

reason of his talents, was the appropriate successor. When Roosevelt appointed Frankfurter, he well understood, as his cousin Theodore had not when he appointed Holmes, that he was putting an independent on the Court, that for Frankfurter there could be no loyalties greater than those owed to the Court itself. And it is this independence, in the tradition of Holmes and Brandeis and Cardozo, which the Justice has demonstrated ever since. He has never been either a leader or a member of any judicial faction, dominant or subordinate. And though historians will be able to measure the imprint on constitutional doctrine which his opinions will have made, none except those who have served with the Court will be able to know or understand the influence he has wielded in assuring that the Court framed the right question for resolution, an aspect of constitutional jurisprudence not less important than framing the right answer.

To know the Justice is to feel strongly about him. His admirers are legion, but his detractors are also numerous. This might be expected of one so outspoken as he. Popularity has never been a goal to which he has aspired. He has never suffered fools gladly, if at all. He has admired intellectual capacity only when it is matched by intellectual integrity. Neither as a teacher nor as a jurist has he been a "man of the people." As a Justice, he has had no object other than the able performance of his duties.

A twentieth anniversary for a Justice is not an extraordinary event in the history of the Supreme Court. Twenty-five others have passed that milestone in their judicial careers. But perhaps it is noteworthy that among these were Marshall and Johnson and Story and Taney and Holmes and Brandeis and Stone. The occasion does, of course, call for felicitations from the world of legal education both to the Justice and the institution which he has served so well. And with these must go the earnest wish that the service which Mr. Justice Frankfurter has so well rendered for the last twenty years will continue for many years into the future.

JUSTICE DOUGLAS: AN ANNIVERSARY FRAGMENT FOR A FRIEND

FRED RODELL†

SUPREME COURT justices, by and large, are a pretty dull and anonymous lot to the average man. An occasional Holmes may become a legend on a Civil War record, a Back Bay clique, longevity, and flowering moustachios. An occasional Hughes may become familiar by running for the presidency and sporting a full-rigged beard. But the nine men in their marble temple, even when they are Dred Scotting or anti-New Dealing or desegregating, usually make the news *en masse*; it is not they but the *Court* that has done this wonderful

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or terrible thing; and who *is* that character sitting second from the left? Namelessness springs in part, of course, from the Garbo-like withdrawal that almost all the Justices affect, once they are Justices. But there is something more. These are the ultimate among egg-heads; their world is a world of sheer thinking; they write in and of the ratiocinations of law. Indeed, the law—save for frolics and detours on the same intellectually stratospheric level—is generally their life.

To this stereotype of the average Justice, who is hence unknown to the average citizen, the current Court holds one outstanding exception. William O. Douglas has never let the first half of Juvenal's phrase for a whole man unduly interfere with the second; no top-ranking U.S. government officer since Rough Riding Theodore Roosevelt has so starkly exemplified—in rugged person and rugged off-the-job way of living—*mens sana in corpore sano*. Yet even this quite un-Justicelike trait of existing for more than the mind alone is but one of a batch of exceptional facts about Justice Douglas. Thus, be it remembered that Justice Holmes, who served longer than any other Justice this century, was named to the Court at the age of sixty-one; that Douglas is now one year younger than that; and that Douglas this Spring marks the twentieth anniversary of his Justiceship. His judicial achievements, already major, may barely have begun. Be it also remembered that few men, if any, have managed to match in a long lifetime what Douglas has done—off the Court and on—in his first sixty years.

Lawyers know him primarily, of course, as the militantly liberal Justice who has long teamed up with Justice Black, in dissent or majority, on civil liberties and business regulation—much as Brandeis, whom he succeeded on the Court, used to team with Holmes. Many Americans know him still better as the author, over the past nine years, of no less than nine books on subjects ranging from the Bill of Rights to his own travels in the Middle East—almost all of these books best-sellers. The peoples of Asia know him as an unofficial roving ambassador—and wish that the official breed understood them and their problems as well as he. Colleges and liberal organizations throughout the nation know him as a ready and forceful speaker for his and their ideals. Sportsmen and outdoorsmen know him as a devotee of their kind of life—camper, hiker, horseman, fisherman, mountain-climber, longtime crusader for keeping what little is left of the U.S. wilderness wild. And with all these careers still going simultaneously strong, it is easy to forget that this son of a poor itinerant minister—who earned his way through college with such jobs as picking berries and herding sheep, and then rode a freight-train East to law school—once worked in a Wall Street law firm before he started teaching law; became a full professor when barely five years out of law school; was dubbed by Robert Hutchins the ablest law teacher in the country; was chosen by Franklin Roosevelt to head the SEC at the peak of its toughest regulatory tasks; and as SEC chairman, among other feats, brought the proud and reluctant New York Stock Exchange to heel under government control. For all of this was prelude—such a prelude to such a present as Horatio Alger could never have wildly dreamed.

Of Douglas' current quintet of careers—Justice, writer, traveler, speaker,

outdoorsman—the Justiceship, quite naturally, takes precedence. Not even his bitterest enemies—and like all strong men, he has more than a few—have ever charged him with shirking his Court duties for extra-curricular doings; nor could they. For the past two decades he has written each year, along with a pack of dissents, far more than his average share of majority opinions—many of them, as the Court's acknowledged financial expert, in the tough cases dealing with business and industry. When Hughes was Chief and the load was greater, Douglas used to speak for the Court as often as thirty times a term; indeed, one reason for his increased outside activities of late is that a lighter case quota does not begin to demand the whole of his almost inhuman store of intellectual and physical energy. His total judicial output, spreading over a score of years, has been so voluminous that a short sketch can but trace the outlines.

Named to the Court primarily as a tough-minded wizard at corporate law, Douglas here had only to use from a higher vantage point the intricate analytical insights he had soaked up, first when refashioning law school courses to fit the facts of financial life, later when searching out subtle business skullduggery for the SEC. Like his predecessor (said Brandeis, "I wanted you to be here in my place") an ardent enemy of giantism in industry or commerce, he championed the small firm, the small investor, the small shipper, and always the consumer. In an eloquent anti-trust dissent against the Westward expansion of U.S. Steel, he exploded: "Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. . . . The fact that they are not vicious men but respectable and social minded is irrelevant." His insistence that government regulation of business be functionally effective, not just flimsily formal, and that the Court read the laws to help make it so, has not slackened over the years. Only this past winter, in the gas-rate case that hit financial headlines, he flayed his brethren of the majority for letting the gas companies in effect set their own rates—at the consumers' cost. Taxes or labor disputes, patents or employers' liability, in all the economic fields of law Douglas has been a down-the-line New Dealer. And the quality of his opinions, backed by his technical expertise and inspired by his concern for FDR's "common man," has been uniformly high.

But shortly after World War II, as "loyalty" and "security" laws and programs began to burgeon at every stage of government, Douglas' prime attention turned more and more to civil liberties, to what the title of his next-to-latest book calls "The Right of the People." From the start he had been, as he remains today, a staunch upholder of those sections of the Bill of Rights that guarantee to criminal defendants fair treatment by police and prosecutors and trial judges. But this new multi-faceted official hysteria was different and, to Douglas, far more dangerous than the sporadic search-and-seizure or forced-confession stuff. A few thousand native Communists—whom Douglas once aptly dubbed "miserable merchants of unwanted ideas"—were being used as a far-fetched excuse to try to force on millions of Americans a Kremlin-like conformity of political

thought, speech, and association. The penalties for unorthodoxy—or even for seeming unorthodoxy born of the unproved accusations of unknown informers—ranged from jail sentences to deportation to loss of jobs. Aghast at this flouting of the First Amendment, Douglas, along with Justice Black, protested in dissent after ringing dissent, not just against the network of pseudo-security laws but against their tame toleration (up to the past two or three terms of Court) by a majority of his judicial colleagues.

For Douglas was well aware—and so stated in books and speeches and articles as well as dissenting opinions—that the ultimate responsibility for protection of the people's liberties belongs, under our constitutional system, to the judges. Attacking at every turn the leave-liberty-to-the-legislature slant of the Austin-Thayer-Hand-Frankfurter school of jurisprudence, Douglas has gone so far as to say of Judge Learned Hand's comment that the First Amendment's prohibitions are "no more than admonitions of moderation:" "The idea that they are no more than that has done more to undermine liberty in this country than any other single force. That notion is, indeed, at the root of the forces of disintegration that have been eroding the democratic ideal in this country." On a more positive note, Douglas has expressed his credo in Brandeisian terms: "We need be bold and adventuresome in our thinking to survive. . . . The Framers knew . . . the strength that comes when the mind is free."

To say this much about Justice Douglas—as one might try to capsule the judicial career and philosophy of any sitting Justice—is not to come close to capturing the infinitely complex and yet essentially direct and simple human being whom his friends cannot help but call Bill. There is an air of artlessness about him which only half-conceals a mind that ticks like a tight-wound watch. When, as SEC chairman, he was trying to force the Stock Exchange to regulate itself, and negotiations got stalled, the Exchange spokesman, eyeing the boyish face and the loose lock of hair on the forehead, said: "Mr. Douglas, if you're going to take us over, there might be a few things we could tell you that would help you in running the Exchange." "Yes," said Douglas, "there's one thing we'd like very much to know. Where do you keep the pencils and paper?" It is this sort of untelegraphed three-steps-ahead thinking, plus the control that masks it, which can infuriate those who dislike or disagree with Douglas. As can his patent wariness with men he mistrusts and his brusque bluntness with time-wasters, sycophants, or bores. But his friends—and they are far-flung over five continents—know the casual manner, the easy talk, the grin that explodes into laughter, the utter lack of social or official affectation, the warmth that is all the warmer for coming from a well-banked fire. It would be impossible to convince an Oregon rancher he has ridden trails with, or an Iranian shepherd he has shared a meal with, that Douglas is other than the world's kindest man. It is pretense or phoniness or dishonesty on any level that he will not suffer gladly; his own deep integrity reaches out to the same quality in other men, be they presidents or shopkeepers, scholars or intellectual paupers.

Indeed, despite his vast intellectual attainments, Douglas is not primarily a cerebral man. Wisdom, to him, is worthless in the abstract; knowledge does not deserve a page of reading or five seconds of thought if it is not directly and intimately related to the stuff of life—to people and events and tangible things. To the despair of some sedentary legal pedants, he is a man of action and decision rather than contemplation. He is also a man of tremendous physical and intellectual courage, afraid of no person, no situation, no idea. Reared on the American frontier, he has the drive and down-to-earth practicality and adventurous spirit of a frontiersman—and he carries these over to the work he does with his mind. The nation is lucky to have had his strength devoted to its service for so long—as presumably it will be for many years to come. And it is rare treat for one of his friends to be able to pay here this sketchy anniversary tribute to a great and an extraordinary man.

JUSTICE DOUGLAS: A LAW CLERK'S VIEW

WILLIAM COHEN†

I WAS Justice Douglas' law clerk for a single term of court. This is an extremely short period of time, in which conclusions drawn about the man are apt to be fragmentary.¹ But it was long enough, for me, to form lasting impressions.

In recent years, eight Justices of the United States Supreme Court have employed at least two law clerks. This is a "luxury" with which Justice Douglas can dispense, for he is able to handle his responsibilities as a judge, particularly in the writing of opinions, in less time than other judges. Opinions are written in longhand—a kind of hieroglyphic taking considerable practice to decipher but which is written with the speed of shorthand. He has an uncanny knack of putting his finger on the essential issue of a confusing and difficult problem, and he has an easy, fluid writing style which expresses his thoughts accurately. The

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¹ While twenty years is a significant slice of time, in this case it is largely one arbitrarily limited. For a man who ascended the bench at the age of forty, the first twenty years of judicial service can be entitled just that—the first twenty years. The impact of a judge is difficult to appraise during his tenure on the bench, especially when he has many years of active service ahead of him. Moreover, in twenty years of the Supreme Court, a Justice is called upon to express judgment upon a myriad of legal problems. Since 1939 Justice Douglas has left his mark in such diverse areas, among others, as administrative law, anti-trust law, bankruptcy, criminal law, the law of domestic relations and the law of obscenity. Discussion of the totality of his contribution to the Court and to the law over two decades is inappropriate here, in the limited time and space available to me. And I must leave to others, whose association with him has been longer and more intimate than mine, the close personal appraisal of the man.