his name. The attempted "Draft Douglas" movement never got off the ground.

Numerous interested observers of Douglas' role on the Court believe that many of his decisions over the years were politically motivated; that is, they were aimed not at what would have been a proper judicial interpretation or decision, but rather at pleasing a particular segment of the electorate in hopes of future political advancement.

His performance in the case of atomic spies Julius and Ethel Rosenberg is a significant example. On its face, the stay of execution granted by Douglas to the convicted Communist spies was in essence a meaningless gesture, since at best it could give the Rosenbergs only a few more days of life. Already the Supreme Court had refused a number of times to entertain legal moves in their behalf. In this context, Douglas' action becomes understandable only as an effort to make himself particularly appealing to the left-wing of the Democratic Party.

*Time* magazine of June 29, 1953 told the story:

> It was a Monday, the last day of judgment before the U.S. Supreme Court recessed for summer vacation. It was also. . .the last hope before the bar of justice for Julius and Ethel Rosenberg. For the sixth time. . .(they) had petitioned the highest tribunal, this time for a stay of execution and review of their trial. For the sixth time, a majority of nine justices rejected a Rosenberg appeal.

Then as the clock ticked on toward 11 p.m., Thursday, the

hour of death for the spies, Supreme Court Justice William Douglas acted alone, Unexpectedly, the court having recessed for the summer, he granted the stay of execution that the full court had denied. . .On Tuesday morning, while most of his fellow justices were packing vacation bags, Douglas had listened in his chambers to two sets of lawyers: the Rosenbergs' regular counsel, and a couple of earnest, frenetic newcomers to the case, Fyke Farmer of Nashville and Daniel Marshall of Los Angeles.

The newcomers won Douglas' ear by pleading what was characterized as a new "point of law." Their argument was that the Rosenbergs were wrongly sentenced under the Espionage Act of 1917, which allows the judge to fix the death penalty. They should have been sentenced, argued the lawyers, under the Atomic Energy Act of 1946, which provides the death penalty for atomic espionage only when a jury so recommends.

*Time* noted:

> Months ago when Farmer and Marshall tried to sell their point of law to Rosenberg chief counsel Emanuel Block, they were put off and ignored. When last week Farmer and Marshall submitted their arguments to the Federal District Court at New York before Judge Irving Kaufman. . .he rebuked them as "intruders. . .interlopers. . .reckless in charges as to verge on contemptuousness." But Associate Justice Douglas was impressed by the arguments of Farmer and Marshall.

Far into Tuesday night, Douglas stayed in his office and on Wednesday morning the decision was announced, stunning the legal world: an indefinite stay of the Rosenbergs' execution. Then Douglas rushed off to vacation in distant Washington.

On Thursday, however, Chief Justice Vinson ordered an immediate sitting of the Supreme Court to rule on Douglas' order. At the appointed hour all nine justices were in their chairs. The Government's argument was simple: the Rosenbergs' atomic espionage was carried out in 1944 and 1945 *before passage of the Atomic Energy Act* and therefore they had been properly tried and sentenced under the 1917 Espionage Act. The next day Chief Justice Vinson read the majority decision (the Court's seventh action on the case). Vinson stated: "We think further proceedings are unwarranted. A conspiracy was charged and proved. . .The Atomic Energy Act of 1946 did not repeal or limit the provisions of the Espionage Act of 1917. Accordingly, we vacate the stay entered by Mr. Justice Douglas."



Only Justices Black and Douglas disagreed.

Justices Jackson and Clark read fuller opinions supporting the majority view. They stated that "The Constitution prohibits passage of an *ex post facto* act." To try the Rosenbergs for crimes committed in 1944 and 1945 under the Atomic Energy Act of 1946 would, according to this view, be an *ex post facto* procedure.

As *Time* pointed out:

> Justice Douglas in his dissent admitted the Government's contention that it 'would have been laughed out of Court' if it had attempted to indict and try the Rosenbergs under the 1946 law. Douglas insisted, however, that the sentencing procedure of the 1946 law was the only one that could be applied to the case. He said: "Where two penal statutes may apply . . . the Court has no choice but to impose the less harsh sentence . . . I know deep in my heart that I'm right."

If Justice Douglas' purpose had been to create a stir in the political arena and keep alive his hopes of future consideration for the Presidency, he succeeded in large measure. Admitting Douglas' well known and vocal political opinions, *The Commonweal* of July 3, 1953, noted editorially:

> The last minute stay of execution issued by Justice Douglas in the Rosenberg case was dramatic even in a case so filled with drama that it has long been the subject of heated discussion all over the world. But why there should've been such widespread resentment over Justice Douglas' action is hard to understand.
>
> Douglas is an outspoken liberal Democrat who holds off the bench views that are not currently popular with the majority of the voters of the United States. On the one hand it's reported that some of his liberal admirers were very upset at his intervention in this controversial case. Their idea seems to have been that this is a time for liberals to keep their heads down. Above all they feared that Justice Douglas by his own action contributed to the belief that liberals favor a 'soft' policy towards subversion and espionage."

Whatever else may be said about Justice Douglas' decision to grant a stay of execution to the Rosenbergs, it is clear that most people who observed and commented upon the action understood it to be clearly political in nature. Rep. Hugh Scott of Penn-

sylvania placed into the *Congressional Record* an editorial from the *Philadelphia Inquirer* of June 18, 1953, titled "Could Justice Douglas Hear Moscow's Cheers?"

The *Inquirer* noted that "Justice Douglas has done his country one more monumental disservice. His action in granting a stay to the atomic spies is particularly offensive in the way it was done." The editorial continued:

> The Supreme Court as a whole had ruled---twice that same day---against granting a stay. Then Douglas, after the Court had adjourned until fall, took it upon himself to reverse the whole Supreme Bench by a masterpiece of legal red-hair splitting.
>
> ...As Americans we are shocked by the spectacle of a Supreme Court justice who has been repeatedly cheered in the Communist press coming to the last-minute rescue of these atomic spies. . .Not quite two years ago Justice Douglas, on the eve of the conference for signing the Japanese Peace Treaty, tried to throw an ideological monkey wrench into that conference. He publicly urged the United States to recognize Communist China---at a time when the Chinese Reds were waging war upon us.

*The Inquirer* concluded: "That action of Justice Douglas was cheered in only one major world capital---Moscow. His latest action will be cheered in only one capital---the same one---Moscow."

*The Washington Post* of June 18, 1953, noted that "There is no question about the authority of a single Justice thus to postpone an execution until any doubts as to legal points have been cleared away. But how far is this power to be extended? A Justice could presumably postpone an execution indefinitely by continuing to find some point in the law that had not been adequately weighed. But there seems to be little substance in his (Douglas') fears that the wrong law may have been invoked."

The real question involved in any serious consideration of Justice Douglas' career, however, does not relate to the substance of his decision in the Rosenberg case. It relates, instead, to the question of whether, as a member of the Court, he has consistently been performing what he conceived as a political rather than a judicial function. Was the Court, at least in



Douglas' mind for many years, simply to be a stepping stone to the Presidency? This is impossible to say, but the evidence leading to this conclusion is exceedingly persuasive.

Commenting upon this point, author Rosalie Gordon wrote the following:

> Why, then, did Douglas make the gesture? (Staying the Rosenberg execution) He, himself, of course, put it on the high ground of the law without thus seeming to commit himself to the loud and blatant defenders of the Rosenbergs. But there are those who believe that Douglas has never quite got over being within a breath of the domicile at the other end of Pennsylvania Avenue. He is comparatively young, as Supreme Court justices go, and some of those 'in the know' think he is banking on a wave of the not-too-distant future when the legions of the far left will be in the saddle and looking about for a presidential candidate. To these observers, Douglas---in the Rosenberg case as in many others---is simply building up for himself an annuity that will insure the dreamed-of mantle falling where it belongs---on his shoulders.

In more recent years, Justice Douglas has taken similarly political actions. On September 12, 1968, for instance, Douglas temporarily blocked the shipment to Vietnam of 113 Army reservists who claimed to have been called up illegally. The delaying action gave them time to appeal a ruling against them by the 4th U.S. Circuit Court of Appeals. They were challenging a 1966 law which allows the President to order any Reserve unit to active duty for two years. Several days before both Chief Justice Earl Warren, and Justice Hugo L. Black denied the reservists' request.

Nevertheless, in his order Douglas said that he was reluctant to grant the stay after his two colleagues had denied it, but could not discuss the problem with them because the legal papers reached him at Goose Prairie, Washington, his vacation retreat, "where there is no telephonic connection." Douglas of course, never made a secret of his opposition to the war in Vietnam, leading to the view that his ruling was based more upon political expedience than upon the fundamental legal questions involved.

Likewise, on August 4, 1969, Howard B. Levy, an Army doctor sentenced to three years in prison for refusing to train medics bound for Vietnam, was ordered freed on $1,000 bail by Justice

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There were prompt and diverse reactions to Rep. Ford's proposal. His demand for a special impeachment study received the backing of fifty Republicans and a like number of Democrats, though several Republicans almost immediately took public issue with their own floor leader. Paul N. McCloskey, Jr., a California Republican, told the House that he "respectfully" disagreed with Congressman Ford's contention that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history."

To accept such a view, McCloskey said, "would do grave damage to one of the most treasured cornerstones of our liberties, the constitutional principle of an independent judiciary, free not only from public passions and emotions, but also free from fear of executive or legislative disfavor."

Many others, such as *The Nation* magazine in its editorial of April 27, 1970, expressed the view that the move against Justice Douglas was simply a political vendetta by those who were angered over the Senate's rejection of Judges Haynsworth and Carswell. *The Nation* stated: ". . .it is the cheap partisan politics behind the move that should be emphasized. . .the move has partisan politics—Nixon, Mitchell, Agnew politics—written all over it."

Others, of course, have disagreed. Rep. Jack Edwards of Alabama, in his column to constituents for April 26, 1970, stated that "The case against Justice Douglas is long and involved, running from his very politically shaded public statements to his accepting money from an individual involved in a case before the Supreme Court. . .Upon examination of all the evidence it is difficult to see how anyone can declare him still fit to serve as a member of the Supreme Court. . .If anyone is unqualified to serve on the Supreme Court due to past and present actions, it is Justice William Orville Douglas."

The Constitution provides that a Supreme Court justice shall hold office "only during good behavior" and shall be bound by "Oath or Affirmation to support this Constitution." The questions concerning Justice Douglas, those concerning the Parvin Foundation, the Ginzburg case, the Center for the Study of Democratic Institutions, and his recent volume, *Points of Rebellion* all hold open to serious consideration whether or not his behavior has, in fact, been "good." It is this question which the subcommittee headed by Congressman Emanuel Celler of New York is seeking to answer.

Many have argued that impeachment proceedings against Justice Douglas would undermine the independence of the Court. To this argument Rep. Louis Wyman, formerly Attorney General of New Hampshire and head of the National Association of Attorneys General, stated that "This process is not going to destroy the Supreme Court. Some of the more hostile recent editorials have suggested that a subcommittee investigation of these rather serious charges will destroy or undermine the Supreme Court of the United States. As a matter of fact, the contrary is true. If we did not do anything about such conduct it would go further and it would destroy confidence in the judiciary, because the activities of Justice Douglas are continuing to bring the Supreme Court into



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disrepute."

Throughout his career William Douglas has been a highly political man. As a young member of the faculty of Yale Law School, Douglas was brought to Washington by the late Joseph Kennedy, at that time chairman of the newly established Securities and Exchange Commission. Several years later, Douglas succeeded him in that job.

Appointed to the Court in 1939 by Franklin Roosevelt, Douglas has had a stormy career. He has taken stands on many controversial political issues, he has been considered as a candidate for high national office, he has had a number of wives, and has traveled to the far corners of the world. In a full and long life, a man makes many friends as well as many enemies. In the current controversy all are having their say.

Asked about the House action, Justice Douglas, in a television interview, stated "I have done nothing in my life to worry about. I have no reaction. . .I'd prefer not to comment on it." Responding to those who criticized his recent book, he stated that he had never "recommended, promoted, suggested violence to anybody." He added that he planned to "just go ahead about my business. My life's an open book."

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ALLAN C. BROWNFELD
Alexandria, Virginia
May, 1970

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# Acknowledgments

I want to thank everyone who had a part in making this book possible.

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The responsibility for content, however, must remain my own.

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Douglas. During the following week Levy would have completed serving his sentence at the federal penitentiary at Lewisburg, Pennsylvania, and Douglas acted to make sure that Levy's case would remain alive for consideration by the Court when it returned in October from summer recess. Levy had already been denied bail by federal courts in Pennsylvania, and on July 8, by Justice William J. Brennan, Jr., who had jurisdiction over the courts in the state. Levy's lawyer, Charles Morgan, Jr., of Atlanta, then applied to Douglas who, in a rare step, overrode his colleague. Echoing his argument in the Rosenberg case, Douglas stated that some of the legal points raised by Morgan "seem substantial to me." Douglas acknowledged that justices seldom grant requests denied by their colleagues, but noted the Court was then in recess and its members widely scattered: and "in my view substantial issues are presented."

The "substantial issue" was more political than legal. Levy had spoken out against the war in Vietnam while serving as an officer and had refused to perform his assigned tasks. Douglas' argument was that Article 134 of the Uniform Code of Military Justice was too vague to be constitutional. The article makes a crime of "all disorders and neglects to the prejudice of good order and discipline in the Armed Forces."

One wonders if Justice Douglas would have been so eager to enter the case if he had not shared Dr. Levy's opposition to the war. Taken together, the three cases—the Rosenbergs, the reservists, and Dr. Levy—all show Douglas taking extraordinary action on shaky legal ground in highly political cases. If Douglas is, in fact, a great "dissenter," it seems that in recent years most of his dissents have been political rather than judicial.

Douglas' earlier career on the Court was also filled with controversy. His style was characterized by Jack Alexander as "distinguished for blunt clarity." Many of his decisions, it must be made clear, were outstanding and highly respected by many legal authorities. The majority decision of May 16, 1949, ruling that free speech must be guaranteed even to a speaker who "stirs the public to anger, invites disputes, brings about. . .unrest or creates a disturbance," was written by Justice Douglas. In this connection, Douglas stated that free speech might well serve its purpose when creating such conditions. The decision roused much controversy and evoked a vigorous dissent from Justice Jackson.



Another majority decision written by Douglas which attracted considerable attention is that of June 5, 1950 (which the Court later refused to reconsider on October 16, 1950), ruling in two tidelands oil cases, involving large sums of money and constitutional relations between States and the Federal Government, that the latter has "paramount rights" to oil-rich areas off the coasts of Texas and Louisiana.

In 1947, in what has been termed "an indignant dissent," Douglas (with Justices Black, Rutledge and Murphy) differed from the Court's rejection of a Justice Department charge that purchase of the Columbia Steel Company by the Consolidated Steel Corporation, a United States Steel subsidiary, violated antitrust laws; he called it the most important anti-trust case before the court in years, and one revealing "the way of growth of monopoly power." Delivering a nonvoting opinion on a decision (rendered June 13, 1949) invalidating Standard Oil of California's "exclusive dealer" contracts, Douglas declared the ruling suggested a "formula" which would enable the oil companies to build "service station empires of their own." The opinion developed into an attack on the Supreme Court's basic stand on monopoly, in which Douglas stated: "The economic theories which the court has read into the antitrust laws have favored rather than discouraged monopoly," and "the court approves what the antitrust laws were designed to prevent. It helps remake America in the image of the cartel." In a June 20, 1949, dissent Douglas held that an 1886 ruling, according to which corporations were "persons" entitled to protection under the Fourteenth Amendment, should be reversed.

An analysis of Supreme Court voting records in non-unanimous decisions during 1937-47, *The Roosevelt Court* by C. Herman Pritchett, placed Douglas in the liberal bloc of the court and revealed a high rate of agreement between his voting and that of Justice Black. Arthur Schlesinger, Jr. attributed to Douglas and Black a belief "that the Supreme Court can play an affirmative role in promoting social welfare" and a tendency to "settle the particular case in what they regard as the spirit of the American democratic tradition" rather than on legal merits. This approach is transparently a "political" one.

Among cases rejected for review, but which Douglas favored reviewing, were: the appeal of the RD-DR motion picture corporation in a case based on censorship of a film—the movie



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concern sought classification for the industry as "press" with freedom guaranteed in the Constitution; the appeal from contempt conviction of Hollywood writers John Howard Lawson and Dalton Trumbo for refusing to reveal to a Congressional committee whether or not they were Communists; appeal from a New York State Court of Appeals ruling upholding exclusion of Negroes from an insurance company public housing project; the appeal from a $1,420,000 contempt-of-court fine imposed on John L. Lewis and the U.M.W.A. for failure to curtail a strike in 1948.

"The recurrent Douglas boom whenever a vacancy occurs in a top Government job is a familiar feature of the Washington landscape," wrote Schlesinger in 1947. Excerpts from some of Douglas' speeches were published in 1948 under the title, *Being An American*. Its contents included a passage from the eulogy he delivered when unveiling the Roosevelt plaque at Hyde Park in 1948. *Commonweal*, in reviewing the book, remarked: "Mr. Douglas reveals himself as a phrasemaker with eloquent and optimistic devotion to civil rights and the well-being of the common man."

Much of Douglas' life has been spent in the outdoors. In *Of Men and Mountains*, published in 1950, he tells of experiences as a mountaineer in the Cascade and Wallowa Mountains of the Pacific Coast. After one such expedition in October, 1949, Douglas was hospitalized for six weeks with broken ribs suffered when his horse rolled on him. He emphasizes the strengthening of physical and moral fibre these rugged experiences have brought him, from the time of his early climbs as a boy seeking to strengthen his legs after having overcome infantile paralysis. Reviewing the book, N.F. Forse of the *Chicago Sun* wrote: "Justice Douglas writes with disarming simplicity. . .His trout fishing forays are an armchair adventurer's delight to read. . .small classics of their kind." And Orville Prescott pointed out admiringly in *The New York Times*: "Its quality lies in the character of its author, the warmth, friendliness, humanity, and bedrock idealism."

Despite his outdoorsy image, one subject in Justice Douglas' life which has attracted a great deal of interest and attention concerns his several marriages. On August 16, 1923, while a student at Columbia Law School, Douglas married Mildred Riddle, a former fellow teacher at Yakima High School. Their children are Mildred Riddle and William, and in May, 1950,



Douglas was named Father of the Year by the National Fathers' Day Committee in New York.

Douglas' second wife was Mercedes Hester Davidson, who had divorced a former Assistant Secretary of the Interior. She had been Douglas' research assistant and, according to *Time* magazine, "had even attended auto mechanics school to learn how to change tires and spark plugs on their far-away trips." Despite this similarity of interests, after nine years of marriage Mercedes won an uncontested divorce on grounds of cruelty. Five days later Douglas, then a spry 64. married 23-year old Joan Martin.

Douglas, it developed, had met Miss Martin when he addressed Allegheny College in Pennsylvania, in the spring of 1961. A slender, brown-haired Kappa Kappa Gamma sister, Joan, was a political science major, and deeply interested in judicial philosophy. She was also especially hopeful of meeting the famous Justice.

Joan was introduced to Douglas by an Allegheny professor, and she escorted him about the campus. The next year, Joan titled her senior thesis, "Testimonies and Concepts of Justice Douglas," and after graduation she headed for Washington.

Joan then went to work for Douglas, typing notes for a book he was writing. That fall, Douglas separated from his second wife and moved into a bachelor apartment. Following his divorce, on August 5, 1963, Douglas and Joan Martin were married in Buffalo, New York.

After two and one-half years of marriage, Joan in turn filed suit for divorce, charging cruel treatment and personal indignities. The then Mrs. Douglas said the Justice had agreed to support payments of $500 a month for eight months beginning January 1, 1966, and $400 a month thereafter for her lifetime or until she remarries. The first Mrs. Douglas had said that her husband left her "abandoned and alone while engaged in his work and in travels to remote places of the world."

Douglas' most recent, and current, marriage began when young Cathleen Heffernan met Justice Douglas during the summer of 1965. At that time, Cathy was working as a cocktail waitress in Portland, Oregon's Three Star Restaurant to earn enough money to finish college, but had objected to the scanty costumes she was asked to wear. As a result, the owner agreed to let her serve in a street-length dress.

One night, Justice Douglas came into the restaurant with a friend, Damon Trout. "When my boss told me who I'd just served a vodka and Seven Up, I thought he was kidding," Cathy told a reporter for the *Ladies Home Journal*. "Mr. Douglas had that one drink and left. I don't think I spoke with him for more than five minutes."

But Justice Douglas needed not even a full five minutes to make up his mind. "I loved her the first time I saw her," he states. In December, 1965, Cathy received a letter from Damon Trout. "It said Mr. Douglas was coming to Portland and would I CARE TO HAVE DINNER with him," she remembers. "I was very excited. Of course I went."

Following Cathy's marriage to Justice Douglas in 1966, within hours of the week's first Congressional session, members of the House had introduced four resolutions calling for an investigation of the thrice-divorced Justice's "moral character." Kansas Rep. Robert Dole charged that Douglas had not only used "bad judgment from a matrimonial standpoint, but also in a number of 5-4 decisions of the Supreme Court."

Democrat Byron Rogers of Colorado suggested that the romantic justice might be retired under a law allowing for the removal of a judge "permanently disabled from performing his duties."

The impromptu nature of Douglas' most recent marriage has been a subject of frequent comment. Invited to a banquet in Los Angeles, Douglas asked Cathy along, just in time for her to be stranded by the airline strike. Said Cathy: "I stayed over three days and I got married."

There is, of course, much disagreement about whether or not the private life of Justice Douglas, or any other public official, is really a valid basis upon which to measure fitness for public office. Most observers believe it is not, yet there is no way to prevent public discussion of a prominent figure who pursues so flamboyant a life style as Justice Douglas. All aspects of a man's life necessarily are considered, for better or worse, by the public when it appraises his character and its attitude toward him.

In his life William Douglas has done many things. He has been an outdoorsman, a law professor, school teacher, chairman of the Securities and Exchange Commission, and a Supreme Court Justice. He has been outspoken in taking political positions; he has traveled far and married often. His career has also involved



many activities which, at this time, are under close scrutiny by the House of Representatives.

A man's life, taken as a whole, is many things. Justice Douglas has not been remiss in providing much material for those who would consider his public career.

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Chapter II.

# The Partisan Political Biases of Justice Douglas

There have been over the years, many and diverse opinions expressed about the nature of the judicial function. There has been a school of thought which repeatedly has called for "strict" construction of the Constitution, maintaining that the function of a judge was not to "make" law, but to apply law which has already been made to the particular circumstances of the case before the Court.

This view has been predominant in our legal thinking, and was expressed in these terms by Justice Sutherland in the case of *West Coast Hotel Co. v. Parrish* (300 U.S., 379, 1937):

> . . .the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written---that is, that they do not apply to a situation now to which they would have applied then---is to rob that instrument of the essential element which constitutes it in force as the people have made it until they, and not their official agents, have made it otherwise:

Justice Sutherland noted further that ". . .the judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of dif-

ference between the two is to miss all that the phrase 'supreme law of the land' stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections."

There has, however, been another view of constitutional interpretation and the judicial function almost as old as the one enunciated by Justice Sutherland and supported by the bulk of our legal tradition. That view has popularly been called one of "broad" or "flexible" interpretation of the Constitution.

The traditional view that judges were bound by the inexorable limits of precedent and "interpretation" has been undercut many times. This blunt declaration by Chief Justice Stone in *United States v. Butler* (297 U.S. 1, 78-9, 1936) is only one example:

> . . .while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint.

In his important volume, *The Twilight of The Supreme Court*, Professor Edward S. Corwin notes that the modern Court's background of precedent is now sufficiently varied to warrant almost any course of judicial action the judges preferred in such crucial fields as commerce, due process, and taxation. And in affirming the "flexible" approach Professor Robert G. McCloskey points out that "The 19th century synthesis had to go, and such critics as Holmes, Corwin, and Powell performed a brilliant and necessary service when they hastened its departure. But in constitutional law as in nature, when a vacuum is created it must be filled; the 20th century needs and still lacks its own affirmative theory about the place of the Constitution and the Court in our social-political order."

Still, advocates of both judicial approaches have tended to agree that the role of a judge was *not* to be a participant in the political arena, an advocate of partisan political positions, a crusader for causes which might someday be brought before the Court. For, if the Courts were to remain sacred, and the independence of the judiciary was to be maintained, the separation of powers had to be a two-way street. Just as it was considered improper for those in the Legislative or Executive branches to meddle with the Judiciary, it was also considered wrong for judges to enter the political arena.

Entering the political arena is not simply a matter of supporting the Republican or Democratic candidate for election in a



given district or expressing oneself in behalf of or in opposition to a particular legislative proposal. It is, most observers agree, something far more inclusive. To make general pronouncements about policy decisions to be decided by the Legislative and Executive branches of government, and which may be subject to legal and judicial processes at a later time, is, on the part of a judge, to prejudice himself---to state in advance what his position is.

It is well known that a prospective juror will almost always be excused by the court for "prejudice" if he has publicly stated his opinion with regard to the case at bar. If Mr. Jones is being tried for murder and prospective juror Smith has publicly stated that he believes Jones is guilty and should hang, Smith will quite properly be removed from consideration as a juror.

Had the judge expressed a similar view, it is certain that his position would be untenable. He would be unable ton conduct a fair trial and would not be permitted to sit on the case. The same is true in more sophisticated cases concerning civil disobedience, the evasion of the Selective Service System, obscenity, the right to travel, and the right to free speech.

In assessing the political activities of Justice Douglas, the paramount questions are whether, initially, his involvement in public controversies is consistent with his judicial role and, secondarily, whether such involvement has prejudiced him in the past or can conceivably prejudice him in the future and so make his position as a Supreme Court justice one which he is unable to fulfill in accordance with our long established standards.

Writing in the *Washington Daily News*, George Carmack noted that "Justice Douglas is unique among Justices in speaking out on questions not in the legal field." Providing a brief run-down of the areas covered by Mr. Douglas. Carmack wrote:

> He speaks for recognition of Red China and has been critical of the Pentagon and the C.I.A. He opposes military emphasis in foreign aid and declared the United States has 'wasted the years since World War II with a series of vain military adventures.' In one speech he advocated the revision of textbooks to inform students about the danger of radioactive fallout, false advertising and the pollution of rivers and destruction of land by industry and government. Douglas has also proposed a new Federal agency with the power 'to review state actions that threaten the rights of individuals.'

Douglas, however, has not confined his political pronoun-

cements to the broad, philosophical questions inherent in any discussion of the nation's present and future. He has become significantly more partisan in the traditional sense when he felt the occasion required it.

On August 1, 1968, *Chicago Tribune* Washington correspondent Willard Edwards discussed in his column another aspect of Justice Douglas' partisan political role:

> A local businessman opened his mail this week to find an impassioned appeal for funds to aid the reelection campaign of a Democratic Senator. . .The fund-raising effort bore the endorsement of Supreme Court Justice William O. Douglas.
>
> 'I may be naive but I was shocked by this use of a Supreme Court Justice's name and opinions,' wrote the recipient of the letter as he forwarded it. 'Are we approaching the day when the Justices will be stumping the country for their favorite candidates for office?'

The Senator in need was Ernest Gruening of Alaska, 81, seeking to stretch 10 years of Senate service into 16. "Ernest Gruening is a very versatile, a very brave, a very deep man," said William Douglas. *The Tribune* noted that "Those who know Douglas did not doubt that he had authorized quotation of his salute to Gruening in a fund-raising letter. The Justice has breached many of the barriers which formerly kept the Supreme Court out of the political forum."

Justice Douglas once told a Sarah Lawrence College audience that "an awful thing happened when the politicians decided to vie with each other in denouncing Communism." He has advocated that the United Nations charter be amended to permit the formation of a world government, and he told a convention of the Congress of Industrial Organizations that labor should get into the international field, take over the job of the diplomats and become America's ambassadors to a "new Europe."

Speaking at Occidental College in 1949, Douglas stated that the only answer to communism was the Welfare State, with much less emphasis on individual property rights. Justice Douglas was the only Washington official who attended the annual reception at the Soviet Embassy in 1956. At that time anger over Soviet action in suppressing the Hungarian revolution was at its height and every important Washington official stayed away. Called upon to answer the storm or criticism which came down on him, Douglas said he didn't know the reception was being boycotted.

Russia and Communism have been of great interest to Mr.



Douglas, and he has frequently written and spoken about the Soviet Union. While opposing the harshness of the Stalin period, and finding aspects of the Soviet system to be brutal and inhumane, Douglas has gone to great lengths to provide the American people with what he terms a "fair" appraisal of the merits and demerits of that system.

After visiting Russia he wrote a volume about his experiences in 1956. In his book, *Russian Journey*, Douglas discussed the five-year plans imposed upon the Soviet economy:

> The five-year plan suits the Russian character. It suits the competitive urge and helps create a sense of national effort. I sensed it in every factory I visited. Each has its annual quota, which in turn is broken down into months and days. Large charts show whether yesterday was short of the quota or beyond it. . .There are instances where the system breaks down, due to mismanagement or inefficiency. But by and large it seems to work.

Although his visit took place only a few years after the end of the Stalin era, Mr. Douglas felt that the "era of good feeling" ushered in by the fall of this dictator would provide the opportunity for real cooperation between East and West. He viewed the Russian people as no longer afraid of their government, but as happy, enthusiastic and spirited:

> The Soviet people today are making an energetic, enthusiastic, united effort in building up their country. I went to Russia feeling that fear was one of the chief compulsions. I left Russia with a different viewpoint. Fear may play a part; but it is not the paramount one. Fear of the government, fear of the police, fear of the invader, fear of the foreigner have left their impact over the ages. . .But the Russian these days is also influenced by more generative and constructive forces. People move and act with enthusiasm. They have smiles and spring in their walk. The people of Russia are always going somewhere in a hurry. They have bounce and bustle. That is, indeed, the most prominent single observation my notebook records.

Douglas concluded that freedom of speech is being slowly restored in the Soviet Union and noted that "Both the Russian people and the Russian officials want peace. They want to avoid war. . .They want peace so that they can enjoy the dividends of the society which they have created." He expresses the optimistic view that since the death of Stalin ". . .there has been an important change. Today Russia is run not by one man, but by a committee. . .They cherish the freedom which Stalin's death

brought them. They thrive under new contacts with the outside world."

This book provides us with a number of contradictions. On the one hand, Douglas believed at that time that the Soviet Union's aggressive intentions might be stemmed as a result of Stalin's demise. On the other hand, Douglas provided his own blue-print of the manner in which the non-Communist world might be kept from domination by Communism:

> Over the years it is this pressure of the Communist totalitarian faith that will present the greatest difficulties to the Western world. Only strong nationalist leaders like Nehru of India, U Nu of Burma, Ngo Dinh Diem of Vietnam, and Magsaysay of the Philippines can compete with the Communists at that level. They alone can supply the symbolism of authority and security which the masses sorely need.

It is particularly surprising to record Justice Douglas' support for Ngo Dinh Diem in 1956 since, later on, Douglas was to become a critic of the war in Vietnam. It is equally surprising to see U Nu of Burma hailed as a proto-type leader for the non-Communist world. U Nu was elected by no one, and Burma has not had a free election to this day. What Mr. Douglas insisted upon for Vietnam has not concerned him with regard to Burma, and he finds not at all worthy of criticism in the Communist world. Accordingly, his real view of democratic elections is difficult to discern.

Douglas' *Russian Journey* concluded with this advice for American policy makers:

> Attitudes also change. Even those Americans most hostile to communism often found comfort in having Communist Yugoslavia as an ally. The Americans of tomorrow may come on friendlier terms with all socialists and all Communists, not as a matter of conversion to their schools of thought but as a measure of tolerance and of practical expediency in the problem of coexistence.

While post-Stalin euphoria might explain some of the optimism in Justice Douglas' analysis, 1956 saw the Soviet assault upon Hungary, and 1968 the Soviet invasion of Czechoslovakia. And today it is clear that we are witnessing in the Soviet Union a period of re-Stalinization. The continued stress is not on consumer goods, but on the means of war. Intellectual freedom has not come to the Soviet Union as the cases of such writers as Aleksandr Solzhenitsyn to eloquently testify. Real intellectual freedom has not even reached Yugoslavia, for Milovan Dijilas



remains under house arrest. Soviet arms stir crises in the Middle East, and Soviet aid fuels the war in Vietnam. There are also strong indications that one-man rule may once again be on its way in the Soviet Union. After Lenin's demise there was a period of conflict, with Stalin vying with Trotsky for the ultimate leadership. Then, following Stalin's death, there was a similar struggle. What Justice Douglas conceived as a change in the *nature* of the system, most Kremlinologists have assessed more realistically as a *leadership* struggle for power.

The same view as that expressed by Justice Douglas has been voiced by many others. When Stalin was in power not a few said that Communism was good, only Stalin was evil. One of these was English writer Freda Utley who learned at great personal expense the futility of that view. In 1931, she expressed this opinion to her good friend Bertrand Russell and, in her recently published memoirs, *Odyssey of a Liberal*, recorded his response:

> . . . I believed the horrible society I was living in (Russia) was Stalin's creation and that if Lenin had lived or if Trotsky's policies had been followed, all would have been well. Bertie would bang his fist on the table and say, 'No! Freda, can't you understand even now that the conditions you describe followed naturally from Lenin's premises and Lenin's acts. Will you never learn and stop being romantic about politics?'

A political romantic is something Justice Douglas may or may not be. One thing, however, is abundantly clear. His views of the Soviet Union and world Communism have been little altered by the cold facts of history.

In a 1968 volume, *Towards A Global Federalism*, Douglas referred to Owen Lattimore, one of the architects of our policy in the Far East which resulted in the Communist takeover of China, as "Our foremost China expert." And in discussing the origins of the Cold War, after the Berlin Blockade, after Hungary, and during the same period as the suppression of freedom in Czechoslovakia, Douglas wrote:

> The cold war was the creation of Stalin, Truman and Churchill. It was based on the theory that communism was not only evil but expansionist, not only ravenous but guided and controlled by some evil genie that would one day consume the world. The cause of the cold war was served by an armament race that has come to give us an overwhelming commitment to military might and a military mentality. The cause of the cold war was served in this country by a 'witch hunt.' The late Joe McCarthy

> gave impetus to that witch hunt from his seat in the Senate. But Truman---and later Eisenhower---gave it new wings through the loyalty and security programs whereby we put on a massive search for every ideological stray.

For Justice Douglas the war in Vietnam is not a matter of containing Communist aggression. It is not even a matter, as such critics of the war as Senators Fulbright and Church contend, that we made a mistake in believing Communist aggression was, in fact, involved. The war is far more insidious, and the blame entirely ours:

> While the cold war was largely responsible for our Vietnam venture, there was another powerful subconscious influence operating insidiously. For our domestic political philosophy has long rested on an unstated premise of white supremacy. . . .When the whites of Eastern Europe opted for communism (or were forced into it) we did not send expeditionary forces to oppose them. But the colored people of Asia fare differently. The Yellow Peril is an old slogan that our press has exploited. Discrimination against the Chinese and Japanese has long been a force in our lives as evidenced by a persistent pattern of state laws.

Douglas further stated that "It is uncontroverted that the U.S. used its power, prestige, and so-called moral leadership to make sure that the 1956 (Vietnam) elections were not held. . .there certainly was nothing in the Geneva accord that made the holding of an election dependent on its outcome, or that barred the people who so chose from electing a Communist." What Douglas does not tell his readers is that neither the United States nor South Vietnam signed the Geneva Accords and that they did not precisely because there was no guarantee that a genuinely free election could take place throughout all Vietnam, North and South.

Justice Douglas, however, seemed unconcerned with whether the election was "free" and, although Communists have never won an election in any country, he was quite willing to concede them victory in Vietnam: "A Communist head of Vietnam would certainly be a different breed from a Communist head of China, for the anti-Chinese attitude is very pervasive in that part of the world. Moreover. . .communism is not a monolithic state---that it varies greatly as it evolves---with Peking on the far left and countries like Yugoslavia and Outer Mongolia on the far right." Justice Douglas is one of the few men who has accepted the



Soviet myth that Outer Mongolia is a sovereign state. The myth was perpetrated, it must be remembered, to obtain additional Communist representation in the United Nations.

While Douglas in this volume hails Ho Chi Minh, applauds Owen Lattimore, and sees little danger in a Communist triumph in Vietnam, he has some harsh words for Winston Churchill. Churchill, Douglas wrote, was ". . .a true apostle of the Rule of Force and white supremacy." Stalin, he conceded, was "evil," and Truman "was ignorant of the world and its problems." And he charged that "These three men gave us the inheritance of the Cold War with suspicion and hate and made cooperative solutions of common problems extremely difficult."

So to Justice Douglas, it is not the aggressive intentions of world Communism, nor the oft-stated desire on the part of Communists for world revolution and conquest, which brought about the Cold War, but three men---one evil, one a racist, and the other ignorant. The fact that although all three men have vanished from the political scene while Communist assaults upon the non-Communist world continue does not trouble the internal logic of Douglas' case. That, at least, remains unchanged.

Pronouncements on controversial subjects by Douglas have covered a wide range. One major court battle in recent years has been over the question of obscenity. Here, Justice Douglas has been outspoken, not only in his court decisions—where he has both the right and responsibility to express his legal interpretation---but in the public arena as well.

In 1958, long before many of the major issues were heard by the Supreme Court, Justice Douglas in a series of lectures delivered at Franklin and Marshall College and collected into the volume, *The Right Of The People*, made clear his own position that there was, in fact, no such thing as obscenity:

> What is trash or trivia to one may be precious to others The tastes of men differ widely. So does the impact of ideas. Lurid sex accounts may trigger a seriously ill psychopath into some kind of action; and yet in another person add to the sober knowledge of life and help avoid the development of neurotic tendencies. The demands of freedom of expression require government to keep its hands off all literature. Literature performs the important social function of exposing all facets of life. It loses an important social function when it is subjected to the demands of prevailing morality. Literature is the vehicle of ideas, of knowledge---unrestricted by the

> political, religious or moral dictates of the majority group of the day. There can be no freedom of expression in the full sense until all facets of life can be portrayed, no matter how repulsive the disclosures may be to some people.

There can, of course, be both agreement and disagreement with the substance of Justice Douglas' view of obscenity. More important, however, for the purposes of determining appropriate judicial behavior is the question of whether or not such statements prejudice the Justice in advance of hearing a case yet to come before the Court. A juror would surely be disqualified in an obscenity case were he to announce in advance that he believed that there was no such thing as obscenity. But the case, it would appear, is different for a judge. However, it is not clear whether or not it was *meant* to be different and whether such behavior is appropriate and proper.

Justice Douglas has also seen fit to comment publicly on cases in which he sat as a Judge. The 1951 case of *Dennis v. United States* (341 U.S. 494), saw the nation's leading Communists go on trial under a federal law which made it a crime to advocate or teach the desirability of the overthrow of the government by force or violence. A divided Court upheld the conviction on a record which showed advocacy of revolution. The majority concluded that Congress had the power to punish such subversion where the intent was present to overthrow the government "as speedily as circumstances would permit."

Yet in his book, Mr. Douglas made this comment:

> . . .But there was no evidence that these defendants had conspired to overthrow the government. Mere agreement to meet in the future to teach and advocate violence and subversion is not a crime. Yet in the United States in the early 1950s there was no remote possibility that the government or the existing economic structure would then, or in the foreseeable future, be overturned by violent or illegal means. Then, as now the Communists in the United States were the peddlers of unwanted ideas. . .Being close to American affairs in the 1950s, I cannot conceive that the communists' advocacy of the violent overthrow of government has convinced more than a handful of the American public. 'Clear and present danger' has become merely a convenient excuse for suppression. . .

Thus, Justice Douglas is not content merely to state his own view with regard to the nature of the Communist threat in the 1950s. There is, on this question as well as on other public mat-



ters, much room for disagreement. What Douglas seems to have done is something far different. In effect, he challenged the good faith of the majority of the Court's members in the *Dennis* case by insisting that "'Clear and present danger' has become merely a convenient excuse for suppression. . ."

Government loyalty programs have been major targets of Justice Douglas' wrath. He has condemned security programs on a number of bases. Initially, he argued that there was really no Communist threat so such programs were unnecessary. Those not convinced by this argument are given another:

> . . .the available statistics do not demonstrate that the loyalty and security programs have had a great deal of success in protecting our government from the dangers of Communism or of subversion from within. We can be confident that the overwhelming percentage of condemned employees were outlawed not for crimes but for indiscretions, not for disloyal conduct but for unorthodox speech or beliefs.

Even after his most recent public pronouncements produced a furor in Congress and in the press, Douglas continued to comment on partisan, political matters. In an interview with Myra MacPherson before addressing the Sierra Club, an organization which recently lost its tax free status as a result of engaging in partisan political activities, Mr. Douglas described his own judicial philosophy somewhat facetiously by using a favorite phrase of President Nixon's and said: "I'm a strict constructionist when it comes to the Constitution and the Bill of Rights." He said he was against such repressive measures as subpoenaing reporters' files: "I say hands off the press," he said, then smiled and added, "not necessarily because they're good." This comment came at a time of continuing controversy over whether or not courts have a right to subpoena such files from newsmen, particularly with regard to violence engaged in by the Black Panthers and other New Left organizations. Here again it seems clear that Justice Douglas was once more prejudicing himself in a controversial legal area which, more than likely, will soon be heard before the Supreme Court.

Public discussion about the Douglas case often has been obscured by those who engaged in such discussion from the vantage point of partisan politics. At the same time it is clear that many of Justice Douglas' opponents are simply concerned over the fact that he expresses views with which they disagree; in their view,



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it would be best for the country were Douglas removed from the Court. Others seek to impeach Mr. Douglas in reprisal for the Senate's refusal to confirm the nominations of Clement Haynsworth and G. Harrold Carswell to the Supreme Court.

On the other side, there are those who defend Justice Douglas simply because they agree with his views, and neglect considering the question of whether or not a Supreme Court justice is meeting his obligations by assuming an active, partisan political role. Such supporters argue that in assessing Justice Douglas' activities it is not Douglas, the man, who is being considered, but rather his ideas themselves which are on trial. This view was expressed by John Finney of *The New York Times*:

> . . .Mr. Ford's target may not be so much Justice Douglas as the liberal and moderate Democrats who have sided with the liberal trend of the Supreme Court in recent years and who in the Senate have succeeded in blocking the appointment of two Southern conservatives to the Court. To many in Congress, however, Mr. Ford's move goes beyond political recrimination, although that may be an element. By raising the Douglas issue--according to this view--Mr. Ford appears to be attempting to use the Supreme Court as a campaign issue against the Democrats. . .what worries some responsible Democratic leaders. . .is that Mr. Ford in the process may be tearing down public respect for the institution of the Supreme Court. 'It's an ugly mood,' commented one leading Senate Democrat after the Ford speech. 'What we seem to be witnessing is McCarthyism directed not at personalities but institutions.'

A similar view was set forth by Haynes Johnson in the *Washington Post*. Johnson, noting that "The Douglas case represents something that transcends his own career," wrote:

> It comes at a moment when the nation is under stress. Part of it is reflected in the desire of the President and many citizens to change the direction of the highest tribunal. Part stems from bitter disputes over new styles of life, new freedoms challenging old traditions, new political movements clashing with established orders, a new generation pitted against the old. Douglas. . .with some irony, is a symbol of much of the dissent and dissonance sweeping America today.

Many others, however, regardless of whether or not they agree with the substance of Justice Douglas' opinions, feel that the case must be judged on its own merits. Senator Birch Bayh, the man who led the fight against both Judges Carswell and Haynsworth, was asked whether he thought Justice Douglas was qualified to



retain his seat on the Court. He replied: "Well, I haven't had a chance to investigate all these charges. As you know, the Con stitution provides that the House shall bring impeachment proceedings; and there's been so much talk over there . .relative to bringing impeachment proceedings against Justice Douglas that I think some questions have been raised that ought to be laid to rest, and I hope they will proceed with this investigation and find out if there's any merit in it."

Publications which have expressed serious reservations about the concept of impeachment have, nevertheless, generally agreed that Justice Douglas' conduct has been of a nature which raises serious questions with regard to his suitability for the Court.

*The New York Times*, for example, stated the following in its lead editorial of May 24, 1969:

> . . .sound practice requires more than a minimal regard for appearances. Outside associations which do not involve dubious connections may still be distracting, time consuming or productive of needless controversy. Thus, it is a questionable practice for Justice Douglas to serve as chairman of the Center for the Study of Democratic Institutions in Santa Barbara, California. Although this association is much less objectionable than his connection with the Parvin foundation, the Center does, in effect, take sides on highly controversial public issues. Anyone who serves on the Federal bench surrenders the right to engage in the arena of public controversy or in the business world. This self-denying ordinance had long been taken for granted, but in the light of recent disclosures an explicit code of conduct for the judiciary may be useful.

*The Washington Evening Star* expressed a similar view concerning the propriety of Justice Douglas' public pronouncements in its editorial of April 16, 1970:

> . . .Nor, on occasion, has Douglas been wise in what he has written or responsible in where he has allowed it to be published. One would have to be foolish far beyond Douglas' 71 years to compare today's revolutionary anarchists with those who opposed George III, as the Associate Justice has done in his latest book, *Points of Rebellion*. And while it may be swinging to permit republication of excerpts from the book in *Evergreen Review* just behind a display of nude photographs, one has come to expect a bit more discretion from jurists in the selection of their forums.

Although opposing impeachment, the *Evening Star* advanced

the view that ". . .Justice Douglas would be doing the country, the Court and perhaps himself a favor were he to resign which he is entitled to do at full pay."

It should be emphasized that the question involved in this case does not concern the substance of Justice Douglas' views on most of the matters concerning which he has publicly spoken. His opinions concerning free speech, concerning the right of privacy, concerning conservation, and many other matters are opinions with which the majority of Americans might well agree. Despite the view being presented by many of the Justice's firmest supporters, it is Douglas himself who is being subjected to investigation and scrutiny, not his opinions. He is not, as newspaper writers and other defenders have intimated, being held up as a symbol for all that some Americans find objectionable in the modern world.

Admittedly, there are those who would urge Justice Douglas' removal simply because they found his views objectionable. Such would be a serious threat to the independence of the judiciary and would, by no means, fulfill the Constitutional requirements. It is, however, an equally serious threat to the independence of the judiciary when a member of the Supreme Court is a participant in the partisan political arena If the concept of the separation of powers does not apply equally to all three branches of government--Legislative, Judicial, and Executive--then the law has truly been made a mockery.

In politics it is traditional for each side in a controversy to assert that it alone is truly representative of the virtues of the common tradition. How often have we heard spokesmen on both sides of a question telling us how Jefferson, or Lincoln would feel if he were with us at this time? So, in the case of Justice Douglas, both his supporters and detractors claim their view as the one which truly serves to defend the independence of the judiciary There is politics on both sides. However, those who are seriously concerned about the Court must look beyond more politics to the actual facts of the case.

At the very moment when controversy about Douglas' conduct was becoming a major subject of discussion in Congress and in the press, an excerpt from his recent book was published in the *Evergreen Review*, adjacent to photographs described as "pornographic" by a number of Congressmen who viewed them. Justice Douglas replied that he had given his publisher the right



to do with his book as he, the publisher, saw fit, thereby disclaiming any personal responsibility for the publication. Few observers felt that this represented an adequate explanation.

By his own standards, Justice Douglas apparently sees no conflict between his participation in the partisan, political arena and his role as a member of the Supreme Court. Whether society shares his view of what a Supreme Court justice should be, is another matter. And in the period while society is deciding whether this role is appropriate, Justice Douglas is making little effort to alter it, even for the sake of appearances.

*U.S. News and World Report* on April 27, 1970, reported recent plans made by Douglas--plans which, through no fault of his own, will not materialize:

> Supreme Court Justice William O. Douglas made a formal request to Secretary of State William P. Rogers for approval of a trip to Communist Cuba in January. The request was denied and the matter ended there. The Justice gave no reason for his planned trip.

The facts with regard to Mr. Douglas' persistent involvement in the political arena are entirely clear. All that remains to be decided is whether or not such activities are consistent with what, traditionally, has been conceived to be the proper role of a Justice of our nation's highest court.



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Chapter III.

# Justice Douglas and the Parvin Foundation

The connection between Justice William Douglas and the Parvin Foundation created such public furor that Douglas was forced to resign his position with the Foundation. There has been almost no defense of Douglas' participation in the work of this Foundation, and in an editorial for May 24, 1969, one day after Douglas announced his resignation, *The New York Times* expressed this view:

> The Parvin Foundation's assets consisted initially of a first mortgage on the Hotel Flamingo in Las Vegas and subsequently, until a few months ago, shares of stock in the Parvin-Dohrmann Company which owns three Las Vegas casinos. The mere recital of these facts makes it clear that Justice Douglas should never have entered into a relationship with the Parvin Foundation...nothing could justify a judge in associating his name and the aura of his office with any individual or organization involved in the Las Vegas gambling community...Anyone who serves on the Federal bench surrenders the right to engage in the arena of public controversy and the business world.

In November, 1960 Albert Parvin set up the Albert Parvin Foundation. He had been president and 30 per cent owner of the Hotel Flamingo, Inc., which operated the hotel and gambling casino in Las Vegas, Nevada. It was first opened by mobster Bugsy Siegel in 1946, a year before he was murdered.

Siegel's contract for decorating and furnishing the Flamingo was with Albert Parvin and Company. There were three other titular heads of the Flamingo and after Siegel's murder in Los Angeles, Sanford Adler, a partner of Albert Parvin's in another gambling establishment, El Rancho, took over. Adler subsequently fled to Mexico to escape income tax charges, and the Flamingo passed into the hands of Gus Greenbaum.

Greenbaum later went to Cuba where he was murdered, and Albert Parvin next associated himself with William Israel Alderman, known as Ice Pick Willie, to head the Flamingo. But Alderman soon left for the Riviera, and Parvin assumed leadership himself.

On May 12, 1960, Parvin signed a contract with Meyer Lansky, one of the country's leading gangsters, paying Lansky what was purportedly a finder's fee of $200,000 in the sale of the Flamingo. The agreement stipulated that payment would be made to Lansky in quarterly installments of $6,250 starting in 1961. If the schedule was kept, final payment of the $200,000 would have been made in October, 1968. Parvin and the other owners sold the Flamingo for a reported $10.5 million dollars to a group that included Florida hotelmen Morris Lansburgh, Samuel Cohen and Daniel Lifter. Parvin's attorney in the deal was Edward Levinson, who had been involved with Parvin in a number of enterprises. The Nevada Gambling Commission saw fit to approve the sale on July 1, 1960.

In November of 1960, Parvin established the Albert Parvin Foundation. It is not clear whether the foundation was funded with Flamingo Hotel stock or with a first mortgage on the Flamingo taken under the terms of the sale. Whatever the case, the Foundation was incorporated in New York and, according to the I.R.S., Justice Douglas assisted in setting it up. If Mr. Douglas did indeed help to draft the articles of incorporation it would have been a clear violation of Title 28, section 454, United States Code, which states that "any justice or judge appointed under the authority of the United States who engages in the practice of law is *guilty of a high misdemeanor.*"

The stated purpose of the Parvin Foundation was to be the education of the developing leadership in the Latin American countries. It was established as a tax-exempt, educational foundation and applied for tax-exempt status in 1962.

In 1961, Justice Douglas was named a life member of the



Parvin Foundation's board, elected president, and voted a salary of $12,000 per year plus expenses. Justice Douglas drew his salary until his resignation in May, 1969, which occurred in the wake of the controversy over Justice Abe Fortas.

In 1961, the Parvin Foundation published Justice Douglas' book, *America's Challenge.* Costs were borne by the Foundation, but royalties went to the author. On October 22, 1962 Justice Douglas' participation in the work of the Foundation involved him with Bobby Baker, who was then majority secretary of the Senate. Baker was in Las Vegas for a three day visit, his hotel bill was paid by Ed Levinson, Parvin's associate and attorney, and on Baker's registration card a hotel employe had noted: *"Is with Douglas."* It is unclear whether the notation meant literally that Justice Douglas was also visiting Las Vegas at that time or whether its intention was to identify Baker as a Douglas associate.

In December, 1962, Bobby Baker in New York City met with Juan Bosch, who was soon to become President of the Dominican Republic, and in January, 1963, the Parvin Foundation decided to drop all its Latin American projects and to concentrate on the Dominican Republic. Douglas described President-elect Bosch as an old friend. On February 26, 1963 Bobby Baker and Ed Levinson purchased round-trip tickets on the same plane for the Dominican Republic. It was at this time that Trujillo had been deposed in a violent uprising and Juan Bosch was about to be inaugurated as the new President. Officially representing the United States at the ceremonies on February 27, 1963 were the Vice President and Mrs. Johnson. Their Air Force plane included Senator and Mrs. Hubert Humphrey, two Assistant Secretaries of State, Mr. and Mrs. Jack Valenti, and Mrs. Elizabeth Carpenter. Bobby Baker and Ed Levinson, however, flew commercially.

Also in Santo Domingo for the inauguration were Albert Parvin and Justice Douglas. Discussing this matter on the floor of the U.S. House of Representatives, Rep. Gerald Ford described this rendezvous in these terms:

> ...there is conflicting testimony as to the reason for Mr. Justice Douglas' presence in the Dominican Republic at this juncture along with Parvin, Levinson and Bobby Baker. Obviously he was not there as an official representative of the United States, as he was not in the Vice President's party.

> One story is that the Parvin Foundation was offering to finance an educational-television project for the Dominican Republic. Another is that Mr. Justice Douglas was there to advise President Bosch on writing a new constitution for the Dominican Republic.
>
> There is little doubt about the reasons behind the presence of a singularly large contingent of known gambling figures and Mafia types in Santo Domingo, however. With the change of political regimes, the rich gambling concessions of the Dominican Republic were up for grabs. These were generally not owned and operated by the hotels, but were granted to concessionaires by the Government—specifically, by the President. It was one of the country's most lucrative sources of revenue as well as private corruption. This brought such known gambling figures as Parvin and Levinson, Angelo Bruno and John Simone, Joseph Sicarelli, Eugene Pozo, Santa Trafficante, Jr., Louis Levinson, Leslie Earl Kruse and Sam Giancanno to the island in the spring of 1963.

In addition to serving as a go-between for his Las Vegas friends such as Ed Levinson, Bobby Baker was personally interested in concessions for vending machines of his Serv-U-Corporation, then represented by Washington attorney Abe Fortas. Baker had described Levinson as a former partner. Mrs. Fortas, also an attorney in her husband's law firm, was subsequently to be retained as tax counsel by the Parvin Foundation. Her precise fee is not known, but in that year the foundation spent $16,058 for professional services.

Continuing to describe the various machinations concerning gambling concessions in the Dominican Republic Congressman Ford pointed out that:

> There are reports that Douglas met with Bosch and other officials of the new Government in February or early March of 1963, and also that he met with Bobby Baker and Albert Parvin...Baker and Levinson made at least one more trip to the Dominican Republic about this time but, despite all this influence peddling, the gambling franchise was not granted to the Parvin-Levinson-Lansky interests after all. In August, President Bosch awarded the concession to Cliff Jones, former Lieutenant Governor of Nevada who, incidentally, was an associate of Bobby Baker's. When this happened the further interest of the Albert Parvin Foundation in the Dominican Republic abruptly ceased. I am told that some of the educational-television equipment already delivered was simply abandoned in its original crates. On September 25, 1963, President Bosch was ousted and all deals were off. He was later to lead a comeback effort with Communist support which resulted in President Johnson's dispatch of the U.S. Marines to the Dominican Republic.



There is, however, far more which is questionable about the Parvin Foundation. This foundation, served for so long by Justice Douglas as a $12,000 a year president and director, engaged in "self-dealing" stock transactions with its creator, Albert Parvin, which were *not reported to the Internal Revenue Service until five years after they took place.*

Technically, the Parvin Foundation apparently falsified its income tax returns from 1961 thru 1965 by failing to record the transactions as specifically required on the Federal tax form. Justice Douglas headed the Foundation during this period.

The Parvin Foundation's 1966 tax returns show that in 1961 Mr. Parvin bought from and sold to the foundation two blocks of stock in separate transactions. Such transactions by a principal using foundation assets are termed "self-dealing" and have been cited as a major abuse of the tax-exempt privilege enjoyed by foundations.

As a safeguard against fraudulent activity, the Internal Revenue Service requires foundations to indicate each year, in a series of Yes or No questions, whether any such transactions have taken place. From 1961, when the transactions occurred, thru 1965, the Parvin Foundation answered "No" to all the questions. But on its 1966 return the Foundation finally revealed the dealings with its creator, Albert Parvin.

The return shows that on April 3, 1961, Mr. Parvin sold 95,000 shares of Webb and Knapp, Inc., to the Foundation for $119,700, a sum which the Foundation described as the fair market value at that time. But there was no indication in the 1966 return or in prior or any subsequent returns whether the Foundation still holds the stock in Webb and Knapp. a real estate empire which was headed by William Zeckendorf when it went into receivership in 1965.

The second such transaction took place on December 20, 1961 when Mr. Parvin bought from the Foundation 2,000 shares of Lehigh Portland Cement Company for $51,635, an amount which the Foundation asserted was above the then market value, ac-

cording to the 1966 return.

Not surprisingly the Parvin Foundation profited handsomely from its gambling interests. The very basis of the funds which Justice Douglas was administering in the name of allegedly charitable causes was deeply rooted in the gaming business, with all the associated activity that brings it into such deep disrepute.

But the Parvin Foundation's links to gambling went far beyond the mere possession of gambling stocks in its portfolio. The two men who can be identified as responsible for the Foundation's financial management, Albert Parvin and Harvey Silbert, were closely involved with the actual management of the Fremont Casino--Parvin as casino owner, and Silbert as the father-in-law of another casino owner.

Parvin and Silbert further arranged a $750,000 mortgage loan from the Foundation for their company, Parvin-Dohrmann, at a time when money was tight. This loan was to come under scrutiny by the Internal Revenue Service and become the object of a stockholders' suit, which, if it had reached the Supreme Court, would have required Justice Douglas to disqualify himself as an interested party.

In addition, Parvin and Silbert allowed Ed Levinson to become a $100,000 employee of Parvin-Dohrmann, and to purchase 40,000 shares of Parvin-Dohrmann stock, with full knowledge that Levinson had been notified that he faced possible federal criminal charges for "skimming" operations at the Fremont Casino.

The original capital of the Parvin Foundation, it must be remembered, was derived from the proceeds of the sale of Albert Parvin's stock in the Hotel Flamingo in 1959. The Hotel Flamingo was originally built and operated by the notorious Bugsy Siegel. Siegel's ownership was ended in gangland fashion when he was shotgunned by an unknown assassin. The Flamingo passed through various hands before Albert Parvin acquired a substantial interest in it in the 1950's. Later he donated 2,085 shares of Flamingo stock worth $1.6 million to set up the Foundation. In 1964, the Foundation listed on its tax return, in the category of "other assets", an interest in the "Hotel Flamingo custodian account," worth $1.1 million. In 1967 this account was substantially liquidated, without any explanation.

The basis of the Parvin Foundation, therefore, was a considerable interest in a hotel and casino which carried the worst



possible image in the public mind, and in many newspaper and magazine articles as well.

The second clear link of the Parvin Foundation to gambling interests was some 31,291 shares of stock in the Parvin-Dohrmann Company as of 1967 tax returns--listed at a book value of $450,000. This stock was sold between November, 1968 and March, 1969. The March sale consisted of 21,719 shares at $91.75 per share, for a total of $1,999,324, according to the Associated Press. This price is a speculative value, risen from $38 per share the previous October. The rise was apparently related to the sale of Parvin-Dohrmann to a new management group headed by Delbert Coleman, which has been rumored to be interested in expanding gambling operations. A large portion of the stock was purchased and held briefly by the Fund of Funds Proprietary Funds, Ltd., an international enterprise with gambling interests in several countries.

A third link between the Parvin Foundation and gambling interests lies in its relation to Fremont Casino, Inc. In 1966, when the link to the Fremont Hotel was first revealed, Harry Ashmore, serving as spokesman for the Parvin Foundation, was quoted by *Newsweek* as asserting that the trust arrangements effectively insulated the Foundation from the operation of any Las Vegas "enterprises."

Unfortunately, this does not seem to have been the case. The Foundation's bloc of Parvin-Dohrmann stock resulted in Parvin-Dohrmann profits going directly to the Foundation. Even more significant is the close identification of the principal members of the board of the Foundation with the actual operations of the gambling casino at the Hotel Fremont.

The board of directors of the Parvin Foundation, before Justice Douglas resigned, consisted of the following: Justice Douglas, president and chairman; Albert Parvin, secretary-treasurer; Harry Ashmore, director; Robert Hutchins, director; Robert Goheen, director; and Sidney M. Davis, director.

Mr. Ashmore, Dr. Hutchins, and Dr. Goheen are academic figures who, presumably were representing the interests of the Center for the Study of Democratic Institutions and Princeton University. Albert Parvin, according to the press, managed the Foundation's portfolio for 7 years until the Internal Revenue Service questioned his management; Harvey Silbert, as

board decisions.

Both Parvin and Silbert were two of the key officers in the other Parvin enterprises, of which the principal corporation is the Parvin-Dohrmann Company, a Delaware corporation. It owned 100% of the stock of three other corporations; among others, Albert B. Parvin and Co. The casino in the Fremont Hotel, which has accounted for over half the operation's business, is leased out to a separate corporation, the Fremont Casino Corporation. It is this entity which is charged under its Nevada licenses with operating the gambling enterprises at the Fremont Hotel.

The ownership of the Fremont Casino Corporation, the management operation for the casino, included 135 shares for A.B. Parvin, accounting for 45 per cent, worth approximately $135,000. Also included are Harry Goldman and N.J. Goldman, both members of the board of directors of the Parvin-Dohrmann Company.

So it becomes clear that the claim made by Harry Ashmore that the various trust arrangements isolated the foundation from the operation of any enterprise of the Fremont Casino identified with the same managerial group, but the actual ownership of the Casino operating entity was not even diluted by the spread of stock ownership in the Parvin-Dohrmann Company.

A fourth link of the Parvin Foundation to gambling interests is the mortgage which the Foundation granted to Parvin-Dohrmann Company in December, 1967. In 1962, the Parvin-Dohrmann Company bought property on Wilshire Boulevard in Los Angeles and took out a mortgage of $764,000 that was due on December 31, 1967.

When December, 1967 arrived the U.S. economy was suffering from a tight money market. At this point, Parvin turned to a convenient source of funds, the Parvin Foundation. In December, 1967 the Parvin-Dohrmann Co. remortgaged the Wilshire Boulevard property for $750,000 at 7 1/ 2 per cent interest to the Foundation.

The questionable nature of this transaction occasioned court action against Albert Parvin and Parvin-Dohrmann Company, charging that Parvin's dual role in the Foundation and in the company was a conflict of interest. The stipulation of settlement arrived at in this suit did not touch upon that claim; but the action does serve to illustrate how frequently complicated financial maneuvers are brought into court and point out the impropriety



of a Justice of the Supreme Court undertaking obligations which could result in his having to disqualify himself when suits such as this reach the Supreme Court.

There are significant similarities between the role played by Justice Douglas in his relationship with the Parvin Foundation and the role played by former Justice Abe Fortas in his relationship with the Wolfson Foundation.

On June 6, 1969, *Time* made this comparison:

> ..there were some curious links between the two cases. For one thing, Parvin had been named a co-conspirator---but was never tried---in a securities-law violation case along with Louis Wolfson. Moreover, the Parvin Foundation derived its income from Albert Parvin's ties with Las Vegas gambling operations. This raised a question similar to the central issue of the Fortas affair: Should a Supreme Court Justice be judged by the company he keeps? Adding to the intrigue was the fact that until last week the Parvin Foundation retained Carolyn Agger---Abe Fortas' wife and a top Washington lawyer---as its tax consultant.'

In an interview with the *Washington Post*, Justice Douglas stated that drawing his $12,000 salary from the Foundation, almost one third of this annual $39,000 salary as a Justice at that time, raised no ethical question in his mind!

Although Douglas had been with the Foundation, which he served as President, since its formation in 1960, his $12,000 salary did not begin until about 1962. According to Parvin, it was introduced over Douglas' strenuous objections. Douglas has said that the expenses he incurred in serving the Foundation were "pretty close" to the $12,000 allowance. Also according to Parvin, the Foundation asked for no intemization of Douglas' expenses and the Justice submitted none.

Regardless of the Las Vegas connections, Justice Douglas' expense account would appear to raise an ethical question that is not clearly resolved by the American Bar Association's Canons of Judicial Ethics.

Many observers regard the 36 canons as being far from definitive. But the fourth canon, for example, known as the "Caesar's wife" doctrine, stipulates that "A judge's official conduct should be free from impropriety and the appearance of impropriety."

Under present law federal judges are not required to disclose their financial holdings, outside income, or activities. Nevertheless under existing statute, they cannot practice law, and they are required to disqualify themselves from ruling on cases in which they have an interest. But asserting personal involvement or interest is left up to the individual judge.

Justice Douglas received a total of nearly $85,000 in fees during his tenure as President and Director of the Parvin Foundation. For 1967, the most recent year available, his fee was one-quarter of the foundation's "charitable" disbursements. For the period 1961-1965 the foundation falsified its tax returns, failing to report certain stock manipulations until its tax return for 1966, after the Internal Revenue Service finally started an investigation.

A *New York Post* article noted that "...the tangled situation found the wife of one Supreme Court justice being retainer to a foundation whose president and only paid officer is another member of the High Court. At the same time, her jurist husband was enjoying a similar relationship with another foundation."

There is evidence that Judstice Douglas has been less than frank in admitting his own knowledge and connections with the Parvin Foundation and the manner in which it was financed. *The Washington Post* for October 23, 1969 noted that "A hotel-casino sale arranged by gangster Meyer Lansky helped finance a foundation headed for nine years by Supreme Court Justice William O. Douglas, who said today he knew nothing about the deal."

*Newsweek* for June 2, 1969, includes the following: "Justice Douglas, when questioned by *Los Angeles Times* reporter Ron Ostrow in 1966, gave every impression of denying the Parvin Foundation's income derived from gambling activities. He said he wasn't a member of the Foundation's finance committee, but he thought that a first mortgage on the Flamingo casino-hotel, which had been donated by Albert Parvin, 'was owned for a brief period but disposed of.' "

Newsweek continued:

> At the same time, Pulitzer Prize winning newsman, Harry Ashmore, who is a director of the Parvin Foundation, insisted that various trust arrangements isolated the foundation from 'the operation of any...enterprise in Las Vegas.' Yet, Internal Revenue documents examined



> by *Newsweek's* John J. Lindsay last week show that the Foundation's main source of income at the time both men were speaking was the Flamingo mortgage, which was generating $28,000 in revenues a month to the small Foundation and which was still in the Foundation's investment portfolio at the time it filed its last report covering the year 1967. The Foundation also owned 5,000 shares in a corporation that had casinos in Las Vegas and Lake Tahoe. And through its holdings of Parvin-Dohrmann stock, the Foundation had an interest in the Fremont Casino-hotel, which Parvin-Dohrmann had bought in June...

Justice Douglas also has been guilty of interfering in the Internal Revenue Service's investigation of the Parvin Foundation. *The New York Times* of May 26, 1969, stated in a front page story: "Supreme Court Justice William O. Douglas has privately characterized Internal Revenue Service Investigation of the Albert Parvin Foundation as a 'manufactured case' intended to force him to leave the bench. The characterization was included in a letter dated May 12 to Albert Parvin...'The strategy is to get me off the Court,' Mr. Douglas wrote. 'I do not propose to bend to any pressure.' " When Douglas wrote the letter, he was still president and a director of the Foundation and was earning a $12,000 annual salary in those posts.

When Mr. Douglas finally announced his resignation from the Foundation, he explained that the extended activities of the Foundation were becoming "too heavy a workload for him." He did not indicate that his resignation came at a time of mounting criticism for his involvement with the Foundation, as well as criticism of his attempt to pressure the government into ceasing its investigation, and the questionable act of giving advice to a Foundation under government investigation.

The Commissioner of the Internal Revenue Service, Randolph W. Thrower, said that there was "no real justification" for Justice Douglas' charge that the inquiry into the Parvin Foundation was politically motivated. Mr. Thrower stated: "I have seen nothing to indicate any political motivation in the examination under the past Administration and can give assurance that none exists within the Internal Revenue Service today."

*The New York Times* of May 27, 1969, states: "...knowledgeable figures in Washington, reviewing the public tax returns of the

Parvin Foundation between 1961 and 1967 said that there were items in the annual accounting that would naturally arouse a revenue agent's curiosity." *The Times* continued:

> ...They said that the Foundation's records disclosed several instances of what they called "self-dealing," or financial transactions between the Foundation and its founder, Mr. Parvin...As a fraction of the Foundation's total assets, charitable disbursements ran as low as 2 per cent. The Department of the Treasury has recommended that Foundations be required to spend for their philanthropic programs an amount equivalant to al least 5 per cent of their assets.

*The New York Times*, pointing to the role of adviser played by Justice Douglas noted on May 27, 1969 that "Letters from Justice Douglas to Mr. Parvin disclosed to *The New York Times* in Los Angeles yesterday, indicated that the Justice had made his own suggestions about how the Foundation could avoid tax difficulties in the future."

The same day, Rep. Emanuel Celler, chairman of the House Judiciary Committee, said that Justice Douglas had overstepped himself in his correspondence concerning the Parvin Foundation. Rep. Celler, later to become chairman of the special committee to consider the possibility of impeachment proceedings against Justice Douglas, declined to say whether he felt Justice Douglas had been "practicing law" while still president of the tax exempt foundation. But he told a *Washington Post* reporter that "If I were in Justice Douglas' shoes, I would never have written that letter." This was reported in the *Post* on May 28, 1969.

There are many aspects of Justice Douglas' relationship with the Parvin Foundation which have, over a period of time, been criticized. Speaking in the Senate on June 5, 1969, Senator Carl Curtis of Nebraska stated that what is most disturbing in the relationship between Justice Douglas and the Parvin Foundation is that he was on the same payroll with men who were called before the Senate Rules Committee during the Bobby Baker investigation. Curtis stated that "These witnesses, one of whom took refuge behind the fifth amendment and refused to testify, are Edward Levinson and Edward Torres. What is most disturbing is that both Messrs. Levinson and Torres were on the same payroll with a Justice of the United States Supreme Court. Not only have Torres and Levinson been employed by and owned



an interest in the Parvin-owned Fremont Hotel and gambling casino in Las Vegas, but Torres also owns 63,000 Parvin shares."

The September 8, 1967 issue of *Life* discussed the policy of "Skimming" at Las Vegas gambling casinos. "Skimming" is the diversion of a portion of cash receipts off the top to avoid taxes. The *Life* article states:

> The biggest skim yet discovered took place in the legalized gambling casinos of Las Vegas from 1960 to 1965; many details of it are being disclosed here for the first time. Its breakup by federal agencies has sent the Mob scurrying all over the world---to places like England, the Caribbean, Latin America, and the Middle East---in search of a bonanza to replace its profits. Some $12 million a year was skimmed for gangsters in just six Las Vegas casinos: The Fremont, the Sands, The Flamingo, the Horseshoe, the Desert Inn and the Stardust.

Senator Curtis charged that "What makes the allegations in the *Life* article most disturbing is that Parvin, with Douglas on the payroll of his Foundation, bought into the Fremont in 1966, and maintained a business relationship with Levinson and Torres for the continued operation of the Fremont and possibly other gambling casinos. It would seem almost inconceivable that Parvin and even possibly Justice Douglas did not know of the skimming operation taking place at the Fremont, when everyone who reads *Life Magazine* knew what was going on. Justice Douglas might want to comment on his knowledge of Parvin's involvement with these mobsters, and the public might well wonder how much Mrs. Fortas, Parvin's tax lawyer, knew of his financial connections in the Las Vegas gambling arena."

*The New York Times* for May 26, 1969 indicates clearly that Justice Douglas had provided the Parvin Foundation with legal advice:

> In Justice Douglas' letter to Mr. Parvin, the Justice insists that the allegations of the revenue service must be fought. Mr. Douglas also makes several suggestions in his letter as to how, in the future, the finances of the Foundation can be completely and unquestionably set apart from Mr. Parvin's control or the implication of it. His suggestions, Mr. Douglas says, probably won't help the Foundation in its present problems with the revenue service, but they ought to limit new difficulties.

Commenting upon this situation, Rep. H.R. Gross of Iowa stated that "Douglas was giving advice only 14 days ago on tax matters under investigation by the Internal Revenue Service. I would think this would create a conflict of interest or possible conflict of interest. I am also told that there are laws forbidding a Supreme Court Justice giving legal advice."

When questioned about this situation, Justice Douglas claimed that he "knew very little" about the tax law problems of a private foundation he had headed for nine years. In a statement issued through the press office of the Supreme Court, Douglas stated that "As far as the tax troubles are concerned, they had tax lawyers and it's up to them, it's their job." The press office stated that "He (Douglas) knew very little about these tax troubles." This statement from the Court's press spokesman, Banning E. Whittington, appeared in the *Washington Evening Star* of May 26, 1969.

Justice Douglas' involvement with the Parvin Foundation, its own self-dealing operation, its involvement with gangland figures and with Las Vegas gambling interests---these alone would be enough to hold Mr. Douglas open to serious question. But, added to this, is the receipt of a $12,000 a year salary, the provision of legal advice, the accusation that an Internal Revenue Service investigation of the Parvin Foundation was a political attack upon himself, and finally his failure to resign from the foundation until absolutely necessary. This adds up to a record which is, at best, questionable.

Commenting on this situation, columnist Roscoe Drummond wrote the following:

> Was it proper and ethical for Justice Douglas to serve for nearly a decade--while he was on the Court--an organization (the Parvin Foundation) which had ties to gamblers and the underworld?
>
> Was it proper and ethical for Justice Douglas, while on the Court, to give legal advice to the Parvin Foundation on its troubles with the Internal Revenue Service?
>
> Could Justice Douglas believe that this gamblers' Foundation was really out to improve the culture of Latin America instead of seeking a cover to enable those who financed it to get around where concessions were up for grabs?



Whatever the final determination may be, there is sufficient reason for concern when a member of the nation's highest Court is engaged in business and financial dealings with underworld figures and receives a salary from a foundation which, itself, has been charged with circumventing the law.

And when he has, in addition, attempted to shield that Foundation from proper governmental inquiry by interposing himself as the issue, charging that the only reason the Foundation was being questioned was as a means to remove him from the Court, he has used his position as a Supreme Court Justice not only for self-enrichment, but in a way which serves to enrich others.

The impropriety of such actions is clear, for even those observers who oppose the effort at impeachment, such as *The New York Times, The Washington Evening Star,* and Rep. Emanuel Celler, have criticized Mr. Douglas for his ties to the Parvin Foundation. The question, it seems, is not whether Mr. Douglas has acted improperly, but whether this impropriety, and the others which have been charged, are sufficient to meet the Constitutional requirements for impeachment. In either case, it is agreed, Mr. Douglas has been less than conscientious in his interpretation of the concept of "Judicial role."

Chapter IV.

# Justice Douglas and the Ginzburg Case

The case of Ralph Ginzburg and *Fact* magazine is an interesting one as it relates to Justice William O. Douglas. The front cover of *Fact* for October 1, 1964 carried a headline stating that "1,189 Psychiatrists Say Goldwater Is Psychologically Unfit to Be President." The article stated that the Republican nominee for President of the United States was, among other things, trigger-happy, unsure of his manhood, and paranoid.

A year later Goldwater sued *Fact*, its publisher-editor Ralph Ginzburg, and its managing editor, Warren Boroson. The case came to trial in May, 1968 and after five weeks of testimony the jury found the defendants guilty of malicious libel and awarded Goldwater $75,000 in punitive damages.

Ginzburg immediately took his case to the U. S. Court of Appeals in New York. Again he lost, for the Appeals Court unanimously ruled to uphold the lower court decision. Ginzburg then appealed to the United States Supreme Court.

Ginzburg has had a long previous record of involvement with the law. He has been known as a "pornographer for profit", and in 1963 was convicted of sending obscene literature through the U.S. mails, fined $42,000 and sentenced to five years in prison. The disputed material was Ginzburg's now-defunct magazine, *Eros,* a book, *The Housewife's Handbook on Selective Promiscuity,* and a leaflet entitled "Liaison, The Biweekly Newsletter of Love."

On March 21, 1966 the Supreme Court, by a vote of 5 to 4, upheld the obscenity conviction of Ralph Ginzburg. Justice Brennan said that Ginzburg's promotion of the three publications involved was



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permeated with the "leer of the sensualist."

*The New York Times* of March 22, 1966, reported that "Justice Brennan's voice rang as he denounced 'those who would make a business of pandering to the widespread weakness for titillation by pornography!'"

Justice William O. Douglas, on the other hand, had consistently opposed all censorship and complained that the new ruling condemned an ancient advertising technique. He said: "The advertisements of our best magazines are chock-full of thighs, ankles, calves, bosoms, eyes, and hair, to draw the potential buyer's attention to lotions, tires, food, liquor, clothing, autos, and even insurance policies."

When the *Fact* libel case reached the Supreme Court in January, 1969, the status of Justice Douglas was open to serious question. By then Justice Douglas had engaged in direct dealings with Ginzburg. He had written an article on folk singing for *Avant Garde*, a publication, which, in sworn testimony, Ginzburg, averred was a direct successor to *Fact*, which had published the vicious article on Senator Goldwater.

Douglas had gained the sum of $350 as a result of Ginzburg's editorial interest in him. The amount was not large, but a conflict of interest issue does not rest upon the sum involved.

Justice Douglas was not perturbed by his prior association with Ginzburg and he voted favorably on Ginzburg's plea for a review. The Court vote, however, was 5 to 2 against him.

Ralph Ginzburg characterized the Supreme Court's refusal to review his case as "a black day for freedom of the press." He agreed, it would appear, with the other dissenting justice, Hugo Black, who argued that deliberate and malicious falsehood is "an inevitable and perhaps essential part of the process by which the public informs itself of the qualities of a man who would be President." This argument ignores the fact that a license to deliberately destroy a man's reputation while knowing that the charges are false has never been one of the guarantees of our Constitution.

It is also noteworthy that Justice Black has led as stormy and as political a judicial career as Justice Douglas. Black was elected to the Senate from Alabama in 1926 and became a faithful supporter of the New Deal. The retirement of Justice Van Devanter in 1937 gave President Roosevelt his first opportunity to appoint a Supreme Court Justice, and Black was his choice.



A few weeks after the confirmation, *Pittsburgh Post Gazette* reporter Ray Sprigle, on September 18, 1937, broke the story that Black had once been a Ku Klux Klan member. As a member of Birmingham's Robert E. Lee Klan No. 1, Black took this solemn oath: "I swear that I will most zealously and valiantly shield and preserve by any and all justifiable means and methods...white supremacy."

Although backed by the Klan in his bid for the Senate, Black resigned from the Klan on July 9, 1925. The "resignation", however, was so temporary that a year later Black accepted the Klan's "Grand Passport" entitling him to a lifetime membership. Black accepted the passport with a melodramatic speech of thanks. "This passport which you have given me," he intoned, "is a symbol to me of the passport which you have given me before. I do not feel that it would be out of place to state here on this occasion that without the support of the members of this organization, I would not have been called...the 'Junior Senator from Alabama.'"

In a thoughtful analysis of Justice Black's record on the Court, M. Stanton Evans and Douglas Caddy point out that:

> The conflicts in Black's career have been so profuse and so astounding that it is sometimes difficult to keep them all in focus...Black rendered the Court's opinion in the case of the Japanese-Americans interned during World War II. In that decision, the Court coolly observed that "we cannot--by availing ourselves of the calm perspective of hindsight--now say that at that time these actions were unjustified."
> Black's indifference to the liberty of citizens who had done nothing to suggest disloyalty to America--except to be born members of a certain race--contrasts glaringly with his hot defense of the "rights" of men and women sworn to destroy this country.

In recent days, Justice Black has shown signs of adjusting his philosophy, believing that perhaps the Court has gone too far in a number of its decisions. However, only these two highly political men, Justices Black and Douglas, have expressed the view that within the political arena, in effect, "anything goes", and that political candidates are not to be protected in the same manner as other citizens by laws relating to libel and slander.

Commenting on Justice Douglas' action in the Ginzburg case,

columnist Ralph De Toledano pointed out that "At the time of the Haynsworth controversy it was noted by me and by other commentators that when the Ginzburg case reached the Supreme Court, Justice Douglas would have to disqualify himself...The sum was not very big, but if Judge Haynsworth was guilty of 'conflict of interest' because he had sat on cases which netted him such munificent sums as 48 cents in one instance and $15 in another, then the money involved loomed very large indeed."

The dissent, in which Justices Douglas and Black joined, included the following extravagant philosophy:

> I firmly believe that the First Amendment guarantees to each person in this country the unconditional right to print what he pleases about public affairs...This suit was brought by a man who was then the nominee of his party for the Presidency of the United States. In our times, the person who holds that high office has an almost unbounded power for good or evil. The public has an unqualified right to have the character and fitness of anyone who aspires to the Presidency held up for the closest scrutiny. Extravagance...is to me an inevitable and perhaps essential part of the process by which the voting public informs itself of the qualities of the man who would be President.

This opinion continued: "Doubtless the jury was justified in this case in finding that the *Fact* articles on Senator Goldwater were prepared with a reckless disregard of the truth, as many campaign articles unquestionably are. But...the grave dangers of prohibiting or penalizing the publication of even the most misleading and inaccurate information seem to me to more than outweigh any gain, personal or social, that might result from permitting libel awards such as the one before the Court today...I would grant certiorari and reverse the Court of Appeals summarily."

Justice Douglas' action in the Ginzburg case was subject to much criticism. Arizona Senator Paul Fannin said that the question of Justice Douglas' receiving a fee for his article is less important than his "contemptuous scoffing" at the canons of judicial ethics and his "scornful disdain" of the respect Americans have a right to expect of their Supreme Court Justices.

"I find it extremely difficult to understand why Justice



Douglas cannot discern the impropriety--or at least the appearance of impropriety--in his writing for a publication put out by a man convicted of violating Federal obscenity laws. I cannot believe him to be ignorant or naive of the consequences of these actions," Senator Fannin said. "The only other conclusion is arrogance and a disregard for the respect of the Court."

For his part, Ginzburg defended Justice Douglas as "an inspiration" to every "open-hearted, open minded American." He said that to try to put the Douglas article in the same category as "bribe taking" is absurd, and he labeled Senator Fannin a "mediocre character."

But the Ginzburg case reveals further interesting ramifications, not only with regard to Justice Douglas but concerning our legal system itself. Ginzburg, 40, whose conviction for violating obscenity laws was upheld in 1966 by a 5-4 Supreme Court decision, remains a free man. In April, 1970, a Philadelphia judge was still listening to "final" arguments in the Ginzburg case.

In Philadelphia in December, 1963, Federal Judge Ralph C. Body found Ginzburg guilty of publishing a slick, erotic magazine, *Avant Garde*, and selling it through the mails. He was sentenced to five years in jail and a $28,000 fine.

Judge Body ruled in a non-jury trial that Ginzburg was "peddling dirt for dirt's sake and dirt for money's sake." By April, 1965, the Supreme Court agreed to hear an appeal of the conviction. In March, 1966, the high court upheld the conviction, 5-4. Justice Douglas, in his dissent, said he found it "shocking...for us to send to prison anyone for publishing anything, especially tracts so distant from any incitement to action as the ones before us. I do not think it is permissible to draw lines between the 'good' and the 'bad' and be true to the constitutional mandate to let all ideas alone."

Justice Douglas opined that "the sexy advertisement" in Ginzburg's magazines, "neither adds to nor detracts from the quality of merchandise being offered for sale."

Ginzburg immediately said that he would ask the Philadelphia federal court to reduce or suspend his sentence. But on July 5, Judge Body ruled that he would do neither. A headline in New York City on July 7 announced: Ginzburg Must Begin Sentence."

The next day, however, the federal appeals court in Philadelphia set a hearing to allow Ginzburg to seek a stay of

conviction--which was granted on July 11, the day before he was to begin his jail term. Only three members of appellate court participated, and the stay was granted by a 2-1 decision. Ginzburg was then freed on $10,000 bail, pending continued efforts by his attorneys to reduce his fine and sentence.

What the Ginzburg case opens to question with regard to Justice Douglas is whether or not Douglas has been guilty of a clear case of "conflict of interest." He had had business dealings with a man whose case was before the Court, yet he made no effort to disqualify himself. Instead, he became one of the two judges who dissented *on behalf of the defendant*. Surely, the judicial canons which condemn even the appearance of impropriety have been severely strained with regard to this episode.

Title 28, United States Code, section 455 states the following: "Any justice or judge of the United States should disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceeding therein."

Commenting on Justice Douglas' role in this case, Rep. Gerald Ford stated that "Writing signed articles for notorious publications of a convicted pornographer is bad enough. Taking money for them is worse. Declining to disqualify one's self in this case is inexcusable."

Since the Celler Committee has started to investigate the possibility of Justice Douglas' impeachment, however, Douglas has given second thought to his original view that there was, in fact, nothing wrong with his participation in the Ginzburg case.

On April 28, 1970, Justice Douglas took himself out of two Supreme Court obscenity actions, leading his congressional critics to remark that the Justice's action compounded the case against him.

Without explanation, Douglas noted that he was taking no part in the Court's decision to permit the filing of briefs by outside parties in cases involving allegedly obscene film, I Am Curious (Yellow). The film is distributed in the United States by Grove Press, Inc., whose President, Barney Rossett, publishes *Evergreen Review*, the magazine that printed excerpts from Douglas' recent book, *Points of Rebellion*, next to pictures which



have been described as "pornographic."

Many observers held this action to be a tacit admission by Justice Douglas that he should have disqualified himself in the Ginzburg case as well.

In another case, Douglas, again without explanation, absented himself as the court refused to intervene in the libel trial in which San Francisco Mayor Joseph L. Alioto is suing *Look* for an article linking him with underworld figures.

*Look* sought to stop the trial on the grounds that even if it prevails when the verdict is in, press freedom will have been impaired through the lengthy defense against the $12.5 million claim. Justice Douglas has been a frequent contributor to *Look*, a relationship which, as a result of mounting political agitation over the Ginzburg case, may well have caused him to conclude that his proper judicial role in this matter would be disqualification.

There are those who advance the view that criticism of Justice Douglas' role in the Ginzburg case relates not so much to any possible charge of "conflict of interest" but involves, instead, a mounting hostility to the substance of his views on libel, slander, and obscenity.

Granted, there are persons who condemn Mr. Douglas because they disagree with his opinions, but by no conceivable standard is this a proper reason to propose his impeachment. In point of fact it is not always easy to discern exactly what his opinions are. Today, Douglas opposes *all* actions for libel and slander, expressing his view that First Amendment guarantees of free speech are total, an interpretation which critics of his opinion have termed "license."

But in his 1961 volume, *A Living Bill of Rights*, Justice Douglas expressed a somewhat different opinion. At that time he wrote that "A person whose reputation is injured by false statements which another made about him can, of course, recover damages. His remedy is through the historic actions for libel or slander which, it would seem, Congress by the First Amendment is barred from creating but which the states traditionally maintained long before the Union was established and have maintained ever since. In dealing with governmental affairs, or the fitness of a political candidate for office, the law, however, has come to recognize a very broad privilege to comment freely and even to criticize harshly. On matters of public concern, the ex-



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pression of ideas may not be suppressed just because someone decides the ideas are false. In that way we encourage the widest and broadest debate on public issues."

Few of Justice Douglas' critics in 1970 would find this view of our libel and slander laws offensive, although there is always room for disagreement over what such phrases as "comment freely" and "criticize harshly" mean in actual practice. Yet, the *Fact* story concerning Senator Goldwater contained material far different from either criticism or commentary. In his volume, *The Manufacture of Madness: A Comparative Study of the Inquisition and The Mental Health Movement*, Dr. Thomas Szasz uses *Fact's 1964* attack on Goldwater, in which 1,189 psychiatrists analyzed the Senator in absentia and declared him sic, as a prime example of what he disignates a "new inquisition."

Dr. Szasz likens the *Fact* attack to Nazi Germany's assault on the Jews, which pronounced them vermin and their extermination a delousing; as well as to the "science" of Dr. Benjamin Rush, revolutionary father of American psychiatry, which concluded that Negroes were suffering from congenital leprosy, but that with treatment and time they could regain their natural whiteness.

All of these targets and others, are in actuality scapegoats. None, Dr. Szasz says, is sick. But their oppressors are moderns who, though lacking black hoods, nonetheless possess the inquisitor's devices. Commenting on Dr. Szasz's thesis, Professor David Brudnoy notes that "Social nonconformity...led to the witch-hunts in our ostensibly less enlightened past. Today, that same social nonconformity is labeled mental illness and dealt with as if it were contagious. Thus, the mythology of mental illness and the 'cure' it expounds: 'treatment' and institutionalization of those who differ radically (like the person who feels the Commies are against him), or are 'useless' (like the aged), or have few defenses (the poor), or are sexually 'deviant.' The accused criminal is afforded a lawyer and a trial of his peers; the accused 'mental case' for his own good, and that of Society, is afforded incarceration, often forever."

Dr. Szasz, once again pointing to the example of *Fact*, writes that "Formerly, the Inquisitor accused the citizen of witchcraft and proved him to be a witch...Today, the institutional psychiatrist accuses the citizen of mental illness (another



thought crime) and diagnoses (detects) him as psychotic; he then turns him over to the court--that is the state, and he is committed to a prison called a mental hospital."

Of course the thesis advanced by Dr. Szasz is a controversial one, and there is much disagreement with it within the medical profession. The fact remains, however, that the attack upon Senator Goldwater was, in no way, within the limits of established by Justice Douglas in 1961 as fair and proper political commentary. By the time of the *Fact* case, however, Justice Douglas had decided that a certain "extravagance" was permitted, and that this attack was not malicious--as the remainder of the Court clearly found it to be--but was merely "extravagant."

The proper site for the debate concerning libel, slander and obscenity is not the same forum within which Justice Douglas' role as judge and the propriety of his actions on the bench are to be considered. Those who insist upon confusing the substance of Justice Douglas' legal beliefs with the question of whether or not he has adequately performed the judicial role, mistake the points at issue.

Throughout the federal court system many judges share Douglas' views on obscenity and libel, as well his views on other subjects. But such judges are not involved in conflict of interest situations and so any quarrel with them on the part of those who find their decisions objectionable becomes simply an esoteric and philosophical dispute.

The final consideration of Justice Douglas' role in the Ginzburg case is not one of whether or not his decision was of a kind with which any one of us may agree. In a democratic society there is no obligation on our part to agree, or on the part of the judges to please us. But there is an obligation of propriety, and an obligation not to participate in cases which would result in either the existence or the appearance of a "conflict of interest."

(Of late, the ignoring by a jurist of these and other implicit obligations has come to be termed "insensitivity". Oddly enough, the term has not been widely used as applied to the conduct of Justice Douglas.)

This is the question which must be answered concerning Justice Douglas and the Ginzburg case. Numerous legal authorities find Douglas' action in disqualifying himself from cases in which he had an interest similar to that in the earlier

Ginzburg case a tacit admission that his previous judicial behavior was less than proper.

Chapter V.

# The Center for the ~~Study~~ Subversion of Democratic Institutions

In addition to his many other activities, Justice William O. Douglas has served as Chairman of the Center for the Study of Democratic Institutions at Santa Barbara, California. He has been paid as much as $500 a day for work with the Center, and received $4,000 for just two seminars. Between 1965-67 the Parvin Foundation gave $70,000 to the Center. Besides Justice Douglas, there are two others who are directors of both the Parvin Foundation and the Center, Robert Hutchins and Harry S. Ashmore.

According to its own description, the Center "is an independent educational institution devoted to continuing examination of basic issues confronting a democratic society." It states that "Its prejudice is democracy. Its objective is clarification, not necessarily settlement of issues...Many viewpoints are represented in the output of the Center, but the Center adopts none as its own. Nor does the Center seek consensus or unanimity in its publications and audio tapes." Those who have carefully observed the work of the Center during the past period find it difficult to believe that this description reflects the reality of that institution. The Center's role, most observers agree, has been far more political and hardly nonpartisan.

The Center is overtly political in its program, and was host to the founding meeting of the National Conference for New Politics. This meeting, in effect, declared war on the economic,

social, and political bases of American society. The Center further organized the so-called "Pacem in Terris" conference, which was designed to seek detente with the Soviet Union, and has been active in encouraging student radicalism.

The *Chicago Tribune* had this to say in an editorial: "The Center was the incubator of the National Conference for New Politics, which held a five day debauch and did more than $10,000 worth of damage in the Palmer House here in September, 1967. A little later the Center was host to a three-day meeting of radical students, at which Devereaux Kennedy, president of the Washington University student association, advocated terrorism to 'demoralize and castrate America' and 'outright revolution to overthrow the government of the United States'...this disgraceful organization enjoys tax exemption...if Justice Douglas does not resign the House should initiate impeachment proceedings."

The Center for the Study of Democratic Institutions distributes a variety of publications and studies around the country. One of these is a document entitled "Students and Society," a report of a conference sponsored by the Center in 1967.

The report contains a paper presented to the conference by student Stephen Saltonstall of Yale University, entitled "Toward A Strategy of Disruption." In it Saltonstall called for small, disciplined groups of student "shock troops" to assist in disrupting society. He urged the "intimidation and humiliation of public figures such as Vice President Humphrey and Defense Secretary McNamara."

What this document had to do with democratic procedures and institutions is difficult to say. Saltonstall urged students to harry university professors and researchers "at their homes." Is invasion of privacy now a part of "democratic procedure?" Saltonstall also made the novel suggestion that "The introduction of a small quantity of L.S.D. in only five or six government department coffee urns might be a highly effective tactic."

A forward to "Students and Society" by W. H. Ferry, vice-president of the Center, affirmed: "This is an edited record of the conference proceedings. Therefore Saltonstall's suggestions were printed with malice aforethought." Mr. Ferry also stated, "The conference on Students and Society was made possible by a generous contribution from S. Herman Meller of New York City." Curiously, Mr. Meller is an investment banker with Meller and Company.



Included in this same document was the following revelation by Devereaux Kennedy, student body president at Washington University: "I'm going to say loudly and clearly what I mean by revolution. What I mean by revolution is overthrowing the American government and American imperialism and installing some sort of decentralized power in this country."

As steps to accomplish his purpose, Devereaux Kennedy proposed "starting up 50 Vietnams in Third World countries...acts of terrorism and sabotage outside the ghetto...I mean completely demoralizing and castrating America."

Mr. W. H. Ferry described "the mood" of students and society as "hammering discontent, combined with impatience for action." The Center, however, clearly appears to have been stimulating precisely that mood.

Harry Ashmore also was involved with what can only be considered as a clearly political controversy. He and William R. Baggs, a fellow member of the Fund for the Republic's board of directors (The Fund for The Republic sponsors the Center for the Study of Democratic Institutions) issued a charge against the President of the United States. The President (then Lyndon Johnson), charged Ashmore, interfered with the plans for peace Baggs and Ashmore were preparing with the government of North Vietnam.

There is considerable question concerning whether or not Messrs. Ashmore and Baggs were in violation of the Logan Act as adopted in 1799 and reinforced in 1948, but never tested in the courts.

The Logan Act declares than "any citizen of the United States who, without the authority of the United States, directly or indirectly communicates or carries on any correspondence or intercourse with any foreign government, or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof in relation to any disputes with the United States, or to defeat the measures of the U. S., shall be fined not more than $5,000 ...."

There is a further serious question about whether or not the Center for the Study of Democratic Institutions was itself violating the Logan Act in sponsoring and financing a "Pacem in Terris II Convocation" at Geneva, Switzerland, May 28-31, 1967, to discuss foreign affairs and United States foreign policy, including "The Case of Viet Nam" and "The Case of Germany."

The first "Pacem in Terris Convocation" sponsored by the Center was held in New York City in 1965 and took its title from from Pope John XXIII's encyclical.

Harry S. Ashmore, executive committee chairman of the Center, went to Hanoi in January, 1967 for a week to extend an invitation to our enemy Ho Chi Minh to attend the convocation. On returning home, Ashmore addressed a founding members' meeting of the Center. The March-April, 1967 *Center Diary* carries long excerpts from Ashmore's speech.

Despite the fact that Americans were fighting and dying in Vietnam at that time, Ashmore eulogized Ho Chi Minh as "a man of great charm, great sophistication, great intelligence. . .He was quite outgoing, quite frank. He stated the Vietnamese (not "North Vietnamese") position without any particular rancor. . .I believe historically he will rank with Ghandi, and it occurs to me there is nobody else around the world today in any country who seems to provide a similar blend of spiritual and political power."

Further along in his speech, Ashmore noted that "Our visit to Hanoi and the possibility that the Vietnamese (sic) will partipate in our Geneva convocation vindicate the faith that we have had at the Center in this undertaking, which, on its surface, seems a ridiculous attempt by a group of private people, without any government sanction or government backing, to do what governments ought to be doing and ultimately will have to do. We are in the rather absurd position of running what amounts to a privately financed, understaffed and wholly unaccredited foreign service."

Ridiculous or not Ashmore's statement was hardly accurate. First, the Center for the Study of Democratic Institutions is not "privately financed" but is financed through tax-exempt contributions. In this sense, it is subsidized by the government. Secondly, several foreign ministers and officials of foreign governments were scheduled to attend the Geneva convocation on traveling expenses furnished by the Center. In addition, our participation in the Vietnam War was a measure undertaken officially by the United States Government and it would appear to be a violation of the Logan Act for a self-constituted "foreign service" outside the U. S. Foreign Service to seek to influence foreign officials in relation to the Vietnam, Germany, or any other problems.



Commenting upon this bizarre situation, columnist Alice Widener wrote the following:

> In the midst of a war in which thousands of our GIs are casualties, what will be the image of our nation abroad as presented by a private "Foreign Service?" Vice President Humphrey spoke with tears in his eyes on return from a recent trip to Europe about the damage done to our nation's prestige there by certain American members of the press. What kind of damage will be done by the Center's convocation in Geneva? What right has a tax-exempt educational fund to enter into foreign affairs with a "private" foreign service in opposition to U. S. Government measures during a major international dispute in which our country has direct participation?

On May 22, 1969 the news was made public that Justice William O. Douglas had been receiving fees of $500 a day for seminars from the Center for the Study of Democratic Institutions. An Associated Press story noted that *Douglas was paid a total of about $4,000 for two seminars!*

The Center's executive vice-president, Harry S. Ashmore, explained that Douglas was paid $500 daily for a four day seminar in January. He said the Justice also received $865 for travel expenses. Ashmore listed $1,000 in fees to Douglas for one seminar during the previous year, plus $100 for an article and $132 for travel expenses. He called the $500 daily fee the usual rate for participants in seminars, but said, "We work them all day "

Four Senators also took part in the January seminar on Japanese-American outlook toward China policy. According to the *Baltimore Sun* for May 22, 1969 Ashmore listed them as Senators J. William Fulbright, John Sherman Cooper, Mark O Hatfield, and Alan Cranston. Senator Cooper confirmed that he received $2,000 for the seminar, but said he paid his own expenses.

Among the studies published by the Center is a short volume entitled "How The United States Got Involved In Vietnam." In its Winter 1965-66 catalog of publications, the Center describes the volume in these words "The detailed history of America's role in Vietnam from the end of World War II to the present, extensively documented with quotations from the press and personal interviews. 80 pages."

The author of this document, Robert Scheer, is described only

as "Journalist," when in fact Mr. Scheer was an editor of *Ramparts Magazine* and subsequently was a New Left candidate for Congress in Berkeley, California. His book is a condemnation of the American role in Vietnam and generally a statement of support for the aspirations and goals of the Communist Viet Cong.

Another document listed in this catalogue is "Keeping The World Disarmed." It is described as "An ingenious and constructive look into the future to describe the possible form, function, and powers of an international police force in a demilitarized world."

The author, Arthur Waskow, is referred to only as being identified with the Institute for Policy Studies. The Institute is a well known voice of the New Left. And Mr Waskow, rather than being in favor of international pacifism, has long advocated American pacifism where our foreign enemies were concerned, but violence in America itself to help overthrow the "Establishment." When asked what he thought about New Left violence aimed at R.O.T.C. campus buildings, Waskow replied: "There is more violence in the R.O.T.C. building existing than there is in blowing it up."

Another Center volume, "Toward Community: A Criticism of Contemporary Capitalism," calls for an end to capitalism and for the institution of some variety of socialism in America. The author is Robert Lichtman, a Fellow in Residence at the Center since 1962. This is his conclusion:

> The defects of classical liberalism bear a new guise, but we have not overcome them. The quantification, inequality, and vacuous individualism of the market have come to manifest themselves in new forms under contemporary liberalism, but in its destructiveness of community the essence of liberalism has persisted amidst apparent change. The moral evolution of man has remained an abortive affair. If it comes at all, it will come through community, which is the spirit of human recognition and support made visible in a common life. If we cease to know, as new "political men," that we are the mere rudiments of our own full being, we will live out our lives between the shadow and the dream, devoid even of the dignity of men who in the thickening darkness retain at least some recollection of the sun.



Rhetoric aside, what Lichtman seems to be urging is that an individual has a right to make the important decisions in his own life but the view he advances is that under our system this freedom is not possible. His prescription, of course, is some form of statism---which he calls "community." Clearly, for him, and for the Center, capitalism is surely the lone enemy.

There remains no doubt about the one-sided nature of the programs engaged in by the Center for the Study of Democratic Institutions. A report concerning the Center appeared in *The New York Times* of June 13, 1967, and included the following:

> "There are two or three Republicans on the staff, although Richard Nixon wouldn't recognize them as such," W. H. Ferry, a Vice President of the Center said. Mr. Ferry, who publicly resigned from the Democratic Party to protest the war in Vietnam, has a large poster of South Vietnam's Premier, Nguyen Cao Ky, on his office door. Under the poster is a caption, "Support Your Local Dictator.". . . "Everyone here is opposed to the war in Vietnam," Dr. Hutchins said, looking around the room where staff members were eating lunch. "I'd like to find someone who is for it and can argue for it."

Had he looked, Dr. Hutchins could have found many leading academicians, with qualifications equal to any represented at the Center, who would speak in behalf of the American commitment in Vietnam. Such men as Professor Frank Trager of New York University, Professor Milton Sachs of Brandeis, and Professor Wesley Fishel of Michigan State University are only a few examples. But the Center has never expressed an interest in complying with the requirements of non-partisanship written into our statutes concerning tax exemption.

Moreover, participants in the Center's programs have generally been of a single unitary viewpoint. Among those listed in a recent President's Report are Paul Sweezy, publisher and editor of the far Left *Monthly Review*, Linus Pauling; Stanley K. Scheinbaum, an editor of *Ramparts*; and Erich Nitzling of the Young Socialist Party of Germany. No effort is made, it appears, to present the balanced and non-partisan programs required for tax-exempt organizations. By any standard, the Center's goal is to advance a singular political viewpoint.

In a Center document entitled "Civil Disobedience," Bayard Rustin wrote the following:

> . . .I believe a person has the duty. . .to engage in lawbreaking. I want to add for clarification that I prefer the term "the breaking of an unjust law" to the term "civil disobedience," for I do not believe, for example, that Negroes have engaged in civil disobedience in the United States; it is the white Southerners who have been civil disobedient. . . I believe that the use of civil disobedience in a democratic society is sometimes the only instrument left to that society to dramatize the injustice that has been hidden and to bring it to the surface. . .

In this same volume, Robert Lichtman, a Fellow in Residence at the Center, supported the concept of civil disobedience and notes that ". . .civil disobedience may perform another, and independently valid, function. It is also the act of a man who will not permit himself to be corrupted."

Lichtman pointed out that "His defiance of society at a given point may be based on the obligation to respect his own conscience---his moral autonomy---and on a respect for truth in human relations which leads him to make this fact known to his oppressor. He may have little hope of altering the law or system of institutions he opposes, but he will not permit that law to alter him."

The reading list appended to the volume contains references only to authors and publications of the far-Left, such as: *The Activist, Liberation, New University Thought, Partisan Review, Studies On The Left,* and *S.D.S. Bulletin.* The books and authors included Nat Hentoff, *The New Equality:* Arthur I. Waskow, *From Race-Riot To Sit-In;* Howard Zinn, *SNCC: The New Abolitionists;* and Sally Belfrage, *Freedom Summer.* Sally Belfrage's father is the exiled editor of the far-Left *National Guardian.* The entirely one-sided nature of this entire presentation is clear, as is its advocacy of violation of the law.

A document "On Coexistence" is equally committed to a biased viewpoint. One of the contributors was N. N. Inozemtsev, Deputy Chief Editor of *Pravda.* His presentation asserted that "The general course of the foreign policy of the Soviet Union is that of safeguarding peaceful conditions for building socialism and communism, of strengthening unity and solidarity among the socialist countries, of supporting the revolutionary liberation movements, of all-out widening solidarity and cooperation with independent Asian, African, and Latin American states, of consolidating the principles of peaceful coexistence with



capitalist states, of saving mankind from a world war."

Adam Schaff, a member of the Central Committee of the United Workers' (Communist) Party of Poland, and another participant in this presentation, wrote that "If it is not true that we are prepared to drop our ideologies, it is true, nevertheless, that we can cooperate. When we Marxists, we Communists, stress that there is no coexistence in ideologies, we are saying at the same time that we can and wish to cooperate in all fields, including my own field of science and those fields which have ideological implications. This is a major fact of our time."

Still another contributor, Yevgeniy Zhukov, Director of the Institute of History, Academy of Sciences of the U.S.S.R., used the Center's platform to denounce the United States in these terms: "No sophism can justify foreign interference in the affairs of other countries, as the United States is doing in Vietnam. It is impossible to reverse history, to stop the progressive development of the Asian countries. This aggravation of the international situation cannot but cause concern to champions of peace and danger to the policy of cooperation among nations. I consider it my duty to say that the Soviet public condemns United States intervention in Vietnam and regards it as a retreat from the peaceful statements made recently by the United States."

This from an official of a country that crushed the stirrings of freedom in Czechoslovakia!

Needless to say, no defense of the war in Vietnam was presented. Among the American participants were: Senator J. William Fulbright, Senator Eugene McCarthy, H. Stuart Hughes of Harvard University (a one-time "peace candidate" in Massachusetts), Senator George McGovern, and Steve Allen, television entertainer. Their participation was sufficient guarantee of the one-sided and anti-American nature of this Center program.

On reviewing the record of the Center for the Study of Democratic Institutions, it becomes evident that this organization is committed to one sole political point of view. Basic elements in this viewpoint are a belief in civil disobedience, in the need for social, economic, and political revolution in the United States, and in so-called "peaceful co-existence" with the Soviet Union. By its own admission, no one at the Center supports the American commitment in Vietnam, and the individuals it selects to participate in seminars and meetings are of virtually

the same persuasion.

The close connection between those involved with the Center and far-Left movements has been commented upon many times. The Communist newspaper, *The Worker,* for example, in its issue of September 14, 1965, noted that "The New Left School of Los Angeles, 1853 S. Arlington Avenue, is launching its first semester. .Sponsors of the school include Robert Lichtman, Harvey Wheeler and Irving Lauchs of the Center for the Study of Democratic Institutions." Among the sponsors and teachers of this radical Marxist school were Mrs. Dorothy Healey, southern California chairman of the Communist Party and John Haag, Los Angeles chairman of the subversive W.E.B. Du Bois Clubs of America.

In California, in 1966, two New Left staff members of the Center campaigned for political office---Harvey Wheeler and Stanley K. Sheinbaum. Three of the Center's "occasional papers" during that period---"Civil Disobedience," "Mass Communications," and "Toward Community" were, in essence, a New Left platform for political candidates.

Writing in the Center magazine, Dr. Fred Warner Neal charged that United States foreign policy is "out of control" because since World War II it has been based on a "myth" of a non-existent Soviet military threat. Neal is a Center associate and professor of international relations at Claremont Graduate School, Claremont, California. "Bent on saving the world from communism," he wrote, "we allowed America to be a threat to ourselves and to everyone else."

Neal sharply attacked those he called "liberal intellectual" social scientists for supporting the myth of a Soviet threat and for falling in line with "general paranoia about the Soviet Union, the national *idee fixe* about communism, and the witch hunts that marked the nineteen fifties. It takes a man of some courage to advance convictions that do not conform to national belief or opinion. The new breed of social scientist has often lacked both the courage and the convictions."

The Center foreign policy expert records that liberal intellectuals, heirs to Woodrow Wilson's crusading idealism, got a taste of power during Franklin Roosevelt's New Deal. When the United States under President Harry Truman veered into a sharply anti-Soviet and anti-Communist course, many liberal intellectuals, according to this view, began to outdo con-



servatives in anti-Communism. This, Neal says, with some accuracy, "was not only useful politically, it also facilitated admission to at least the outer circle of respectability."

"The root of the problem," Neal went on, was "the mistaken assumption that the Soviet Union of its very nature posed the constant threat of military aggression, either to extend its own dominion or to expand the area of communist rule, or both. . .But there was no real evidence then, and there is none now, to support the idea that the Russians posed a military threat to Western Europe or to the United States."

Neal concludes this astonishing assertion by writing that the "myth" is an even bigger problem today, since it is conjured up to justify the deployment of ABM-MIRV missiles, which, he states, may well lead to an uncontrollable nuclear arms race.

Even those publications which have supported the Center have not hesitated to concede its far-Left orientation. For example, *The Nation* magazine of October 6, 1969, stated: ". . .The allegation that most of its publications have a liberal orientation is true, but the Center would not concede this point. It replied that the views expressed in its publications were the authors'; the Center was simply offering an opportunity to make a number of viewpoints known."

*The Nations* paid tribute to the Center in these words: "The Center provided a great service by giving liberal-Left and radical-Left views wide circulation; during the postwar years this was a much needed antidote to the total acceptance enjoyed by outmoded reactionary concepts in the mass media. It appears that the Center, having provided this service, would not or could not take credit for it."

Nevertheless, many of Justice Douglas' firmest friends and supporters have, despite their general approval of Douglas' philosophical viewpoint, found his association with the Center for the Study of Democratic Institutions somewhat embarrasing. In its lead editorial of May 24, 1969. *The New York Times* presented this assessment of the relationship between the Justice and the Center:

> . . .sound practice requires more than a minimal regard for appearances. Outside associations which do not involve dubious connections may still be distracting, time consuming or productive ot needless controversy. Thus, it is questionable practice for Justice Douglas to serve as chairman of the Center for the Study of Democratic

> Institutions. . .the Center does in effect take sides on highly controversial public issues. Anyone who serves on the Federal bench surrenders the right to engage in the arena of public controversy. . .

When it made the statement that "Anyone who serves on the Federal bench surrenders the right to engage in the arena of public controversy," *The New York Times* was certainly not describing Justice William O. Douglas. His connection with the Center for the Study of Democratic Institutions is only one example of Mr. Douglas' deep involvement in the arena of partisan politics.

With regard to the Center, however, the paradox is clear: Should a Justice of the United States Supreme Court, pledged to support the Constitution and uphold the law, act as a leader of an organization which often seems pledged to the opposite? This holds open to further question the validity and sincerity of his own oath of office. The fact that he has also enriched himself in the process raises the prospect of a variety of conflict of interest charges. How, it may well be asked, can Justice Douglas sit on the Court and decide questions relating to civil disobedience and civil disorder if he spends the remainder of his time both supporting and stimulating it? In a larger sense, such a conflict of interest in his case seems all pervasive.

But far more important, in the long run, is the fact that Justice Douglas, over the years, has viewed his role more as that of a political advocate than of an impartial judicial arbiter.

Writing in *The Nation* of April 26, 1952, Professor Fred Rodell of the Yale Law School called for the nomination of his friend Justice Douglas as the Democratic Party's candidate for President.

In his article entitled "I'd prefer Bill Douglas," Rodell wrote that "It is one of the tragedies of our time that William O Douglas will not be the next President of the United States. .There is no doubt where Justice Douglas stands on every important issue of our day. In his Supreme Court opinions---and increasingly in extra-curricular writings and speeches, he has etched out a clear and militantly liberal political credo, such as no other man high in public life can match."

Rodell denounced Adlai Stevenson as " a recent darling of the down the line Trumanites, the clean and correct and slightly sterile Governor Stevenson is so undeviating a devotee of the



Administration's foreign policy . . .that he might be called, in his orthodox internationalism plus efficient conservatism, a Democratic Dewey."

But Professor Rodell expounded a far different concept of Justice Douglas: "Through articles and speeches he has made himself the nation's foremost spokesman against 'loyalty' laws, 'loyalty' oaths, 'loyalty' checks, 'loyalty' programs, and all the apparatus which inevitably equates a frightened and stereotyped orthodoxy of thought without genuine loyalty."

That Justic Douglas has been a highly political and partisan man is something which his friends have been sufficiently frank to tell us over and over again. That the Center for the Study of Democratic Institutions has been openly political and partisan is something that *its* friends have been equally frank to admit.

The only remaining question concerning Justice Douglas and the Center for the Study of Democratic Institutions which remains to be answered is whether his responsibilities to one conflict with his responsibilities to the other. And an increasing number of ethical observers are answering this question in the affirmative.

Chapter VI.

# Points of Rebellion

While Justice Douglas is no stranger to controversy, his latest book, *Points of Rebellion*, published in February, 1970, moves far beyond his previously published works in advocating a radical restructuring of American society---its social, political, and economic institutions, its values and traditions.

Previously, Justice Douglas advocated change within the structure of the society he had pledged himself to uphold when he took the oath of office pledging to defend the Constitution. He had, admittedly, condemned America's role in the world, and had accused it of equal responsibility with world Communism for the advent of the Cold War. He had advocated an end to all statutes protecting the nation from subversion, though he had never advocated such subversion itself. His argument, at that time, was that by instituting loyalty proceedings we were losing more than we were gaining.

Then, in 1970, Justice Douglas took a major step away from his previous position. To see how large a stride this has been it is only necessary to review some of his earilier statements on subjects similar to those considered in *Points of Rebellion*.

In *The Right of the People*, published in 1958, Justice Douglas went to great lengths to set forth his idea of what a university, in a free and democratic society, should be:

Every generation, if it is to grow to maturity and have

> understanding of man and the universe, must have no limits to its horizons. In Plato's *Republic* the state would dominate and control education, dictating how literature, poetry, art, music, and even gymnastics are to be taught. In our society, the search for knowledge must be free and unhampered. The spirit of free inquiry must be allowed to dominate the schools and universities. "Universities should not be transformed as in Nazi Germany into loud-speakers for men who wield political power." (Chafee, *The Blessings of Liberty*) Teachers must be allowed to pursue ideas into any domain. There must be no terminal points in discourse.

Today, of course, the traditional concept of academic freedom is being challenged by student radicals who have prevented speakers from addressing college audiences and who have made it virtually impossible for academicians to pursue research of which those students disapprove, such as that relating to national defense. The situation which Justice Douglas supports, one in which "Teachers must be allowed to pursue ideas into any domain," is clearly one which is being challenged today. It is, of course, now under attack by the very people who are praised in his volume, *Points of Rebellion*.

In *The Right of The People*, Douglas quotes approvingly from Robert M. Hutchins, formerly president of the University of Chicago, and long a colleague of Justice Douglas' in the Center for the Study of Democratic Institutions. The following statement is referred to by Justice Douglas as "the classical statement" with regard to the role of the university:

> Education is a kind of continuing dialogue, and a dialogue assumes, in the nature of the case, different points of view. The civilization which I work and which I am sure every American is working toward, could be called a civilization of the dialogue, where instead of shooting one another when you differ, you reason things out together. In this dialogue, then, you cannot assume that you are going to have everybody thinking the same way or feeling the same way. It would be unprogressive if that happened. The hope of eventual development would be gone. More than that, of course, it would be very boring.
>
> A university, then, is a kind of Socratic conversation on



> the highest level for the very best people you can think of, you can bring together, about the most important questions, and the thing that you must do to the uttermost possible limits is to guarantee those men the freedom to think and to express themselves. Now, the limits on this freedom cannot be merely prejudice, because although our prejudices might be perfectly satisfactory, the prejudices of our successors or of those who are in a position to bring pressure to bear on the institution, might be subversive in a real sense, subverting the American doctrine of free thought and free speech.

The dialogue supported by both Justice Douglas and Mr. Hutchins is hardly what the militant leaders of today's New Left have in mind for the American university. The New Left has, in effect, called for a university diametrically opposite to our traditional concepts. We have seen the campus traditionally as a sanctuary where ideas are studied, debated, analyzed, and readied for future action. According to Fred Hechinger, education editor of *The New York Times*: "The American scheme views faculty and administration as the permanent arbiters of goals and ground rules, with the students cast in the role of transient participants. The other scheme involves students in alliance with compatible faculty members, in command of political and ideological goals."

Were the New Left in charge, would our universities continue to maintain the free speech for all ideas which Justice Douglas, in 1958, found necessary? Recent events show clearly that they would not. In his *A Critique of Pure Tolerance*, Professor Herbert Marcuse ("the foremost literary symbol of the New Left," according to *The New York Times*) states that people who are confused about politics really don't know how to use freedom of speech correctly; they turn it into "an instrument for absolving servitude," so that "that which is radically evil now appears as good." Having established this novel premise, Marcuse recommends "the withdrawal of toleration of speech and assembly from groups which promote aggressive policies, armament, chauvinism, racial and religious discrimination or which oppose the extension of public services." For him, the correct political attitude is one of "intolerance against movements from the right and toleration of movements from the left."

The practical result of such a philosophy is Secretary of Defense Robert McNamara entering a police wagon to avoid crowds at Harvard, General Lewis Hershey being forced from the stage at Howard, students charging the podium at Brown as General Earl Wheeler spoke, James Reston of *The New York Times* being prevented from speaking at New York University, a professor pinioned and clubbed across the face at Cornell. As Charles Susskind, a professor of electrical engineering at Berkeley remarked: "I don't know why they think of themselves as the New Left. Their methods look to me much more like those of the Nazi students whom I saw in the 1930s harassing deans, hounding professors and their families, making public disturbances and interfereng with lectures, until only professors sympathetic with the Nazi cause remained."

As a matter of fact, professors not sympathetic with the New Left have already started leaving many of the harassed universities.

The kind of university which Justice Douglas urged in 1958 is being destroyed in 1970. Professor Lewis Feuer, who, after nine years of teaching philosophy and social science at Berkeley left it for the University of Toronto, says this:

> Freedom of discussion presupposes that the chief sides in any national debate will be presented. In Berkeley, the supporters of President Johnson's foreign policy are, in effect, denied a forum on the Berkeley campus. The New Left has made it nearly impossible for the national administration's standpoint to be presented to Berkeley students. This was the effect of the last genuine debate which took place in Berkeley in May, 1965 at which Professor Robert Scalapino and William Bundy defended the administration's policy in Vietnam against two critics. Although the critics were listened to courteously by adminstration supporters,. Scalapino and Bundy were almost shouted down. Some activist leaders have defended the one-sidedness of the "free discussion." The time, they say, for equal discussion of all sides is over; now is the time for action, and discussion should be confined at Berkeley to alternative ways of stopping the war.

Student leader Stepehen Weissman accepts proudly the notion that Berkeley is, in fact, a truly political university. And *the*



*Berkeley Barb.* a leading underground newspaper in California, makes it clear that the destruction of the university is the goal of the New Left:

> The universities cannot be reformed. They must be abandoned or closed down. They should be used as bases for actions against society, but never taken seriously. The professors...have nothing to teach...We can learn more from any jail that we can from any university.

This is, by any estimate, a far cry from the notion of "dialogue" advanced by Mr. Hutchins and the concept of Justice Douglas that "...the search for knowledge must be free and unhampered." Reading the words of Justice Douglas, as written in 1958, one would suspect that he would challenge current attacks upon academic freedom and the integrity of the university. One might think that he would oppose those who want to politicize the university and make it a partisan voice in a nonacademic world. This, however, is far from the case.

Speaking at Case Western Reserve University Law School in Cleveland in April, 1969, Douglas stated that "Only revolutionaries can develop a truly practical curriculum." He said that "not many professors have the spirit" to support these revolutionaries and that "Political action programs are desperately needed if your generation is to avoid becoming politically bankrupt and this will happen if you ape your fathers."

In his most recent volume, *Points of Rebellion*, Douglas goes to some trouble to set forth the view that America is corrupt and evil and, unless radically altered quickly through peaceful means, a revolution would be in order. He is quite explicit in advancing this view, and writes the following, for example, on Page 56:

> Where there is a persistent sense of futility, there is violence; and that is where we are today...The use of violence is deep in our history...The two parties have become almost indistinguishable; and each is controlled by the Establishment. The modern day dissenters and protestors are functioning as the loyal opposition functions in England. They are the mounting voice of political opposition to the status quo, calling for revolutionary changes in our institutions.

On this same page Justice Douglas proceeds to his frontal assault upon the so-called "Establishment." He writes that "...the powers that be faintly echo Adolph Hitler, who said in 1932: 'The streets of our country are in turmoil. The universities are filled with students rebelling and rioting. Communists are seeking to destroy our country. Russia is threatening us with her might and the republic is in danger. Yes, danger from within and without. We need law and order.' "

The comparison of the Nixon administration, and of other so-called "Establishment" figures with Adolf Hitler and the Nazis is, in many respects, similar to the labeling of "Communists" by those Justice Douglas so vigorously condemned during the 1950s. Perhaps more revealing, however, is the fact that the quote attributed to Hitler is inaccurate, and cannot in any way be verified. For a Justice of the Supreme Court to engage in scholarship of this level is certainly out of character; if not censurable.

The first mention of this quote seems to have been in the "Trade Winds" column of Jerome Beatty, Jr., in the May 17, 1969, *Saturday Review*. Checking with him, John D. Lofton, Jr., discovered that he got the quote from a monthly newsletter edited by Dixon Gayer, a professor of journalism at California State College Long Beach. Gayer got the quote from a Professor Leroy Hardy in that school's political science department who said that he had copied the quotation from the office door of Professor Larry Adams of the political science department of the University of California at Santa Barbara. Professor Adams, for his part, was unable to remember where he obtained the original quote.

The next mention of the quote, according to Lofton, came sometime in mid-July of 1969, in an editorial in the *Des Moines Register*. They acquired it, they said, from Senator Edmund Muskie, who made the statement in a speech before the National Council on Crime and Delinquency. And where did Muskie get it? The Senator said that "It was originally brought to my attention by a very reputable personal friend who had clipped it out of a publication last winter. Both he and I had no reason to question its authenticity. My staff has been working with the Library of Congress in an attempt to trace the original source of the quote. Although they have found similar statements by Hitler



in the early 1930s they have not been able to find the exact source. I regret this situation."

Despite a careful search the Library of Congress has not been able to turn up anything. The Library even consulted two Hitler scholars, William L. Shirer and Dr. William Allen of Wayne University's History Department, a specialist on Nazi Germany. Shirer mentioned having hard the Hitler quote in question but was unable to authenticate it. Dr. Allen said that the statement was not typical of Hitler in that it was too concise. He also pointed out that since it was the Nazis who were instigating and perpetuating the disorders, Hitler probably would not have brought them up.

Concluding his analysis of the "Hitler quote," Lofton makes this assessment :

> As Nazi Minister of Propaganda Joseph Goebbels said: "It is my task to provide the naively credulous with the arguments for what they think and wish, but which they are unable to formulate and verify themselves." With the current circulation being given the bastard Hitler law-and-order quote, it would appear that this task has been passed on.

*The Arizona Republic* for February 13, 1970 commented about the poor scholarship evidenced by Justice Douglas' use of this unsubstantiated quote: "Justice Douglas is not only guilty of execrable judgment, but his scholarship also leaves a great deal to be desired...The quote first appeared in the underground press, where it was used to draw the same parallel suggested by Douglas...The only trouble with that quote is that it is a complete phony."

*The Republic* continues:

> But the fact is that it is a phony unlikely to bother Douglas, since his intent was not to serve the cause of history, but to reap propaganda mileage by depicting as neo-Fascists those who are concerned about rioters, demonstrators, and the general breakdown of law and order.
>
> Two can play that game. Since Douglas seems so concerned about quotations from Hitler, perhaps he is familiar with the following authentic quotation, set forth

> in *Hitler's Secret Conversations* (Farrar, Straus, Page 15): "It goes without saying that only a planned economy can make intelligent use of all a people's strength."
>
> It happens that many men of goodwill believe that, and they believe it despite Hitler's feelings on the matter. Douglas himself believes it. Should he---and they---therefore be accused of crypto-Nazism? Obviously they should not be. Yet Douglas has no qualms about trying to tie in those who abhor student riots--i.e. most people--with the Fuehrer.

The shallow level of Douglas' scholarship, however, comes as no revelation to those who have followed his writings for some time, and criticisms have come from those of varying political points of view. Professor Ysal Rog at the University of Chicago, for example, said this of Justice Douglas in the far-Left *New York Review of Books*: "Mr. Justice Douglas has never suffered from what Mr. Justice Frankfurter once called 'judicial lockjaw.' Douglas provides an actual example of a searcher for what Michael Oakeshott has called 'a short cut to Heaven'; he maintains today the kind of shallow and undiscriminating radicalism attributed perhaps unfairly to Populism...As presented by Douglas, not a single case is hard enough to perplex a right-thinking man; a case does not present a tangle of competing principles, but a single transcendent principle--for instance, free speech or religious freedom--which need only to be identified for the solution to be plain...Douglas is a reductionist, he seems to think that Supreme Court justices should answer legal questions by directly applying their beliefs about the overall needs of the country or even the world."

In *Points of Rebellion*, Douglas is guilty of precisely this kind of over simplification. He writes that "We have become virtually paranoid. The world is filled with dangerous people. Every trouble-maker across the globe is a Communist." He advocates civil disobedience and states that 'A speaker who resists arrest is acting as a free man. The police do not have carte blanche to interfere with his freedom."

Here again, Douglas is repudiating the viewpoint he had previously held concerning the obligation of a citizen to obey the law in a democratic society. In his volume, *The Right of the People*, he admitted that there are "...situations in which the



citizen is placed in the dilemma of being forced to choose between violating the dictates of his conscience or violating the command of positive law." Despite this, he advanced this view on page 104:

> Unless the law applies with equal force to those who dissent from it, there can be no ordered society. The choice given the individual is not to obey the law or to violate it with impunity, but to obey the law or incur the punishment for disobedience...democracy is built upon the rule of the majority and a civilized society requires orderly rules, applicable to all alike. If a statute is otherwise valid, the law does not consider the moral values which led to its disobedience.

In 1958, it seems, Justice Douglas supported law and order. Today, however, the situation is completely reversed.

Today Justice Douglas believes, as he states on page 63 of this small volume, that "The vital problems will require a great restructuring of our society." He now believes our country is no longer either demoncratic or responsive to the will of the people, and on page 92, points out that "The special interests that control government use its powers to favor themselves and to perpetuate regimes of oppression, exploitation and discrimination against the many." He then proceeds to his major point, which is the call for revolution unless the changes he demands, but in no place specifies, are made. On page 95 he writes the following:

> George III was the symbol against which our Founders made a revolution now considered bright and glorious. George III had not crossed the seas to fasten a foreign yoke on us. George III and his dynasty had established and nurtured us and all that he did was by no means oppressive. But a vast restructuring of laws and institutions was necessary if the people were to become content. That restructuring was not forthcoming and there was revolution.
>
> We must realize that today's Establishment is the new George III. Whether it will continue to adhere to his tactics, we do not know. If it does, the redress, honored in tradition, is also revolution.

Arguing for a "radical restructuring" of all of our institutions, Douglas attacks numerous targets: the Pentagon, the Federal Bureau of Investigation, the Central Intelligence Agency, former Presidents Truman and Johnson, Government and corporate

bureaucracy, and racist practices by police, employers and educators. He charges that "The Pentagon has a fantastic budget that enables it to dream of putting down the much-needed revolutions which will arise in Peru, in the Philippines, and in other benighted countries. Where is the force that will restrain the Pentagon? At the international level we have become virtually paranoid."

Comments concerning *Points of Rebellion* were quick to come. Writing in *Newsweek* magazine, Kenneth Crawford provided this view:

> Associate Justice William O. Douglas of the U.S. Supreme Court has written a banal little book...If it were a tract concocted by the Students for a Democratic Society to summarize grievances against the government and institutions of the U.S., it would be a respectable effort. Its exaggerations, oversimplifications and gullibilities could be put down to youthful zeal and inexperience. But it is the work of a 71 year old man of broad experience, more than 30 years of it on the Supreme Court, who, but for a trick of fate, might have been President of the United States instead of Truman.

Crawford describes the Douglas volume as "a one-dimensional indictment" of the American society which uses "bromidic under-graduate jargon." He notes that "The cliches of protest slide from its pages like spaghetti from a fork." The America of Justice Douglas has few redeeming qualities. The call for revolution "would be a fairly routine threat if written by a campus firebrand," notes Crawford, and has made news only because it comes from a Supreme Court Justice, a man pledged to uphold the law and not to thwart and destroy it.

Writing in *The National Observer,* John F. Bridge states that "All the cliches are there in Judge Douglas' book, which is essentially a long essay...If the rhetoric is corny, it is also downright wrong at times...Some of this rhetoric borders on the ludicrous. 'Every phone in every Federal or state agency is assumed to be bugged...Certain hotel rooms in Washington have allotments of rooms that are wired for sund and even contain two-way mirrors, so that the occupants can be taped or filmed.' "



Mr. Bridge sums up his analysis of *Points of Rebellion* in these terms:

> In Justice Douglas' simple little world, "young" seems to be equal to good, "older" is bad, and there apparently is little divergence between one young person and another or one older person and another. It is "the young people's unrest" against the "inequities and injustices of the present system." And, "the older generation has in the main become mindless when it comes to criticsm of the system. For it, perpetuation of the corporation state and its glorification represent the true Americanism." Justice Douglas has a lot to say--oh, what a tiresome lot to say---about mediocrity in American life. At least mediocrity is one subject on which he conceivably could be an expert.

In his *New York Times* column for April 15, 1970. James Reston wrote that such views as Douglas holds are "damn silly:"

> Now, this (U.S. Government equals that of George III) is a damn silly analogy---even sillier than suggesting that the universities, which are the center of protest against the Establishment, are somehow subservient to it.

Yet, Reston concluded that, despite such "silliness," the effort to impeach Justice Douglas was misplaced.

Commenting upon Reston's view, *National Review* noted that "Were William O. Douglas not on the Court, were he not presiding over a large part of our destiny, damn silly might suffice. In himself Douglas actually is just a silly old man, obsessed, it seems perfectly clear, by the idea of Youth. There is pathos as well as absurdity in his relentless pursuit of the young--writing for *Playboy,* and for the porno *Evergreen* and *Avant Garde*, marrying a fourth wife some forty years his junior, hopping from campus to campus, striking grotesque poses for rebellion. Touching, perhaps; surely comic. And damn silly "

Unfortunately, however, Justice Douglas is far more than what *National Review* referred to as a "country-club joke or a senile swinger."

> He sits on the Court. Ralph Ginzburg and Hugh Hefner do not shell out for his articles because Douglas writes with unique profundity, *Points of Rebellion* was not published by Random House because it contributes anything at all

to public discourse. The articles are fatuous and the book would be failed if a sophomore turned it in as a term paper in a government course---if it were not, that is, relished by the professor as a hoax. The magazines and book publishers shell our only because the byline *Justice William O. Douglas*. What Douglas is selling is not his writing but his public position; he is selling the reputation and the dignity of the Court itself. And it is precisely because the irresponsible statements, indeed the incitements to rebellion, contained in his book have been made by *Justice Douglas* that he must be called to account.

Jerry Greene, in his column "Capitol Stuff" in the *New York News* referred to *Points of Rebellion* as "an evil little tome" which, he said, "must surely disqualify" Justice Douglas "from further rulings on any case more significant that overtime parking." Greene set forth this critique:

> Pending before the Court for decision now are several hotly controversial cases involving capital punishment, taxation of church property, campus disorder and the military draft, which will call for final judgment of the highest order, nor from personal prejudice. Justice Douglas has laid his opinions open to challenge, in advance...What makes the Douglas declaration of war with the Establishment harder to stomach is the fact that the Justice, for all of his bent toward mischief, is about as complete a product of, and beneficiary of the Establishment as one can find on the American scene.

Greene points out that Douglas is a former Yale law professor, and has been "feeding at the public trough for 34 years; he has drawn down in salary alone from public funds well in excess of $750,000; he has life tenure and a current pay check of $60,000 a year. One doesn't get that kind of dough usually by leading protest marches."

A similarly critical view was expressed by columnist Richard Wilson, writing in the Washington *Evening Star*. Wilson wrote that "Douglas' book is a catalogue of the New Left's complaints against the American system. He reveals some information which sounds more like Georgetown dinner table talk than judicially established fact." Wilson's conclusions include the following:



> Much of what Douglas has written is a summation of conventional liberal poppycock. It reflects the youth cult mentality which entrances the 71-year old justice. This little black book may eventually take its place with the little red book, "Thoughts of Chairman Mao" in the sacred shrines of the young.

Justice Douglas, however, has not been intimidated by the almost total criticism his book has met. Interviewed on A.B.C. news in April, 1970, Douglas said that if his book advocated rebellion, "I'll eat it without any mayonnaise or anything."

The book was the subject of a scholarly symposium held at the Brooklyn Law School on April 10, 1970. Discussing *Points of Rebellion*, Professor Sidney Hook, formerly chairman of the Department of Philosophy at New York University, stated that "Those who write apologies for violence are preparing the way for the very police state they fear." Hook stated that "Mr. Justice Douglas seems to be regarding violence as a species of legitimate dissent. Violence is not inspired by hunger or poverty. The arsonists and bomb-throwers today are not the poor, but the privileged young fanatics." Hook said that Douglas' book had "smeared" the American Establishment as "an echo from Hitler."

Commenting upon Professor Hook's analysis, Justice Douglas stated that "If you write a book you should never try to emulate Tom Paine." Casting a wisftul look toward a window, Douglas remarked it was a "beautiful day for a hike" and that he found it "peculiar" to be spending it in earnest declaration of opposition to violence. The panelists' criticism of his work only revealed, he said, that the older generation was "politically bankrupt."

Professor Hook described Douglas' suggestion that the "military-industrial complex" and other vital areas of "The Establishment" had crushed American freedoms as a "sheer caricature" of the situation in the United States today. Hook said Douglas' book revealed a "total absence" of historical perspective, not to mention a "profoundly disquieting" confusion between legitimate dissent and violence. Douglas' attitude, said Hook, showed a willingness "to sacrifice democratic due process" even though that might mean "opening the doors to anarchy."

When his turn came to speak, Douglas gestured at Hook and

said: "If this book upset Professor Hook, I recommend that he not even open the next one." He promised his next work would be "very, very upsetting."

Douglas concluded his remarks by introducing his 26 year old wife, Cathleen, a first year law student at American University who was, he said, responsible for the best parts of *Points of Rebellion*. There was no evidence that the student audience was disappointed by the jurist, noted *The New York Times*. One law student said later: "Like man, he was telling them. 'If you don't know where it's at, I can't help you.' What a beautiful cat!"

The Douglas book did, however, receive favorable mention in some quarters. A chapter was reprinted in *The Evergreen Review*, next to pictures which were described by congressional critics such as Congressmen Gerald Ford and Louis Wyman as "pornographic." Justice Douglas responded by stating that he knew nothing about the republication of the chapter, and that it was completely in the hands of his publisher. *The Washington Daily News* for April 17, 1970 commented editorially upon this proposition:

> Justice William O. Douglas blithely disclaims responsibility for the fact that excerpts from his latest book are printed in a magazine following a set of pictures we think even the Warren Court in its most liberal moment would have to regard as pornographic. Certainly the pictures aren't art, or uplifting.
>
> Justice Douglas says his book's publisher, Random House, has sole and exclusive rights over post-publication of such excerpts. Hence, contends this man who's been on the nation's highest bench for 31 years, he's blameless on this little matter. Hi, ho! If what he says is correct, then what about the matter of sensitivity?
>
> ...What, we ask in all seriousness, about a judge who's so insensitive about the position he holds and the standing he is supposed to have in public life that he would permit his writing to become a bedmate for out-and-out pornography in a magazine someone is trying to sell for one dollar?

*Points of Rebellion* has found much support throughout the entire American radical movement. One example will suffice to show the enthusiasm with which the volume was greeted by those



whose goal it is to overthrow the basic institutional structure of the American society.

Reviewing the book in the West Coast Communist newspaper, *People's World*, on March 14, Sam Gold noted that "It weighs about four ounces, but it carries real weight---as an indictment of U.S. monopoly capitalism."

Mr. Gold lets Justice Douglas speak for himself. On our economic condition, for example, Douglas states that "We brag about our present unemployment. But this is due to Vietnam. Without Vietnam we would have 15% or more unemployment...the upside down welfare state helps the rich get richer and the poor, poorer. Railroads, airlines, shipping, these are all subsidized; and those companies' doors are not kicked down by the police at night."

The *People's World* conclusion is this:

> Methinks this judge is grown too wise for the Establishment, which he has studied for so long. It is obvious he sees the handwriting on the wall, and the shadow of fascism. His days are numbered, and he's giving us the signal.

Is Justice Douglas, when he preaches revolution, when he condemns the "Establishment," when he compares the leaders of our country with Nazi Germany, when he advocates civil disobedience, acting in such a way that is consistent with his oath of office? The publication of *Points of Rebellion* makes it essential that these very difficult questions be answered.

Chapter VII.

# Impeachment and the Court

The process of impeachment and removal of a member of the Supreme Court, as outlined in the Constitution (Article I, Sections 2 and 3) begins in the House of Representatives.

An impeachment resolution is filed, preferring charges against the official, and referred----usually to the House Judiciary Committee---for investigation. If the Committee then approves the resolution and reports it to the floor, the House must concur in the resolution by a majority vote in order to impeach the official named.

The "articles of impeachment" are then sent to the Senate which tries the accused official. Here a two-thirds vote is necessary to convict; any lesser vote brings acquittal. If convicted, the official is removed from office, and the Senate may further disqualify him from holding any future Federal office.

Impeachment proceedings have been brought against 12 Federal officials, only four of whom have been convicted. And impeachment proceedings have been brought against only one Justice of the Supreme Court.

The Constitution specifies that a federal judge may be removed from office only by "impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." But the Constitution does not specify what is meant by "high crimes and misdemeanors."

Discussing this point, Rep. Gerald Ford said on the floor of the

House: "The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers it to be at the given moment in history; conviction results from whatever offense or offenses two thirds of the other body considers to be sufficiently serious to require removal of the accused from office."

Justice William O. Douglas is no stranger to the impeachment process. In 1953, Justice Douglas survived an impeachment move by Representative W. M. Wheeler (Dem.) of Georgia, whose charges included an allegation that a speech by the jurist "gave aid and comfort" to Communist enemies of the United States. Douglas was under fire at the time for staying the executions of Julius and Ethel Rosenberg, convicted of atomic espionage for Russia. The Rosenbergs were later put to death. At that time, the House Judiciary Committee buried the resolution.

Earlier in 1950, the Texas House of Representatives asked the State's congressional delegation to launch impeachment proceedings against Justice Douglas after he voted to award the Federal Government title to Texas tidelands. This move also yielded no results.

In 1962, Senator John G. Tower of Texas questioned Justice Douglas' "capacity for objectivity on the bench." Senator Tower objected to the Justice's criticism of the Pentagon and the Central Intelligence Agency and their alleged influence on U.S. foreign policy. The criticism was made in a booklet entitled, *Freedom of the Mind.*

In 1966, five members of the House introduced a resolution asking the Judiciary Committee to investigate Justice Douglas' "moral character," but this investigation did not materialize.

A brief look at other federal officials who have been involved in impeachment proceedings provides an essential perspective from which to view the current case.

William Blount, Senator from Tennessee, was acquitted by the Senate (for want of jurisdiction) in 1799 after the House had impeached him for "tampering with the Indians in the interest of the British."

John Pickering, Federal District judge in New Hampshire, was convicted by the Senate and removed from office in 1804 after the House impeached him for "loose morals, intemperance" and irregular judicial procedure.

James H. Peck, Federal district judge for Missouri was



acquitted by the Senate in 1831 after the House had impeached him for imposing an unreasonably harsh penalty for contempt of court.

In 1862 West H. Humphreys, Federal district judge for Tennessee, was convicted by the Senate, removed from office and disqualified from any future Federal office after the House had impeached him for supporting secession and serving as a Confederate judge.

President Andrew Johnson was acquitted by the Senate in 1868 after the House had impeached him for violating the Tenure of Office Act by removing Edwin M. Stanton from his office as Secretary of War, and for making speeches critical of Congress.

William W. Belknap, Secretary of war, was acquitted for want of jurisdiction by the Senate in 1876 after the House had impeached him for graft in connection with the appointment of an Indian post trader. Belknap subsequently resigned.

Charles Swayne, Federal district judge for Florida, was acquitted by the Senate in 1905 after the House had impeached him for padding expense accounts, living outside of his district, misuse of property and of the contempt power.

Robert W. Archbald, Associate Judge of the U.S. Court of Commerce, was convicted by the Senate and removed from office in 1913 and disqualified from any future Federal office after the House impeached him for using his influence improperly and accepting favors from litigants.

Impeachment trial proceedings against George W. English, Federal district judge for Illinois, were dismissed in 1926 after he resigned his judgeship. English had been impeached by the House on charges of tyranny, oppression, and partiality.

Harold Louderback, Federal district judge for California, was acquitted by the Senate in 1933 after the House had impeached him on charges of favoritism and conspiracy.

Halsted L. Ritter, Federal district judge for Florida, was convicted by the Senate and removed from office in 1936 after the House impeached him on charges of various improprieties. Although Ritter was acquitted of the specific charges against him, he was found guilty of having brought his court into "scandal and disrepute."

It is the case of Supreme Court Justice Samuel Chase which, of course, comes most clearly into focus in considering any question of impeaching a Justice of the Supreme Court. Chase was

acquitted by the Senate in 1805 after the House had impeached him for partisan, harsh, and unfair conduct during trials.

The first impeachment, according to Dale McFeatters, "took place when Washington was a malarial swamp and Justices of the six-man Supreme Court spent most of their time riding the muddy roads to sit in federal circuit courts, impaneling grand juries and hearing routine civil and criminal cases."

The year was 1805, and Rep. John Randolph, Jr., of Virginia, whom the House had chosen to lead the prosecution of Justice Chase before the Senate, rose to recite the eight points of the impeachment which he had drawn up.

Briefly, he charged that Justice Chase "did, in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive and unjust..." and stooped from the bench "to the low purpose of an electioneering partisan."

According to Rep. Randolph, Justice Chase had manifested "an indecent solicitude" for conviction and had dealt harshly with defense attorneys, "in the use of unusual, rude, and contemptuous expressions towards the prisoners' counsel" and "in repeated and vexatious interruptions of said counsel."

Rep. Randolph cited instances in which Justice Chase had forced defense counsel to submit in advance written copies of the questions for cross-examination. Justice Chase was also accused of impaneling a grand juror who announced in advance that he believed the defendant guilty, and of refusing to dismiss a grand jury until it indicted a printer whom the judge disliked.

However, the most damaging charge accused Justice Chase, an outspoken supporter of the Federalist Party and its leader, John Adams, of delivering to a jury "an intemperate and highly political harangue."

In that era the Federalists were the party of the aristocracy, the wealthy, and the educated; they believed that public office and the vote should be restricted to property holders. The opposition, Thomas Jefferson and his Democrats, believed in universal sufferage. Although Justice Chase had good credentials, the impeachment was far from his first experience with public controversy.

Chase was appointed to the Court by George Washington and had signed the Declaration of Independence. He had also been a delegate to the wartime general Congress.

Chase's home state, Maryland, had removed him from the



general Congress for trying to corner the flour market, on the basis of privileged information, for profitable resale to Washington's embattled army. Through political connections Chase became chief judge of both the Maryland criminal and general courts, even though such double office was illegal. The state assembly impeached him but fell a few votes short of the necessary two third's majority to convict.

The Democrats' attempt to impeach Justice Chase was the beginning of their effort to impeach five of the six members of the Federalist-dominated Court, beginning with Chase and ending with Chief Justice John Marshall.

Rep. Randolph undertook to manage the impeachment proceedings in the House: bringing the charges, getting appointed head of a committee to investigate the charges, recommending impeachment, which passed 73-32, and finally leading the prosecution in the Senate.

The Senate was redecorated for a show trial. Rep. Randolph repeated the charges; a succession of witnesses followed. Although the testimony was inconclusive, Justice Chase, in the florid rhetoric of the day, was called a "toady," "sycophant," and "opportunist."

The trial considered the question of what the Founding Fathers meant when they wrote impeachment into the Constitution. The two sides argued over impeaching a judge who had committed no indictable offense under the statutes of the country. Rep. Randolph contended that there were laws not imbedded in print which were laws nonetheless. He called them "known laws."

Randolph declared: "For what do we contend?---that the respondent has contravened the known law of the land and of his duty, which required him 'to dispense justice, faithfully, impartially, and without respect to persons.' He stands charged with having sinned against this law and against his sacred oath...."

The defense attorney challenged the view espoused by Rep. Randolph. He argued: "Admit that the House of Representatives have a right to impeach for acts which are not contrary to law, and that thereon the Senate may convict, and the officer may be removed, you leave your judges, and all your other officers, at the mercy of the prevailing party."

In eight successive votes the Senate split. Justice Chase was

acquitted of each charge, the Senate falling short each time of the two-thirds vote required for conviction. Jefferson said that the impeachment of high court justices was "a farce never to be tried again." Six years later at the age of 70 Justice Chase died.

Commenting upon the similarities and differences between the cases of Justice Douglas and Justice Chase, James J. Kilpatrick has written the following:

> ...the bill of particulars against Douglas is far stronger than the charges brought in 1805 against Justice Samuel Chase. Not that Chase's behavior off the bench was good. The truculent Marylander, as rough and rude a man as the court has ever known, was notorious for his partisan electioneering. Yet the most serious counts against Chase dealt with his tyrannical conduct as a trial judge handling cases under the Sedition Act. It was disgraceful conduct, but it was beyond the ambit of "behavior."
>
> By contrast, the case against Douglas depends solely upon his extensive moonlighting as a paid consultant, adviser and free-lance writer. ...Contrary to popular impression, members of the high court are not confirmed for life. They hold their offices during good behavior. And contrary to another popular impression, it is not necessary to prove treason, bribery, high crimes or misdemeanors in order to impeach a judge. It is necessary only to establish to the satisfaction of the House that a judge's behavior has not been good.

One of the arresting aspects of the debate concerning Justice Douglas and possible impeachment proceedings is that even his supporters and defenders find it difficult to condone the things he has seen fit to say and do. Discussing the question of impeachment and the call for revolution advanced in Douglas' book, *Points of Rebellion*, columnist Max Lerner commented:

> ...I don't take these pages as seriously as many seem to. It is foolish of Douglas to reopen the war against George III, to equate the revolutionary anarchists of today with Tom Paine 200 years ago and to give them any moral support. But Douglas has been on this line for some years, and no one has impeached him. Maybe he is disappointed at never having reached the presidency...Maybe he is captivated by the world-view of the young rebels as seen through his youthful wife. Maybe this is part of a general romantic feeling of liberation he has.



Despite his recognition that there is much to criticize on the part of Justice Douglas, Max Lerner concludes that "...it enriches the court to have one member who bridges the world of the young and the old, the radical and the traditional. Besides, the Republicans are likely to have a clear court majority in a few years. Why must they make a clean sweep of it by getting rid of the one true militant on the court?"

The question which Mr. Lerner evades, however, is the most important: whether or not there are sufficient legal grounds for impeachment. Many other commentators, while refraining from a clear call for impeachment, do indicate that the questions which have been brought up merit serious consideration, and are far more than a partisan assault.

An example of this view may be found in the column written by Roscoe Drummond in the *Christian Science Monitor* of May 5, 1970. Drummond points out that the Constitution provides that members of the federal judiciary shall serve only "during good behavior" and that the question before the House of Representatives is whether or not Justice Douglas' conduct has violated "good behavior" in ways which impair his role on the court and render him unfit to serve. The columnist wrote "At first I tended to think that Mr. Douglas was being put upon by partisans because of pique growing out of the Haynsworth and Carswell rebuffs in the Senate," but states that after examining the various charges he has arrived at a different view.

Drummond makes clear that "I am not suggesting a final judgment until the evidence is in," but he states that if the House Judiciary Committee "doesn't show that it is going hard after the facts from every needed witness, including Justice Douglas himself, then the House ought to vote itself another investigating committee."

The difficulty faced in any legal analysis of the impeachment process and Justice Douglas' case with relation to it, is the fact that Article III, Section I states that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior," but does not define what is meant by "good behavior."

As a result this provision has been interpreted to mean that such judges can be removed only on impeachment proceedings. And these proceedings, in turn, have been restricted in their

application only to "treason, bribery, or other high crimes and misdemeanors." These are the conditions set down in Article III, Section 4 of the Constitution as necessary for the removal of "the President, vice president and all civil officers of the United States."

Additionally, impeachment has been considered so serious an undertaking that, as Woodrow Wilson put it, "nothing short of the grossest offenses against the plain law of the land" will lead Congress to resort to it.

Writing in *Congressional Government* in 1885, Wilson noted that "Impeachment is aimed altogether above the head of business management. A merchant would not think it fair, even if it were lawful, to shoot a clerk who could not learn the business. Dismissal is quite as effective for his purposes, and more merciful to the clerk."

Yet, there are other provisions which do specify some of the responsibilities of a judge. It must be remembered that Title 28, United States Code, section 455, states that "Any justice....should disqualify himself in any case in which he has a substantial interest....or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceeding therein." Is this what the Constitution means by "good behavior?" If so, one who violates this section would be guilty of violating the provision of "good behavior," which represents an offense liable for impeachment. It is for the alleged violation of this provision that Rep. Gerald Ford stated that Justice Douglas "...has evidently decided to sully the high standards of his profession and defy the conventions and convictions of decent Americans."

Commenting upon the legal situation concerning the possible impeachment of Justice Douglas, the *Los Angeles Times* made clear that:

> The legal question at issue is whether Douglas has violated the vague constitutional requirement that, as a judge, he observe good behavior during his term of office. The record of previous impeachment attempts makes it plain that there is no consistent standard by which good behavior may be defined.

*The Times*, however, points out that "...if the historical record is unclear, the record of Justice Douglas is not...we think it is unarguably clear that many positions of public trust, foremost



among these membership on the highest court, do impose particular requirements of prudence, wisdom and self-restraint in both public and private affairs. On this score, Justice Douglas has been lacking."

And while doubting whether impeachment is the proper remedy in this case, *The Times* concludes by stating: "We believe strongly that he should resign his position."

A similar view was expressed editorially by the *Detroit News*. Although opposing impeachment, that paper said Justice Douglas "unquestionably" should retire. He "has outlasted his usefulness and should bow out gracefully," the *News* wrote on April 18, 1970.

Commenting upon the impeachment proceedings, Douglas himself notes that "After 25 years in politics, I've developed a good set of calluses." He told a friend that he dreams of the mountain-ringed wilderness of the Northwest. There, he once wrote, "a man can find deep solitude and under conditions of grandeur that are startling, he can come to know both himself and God."

Douglas' friends, columnist Jack Anderson revealed, "detect in him a loneliness that had led to emotional instability. His three divorces came, they say, during periods of moody despondency. After his fourth marriage, the last two to 23 year-old girls young enough to be his grand-daughters, outraged cries rose from ladies sewing circles across the land."

Anderson also speculates that:

> The financial cost of the three divorce settlements has added to the pressures upon a man who yearns to be free of the encumbrances of civilization. The squeeze finally forced him to hire an aggressive agent to sell the jurist's writings and to promote his lectures.

The legal area of impeachment is quite clearly a delicate one, and our experience with it is limited. By any estimate, however, there was never the Constitutional view that judges could not be removed from office for certain kinds of offenses.

The Framers of the Constitution used the broad phrase, "good behavior"; who determines it, and by the use of what criteria, is a vital question. Justice Douglas himself has always supported what is known as a "broad" or "loose" interpretation of the

Constitution which, in other cases at other times, might cause him to agree with Rep. Ford's notion that "an impeachable offense is whatever a majority of the House of Representatives considers it to be."

Douglas' defense counsel, former U.S. Judge Simon Rifkind, challenges this contention, and argues that were it so "it means that federal judges hold office at the pleasure of Congress." Another Douglas supporter, columnist Clayton Fritchey, rejects the idea that there are really any questions worthy of investigation concerning Justice Douglas. Fritchey argues that "...it can be seen that the wretched Fortas-Haynsworth-Carswell chain of events began with political motivation, and now, in the impeachment campaign against Douglas, is culminating in still more politics."

Professor Fred Rodell of the Yale Law School, an old friend of Justice Douglas, has characterized the impeachment drive as an "obviously vengeful and basically absurd effort." Rodell referred to Rep. Ford's argument that if Haynesworth were not confirmed, Douglas should be impeached because the same standards, ethical or otherwise, should be applied for impeachment. Rodell reminded Ford that all federal judges, not just Supreme Court justices, are subject to impeachment.

"By Ford's own rule," said Rodell, "he should have initiated immediate impeachment proceedings" against both Haynsworth and Carswell when they were rejected by the Senate. "Ford's failure to do so while he badgers Justice Douglas," adds Rodell, "lays bare not only the strictly political motivation of this move, but also the blatant and patent intellectual dishonesty of my old student and one time friend."

Professor Rodell's condemnation of Rep. Ford's initial statement was vehement, but perhaps somewhat misplaced.

Actually the gist of Mr. Ford's view was that since the alleged "conflict of interest" charges which were leveled against Judge Haynsworth, and the charges concerning the political views of Judge Carswell, amounted to what was, in his opinion, less than just reason for rejecting these nominees, the Senators who placed. such stringent requirements on potential court members should ask themselves some serious questions.

How, he asked, could Haynsworth and Carswell be rejected. largely because of their political views, while Justice Douglas, with his long record of political partisanship, conflict of interest



relationships, and connection with gambling interests, be permitted to remain on the Court?

In a sense he was asking the Democrats in the Senate whether or not they were being partisan toward the Court, or whether they were willing to apply their newly rigid standards to Douglas as well. By any estimate, it appears conclusive that he would be unable to meet them.

Perhaps Professor Rodell protests a bit too much, and surely Mr. Fritchey is well aware that it was not Mr. Ford who made the Court "political." The question is no longer one of Democrats or Republicans, liberals or conservatives; it is soleoy one of judicial ethics and behavior. No amount of political posturing can stifle the hard questions concerning "good behavior," concerning cerning Ginzburg, Parvin, the Center for the Study of Democratic Institutions, and *Points of Rebellion*, which must be asked.

It has become the responsibility of the country as a whole to make certain that they are answered.

Chapter VIII.

# Conclusion

It is difficult to judge all the particulars of a man's life. and it is nor our role to do so, either with regard to Justice Douglas or concerning other men in the public spotlight. Long ago the question was, "Why are there so many sons of bitches in Congress?" The response was, "Don't the sons of bitches in society need to be represented?"

At first glance the argument makes sense. If men cheat on their taxes, cheat on their exams, and cheat on their wives, how can we ask, in a democratic society, that their representatives adhere to a higher moral standard? Moreover, in a democratic society if people are represented by their peers they can hardly complain if their representatives possess faults which are comparable to their own.

Yet, there is another approach to the question of leadership in a democratic society. Commenting on the view that a representative's opinion should always be consistent with the views held by 51% of those registered and voting in his district, columnist William F. Buckley, Jr., said that "If the latter were truly desirable, we could have running democracy without any difficulty at all by simply plugging in Dr. Gallup to a big IBM machine and turning the dial. Do you prefer Johnson or Nixon? If the answer on Monday is Nixon 51, Johnson 49, we could simply flash the helicopter to jettison Lyndon and pop up to New York to fetch Nixon. . .and so for all the Senators. . .Why have any elected

officials at all. Why not just constantly submit questions about everything to the voters, and let them decide directly?"

This, of course, is the age old question faced by political representatives. Is their function to represent the transitory opinions of their constituents, or their interests as determined by the best judgment of the men chosen to assume positions of leadership?

In the 1830s, a citizen of Massachusetts suggested to John Quincy Adams that his job as Congressman was to register exactly their views on public matters. The ex-President replied that for such a job clerks were available, and that his idea of representative government was that the man sent to Washington was to represent not the transitory views of his constituents but to exercise the judgment in which such constituents had shown confidence by electing him. If the constituents disagreed, he argued, they could turn him out of office at the next election.

And what of the broader view of representation? Is a representative merely the spokesman for those registered and above the minimum age in his district, or is he representative of a broader constituency?

In his important work, *Orthodoxy*, G. K. Chesterton discussed what he called "the democracy of the dead": "If we attach great importance to the opinion of ordinary men in great unanimity when we are dealing with daily matters, there is no reason why we should disregard it when we are dealing with history. .Tradition may be defined as an extension of the franchise. Tradition means giving votes to the most obscure of all classes, our ancestors. It is the democracy of the dead. Tradition refuses to submit to the small and arrogant oligarchy of those who merely happen to be walking around."

Traditionally Americans have believed in the kind of representative government in which representatives were statesmen, and not mere reflectors of the popular will. It was Edmund Burke who noted that in making a decision such a statesman must take into consideration not only the views of the current majority but the views of all those who have gone before and all those who are yet to come. To do otherwise would be to enshrine neither democracy nor freedom, but the rule of the mob and the passions of the moment.

The question of whether a political party should stand for something more than victory is rarely considered. Disraeli



lamented in the England of the 19th century that the Conservative Party had abandoned any semblance of principle. In *Coningsby* he gives counsel to search for something meaningful: ". . .hold yourself aloof from political parties which from the necessity of things have ceased to have distinctive principles, and are therefore only factions."

Too often our men in public life are reminiscent of men echoing the words of James Russell Lowell's poem: "Ez to princerples, I glory/ In hevin' nothin' o' the sort/ I ain't a Whig, I ain't a Tory,/ I'm just a canderdate in short."

The reason for this consideration is that all too often Justice Douglas' partisan political role and record of outspoken pronouncements on many subjects have been hailed. It has been asserted that a democratic society needs men who say what they think, even if it is unpopular, and that Justice Douglas has been courageous in his candor.

Were he a Senator or a member of Congress, this might be a valid consideration. But, he is not. Douglas is, and has been for many years, an Associate Justice of the Supreme Court. Accordingly, what is legitimate for others, is often quite improper for him.

The specifics of an appropriate role for a justice of the Supreme Court have been discussed many times. One of the most recent statements on this subject came from the present Chief Justice, Warren Burger. At a ceremony in Washington, D.C. unveiling a bronze bust of the late Justice Oliver Wendell Holmes, Jr., Burger noted that, "When Holmes spoke of the need of every man to take part in the action and passion of his times, he was expressing his lifelong urge for action as such, but he was in no sense articulating activist judicial philosophy."

Burger remarked that, "Holmes was for action by judges within the sphere of assigned constitutional authority of judges. Nothing in his public utterances and writings is clearer than that." Holmes, Burger pointed out, avoided what he called "the one risk which I am bound to acknowledge" that "comes when judges confuse themselves and their function with the members of other branches of government. . .Above all, he was for letting Congress fix the ground rules, Ad-hoc improvisations by judges irritated him."

The law, according to Holmes, was not geared for "giant leaps forward." Said Burger:

> It is not for nothing that one of the symbols of the law is the tortoise, even though less well-known to laymen than the blindfolded lady with the scales. This is why Holmes argued so vigorously all his life for the right of the political branches to experiment in the search for answers.

Justice Douglas is often compared with the late Justice Holmes, but this comparison is perhaps strained as regards their judicial role.

The Supreme Court, as a whole, has been the target of mounting criticism in recent years. Many Americans seem to be remembering anew the warning issued by Thomas Jefferson when the country was young. Jefferson fore warned that a judiciary which expanded its powers beyond those which were assigned to it might result in an end to the federal system. He stated: "The germ of dissolution of our federal government is in the. . .federal judiciary; an irresponsible body. . .working like gravity. . .gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the government of all consolidated into one."

Rene A. Wormser, New York attorney and author of *The Story of the Law and The Men Who Made It*, is among those who believe that the Supreme Court has erred in appearing to abandon the role of interpreter of the law for that of social reformer. Mr. Wormser, expressing the more traditional view, feels that the desiderata for a judge are restraint and humility. These attributes, he believes, have largely been lost sight of since 1936 when Franklin D. Roosevelt undertook to enlarge the Court in order to defeat the "nine old men" who had blocked New Deal efforts to expand the powers of the federal government. Frustrated by Congress in his efforts to "pack" the Court, the then President began naming only known "liberals" to the Court as vacancies occurred. Mr. Wormser concludes that the competence and dignity of the Court suffered severely and has continued to suffer from a process that puts politics above ability.

"Why," he asks, "was not Judge Learned Hand named to the Court? Or Judge Harold R. Medina? Outstanding men, both of them---as was Roscow Pound, former Dean of the Harvard Law School, an outstanding authority on American jurisprudence. Why wasn't Dean Pound ever named to the Court?"

Politics clearly was placed above judicial experience and



ability when William Douglas was appointed to the court. He was a devout supporter of the New Deal, a liberal, and a controversial chairman of the Securities and Exchange Commission. Douglas was 39 years old and had no judicial experience. True, his academic record was outstanding, as was his career as a member of the faculty of the Yale Law School. Nevertheless, his political philosophy was the key to his appointment. Once on the Court, and in all the succeeding years, he remained far more a spokesman for that philosophy than an impartial interpreter of the law.

Toward the end of his career on the Court, the late Justice Felix Frankfurter found himself increasingly at odds with his associates. "It is not the business of this Court to pronounce policy," he said in 1958. "Self-restraint is of the essence of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the executive branch do."

A year later Professor Henry M. Hart, Jr., of the Harvard Law School, was to say:

> It has to be said that too many of the Court's opinions are about what one would expect to be written in 24 hours. . Few of the Court's opinions---far too few---genuinely illuminate the area of the law witn which they deal.

Professor Philip B. Kurland of the University of Chicago Law School listed four criticisms of the Court in 1964. First, in its concern over "equality" it cares less than earlier Supreme Courts did for "due process of law." Second, its reach for power divides and confuses the federal system. By assuming the role of a second rulemaker (Congress being the first) uniformity in lawmaking is giving way to a confused diversity. Third, the Court is building its own power at "the expense of the power of the other branches of government, national and state." Fourth, there is an "absence of a workmanlike product, an absence of a right quality in court decisions."

All of this may be beside the point in reviewing the case of William O. Douglas, but it is within the margins of these events and these criticisms that the current case is being considered. Justice Douglas must not be made an "example." He should not be held a scapegoat for everything people find objectionable in the Court over the past twenty or thirty years. To do so would be

an injustice. Further, a democratic society does not function by making examples, but by applying all laws equally to all men.

Thus, Justice Douglas should not be supported in the impeachment controversy because he has been "courageous" and "outspoken," just as he should not be pilloried because he personifies what many believe is wrong with the Court as a whole. Nor should he be either supported or opposed because one agrees or disagrees with the substance of his opinions. In a democratic society all citizens have a right to disagree with and criticize their public officials without demanding their ousters.

Yet, when citizens disagree with members of the Congress or of the Senate, they have an opportunity, in two years or six years, to vote them out of office. Every four years citizens have the opportunity to elect a President. Supreme Court justices, however, are appointed for life. They are not subject to recall by the people, as they should not be, if an independent judiciary is to be maintained. They serve for life, or until such time as they no longer meet the standards of "good behavior" set forth in the Constitution.

While the "independence of the judiciary" is rightfully hailed, what is meant by this term is often vaguely defined. As some see it, it means that the Congress shall not tamper with the *functioning* of the courts. There *shall* be trial by jury. On the Court the Justices *shall* be appointed for life "during good behavior" and Congress shall not meddle with this.

But Congress *does* have the power to impeach judges for "bad behavior," and it has been exercised a number of times against federal jurists, though never at the Supreme Court level. To argue that Supreme Court justices are appointed for life and cannot be removed by Congress for any reason, is to challenge the Constitutional provisions that establish the conditions for impeachment.

Narrowly defined, the issue is this: The Constitution sets forth grounds for impeachment. Supreme Court Justices are appointed for life "during good behavior." Has Justice William Douglas acted in such a way as to bring him within the category envisaged by the Constitutional provisions? In other words, has his connection with the Parvin Foundation, the Ginzburg case, the Center for the Study of Democratic Institutions, and the inflammatory calls for civil disobedience and revolution in his recent writings, met the standards for what might be called "bad



behavior." Has he been "practicing law" by giving legal advice to those with cases before the Court? Has he been guilty of sitting on cases in which he had a material interest? Has he been true to his oath to uphold the law when he urges young people and others to disobey it?

To say that no Supreme Court Justice, under any circumstances, should be impeached would be to grant complete license to judges to do anything they desired. It would be in violation of the Constitution. Since there are provisions for impeaching a judge, and since Mr. Douglas has acted in such a way as to make many members of Congress believe that he should in fact, be impeached, it is incumbent upon all those who are considering the case to ponder seriously the above questions.

Unfortunately, much commentary on both sides of the case has been mere rhetoric, ignoring the more substantive questions. The most compelling reason for thinking Douglas has acted improperly is the fact that even his supporters admit it is so. *The New York Times* of May 8, 1970, asks: ". . .if 'good behavior' meant that judges were to hold their jobs on the sufferance of temporary Congressional majorities, what would be left of an independent judiciary." In saying this, the *Times* implies that it would oppose impeachment in almost any and all cases, since the Constitution does leave it up to the Congress to determine what "good behavior" means. Thus, although the *Times* would make this Constitutional provision totally inoperative, in this same editorial, the following point is made:

> If Justice Douglas' name were before the Senate now, that body might well deny him confirmation. His one-time connection with the Parvin Foundation, though far from a crime or misdemeanor, was certainly injudicious. His private life has been less than a model of stability. And some passages in his recent book, *Points of Rebellion,* suggest a free-wheeling emotionalism running rampant over good judgment.

The *Times* advances the view that impeaching Justice Douglas would not be ". . .what the Founding Fathers had in mind when they wrote a system of checks and balances into the Constitution." Yet, impeachment is perhaps the most effective check the people have over a Supreme Court justice guilty of "bad behavior." If we eliminate the Constitutional provision for im-

peachment, we have indeed eliminated the system of checks and balances.

*The Milwaukee Sentinel,* to cite one newspaper which has been critical of Justice Douglas and has called him "unfit for the Court," said the following editorially:

> The evidence of his conflict of interest is more than sufficient to disqualify him to serve on the federal bench. While a judge, he received money from a source with which he was intimately associated and which was involved in a legal dispute with the federal government. . Rather than, by his continued presence, subjecting the high court to prolonged and extraneous stress which will further adversely affect the performance of its important function, Douglas should choose to retire.

Whatever conclusion the individual observer comes to, it should be based on the question of William Douglas' performance on the bench, not on his legal or political philosophy.

And those who oppose his impeachment must ask themselves this: If Justice Douglas' record does not fulfill the Constitutional requirements for impeachment, then whose in history has?

Those who support the impeachment must determine for themselves whether their purpose is political vendetta, or a definite real assessment of Douglas' performance.

Then, weighing all of the evidence, each citizen must reach his own decision.

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