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"The average American," according to William O. Douglas, "is an independent, rough and ready kind of fellow who wants to take a swing on his own."[1] That statement goes a long way toward describing Douglas himself. Given his drive and intelligence, however, it would be inappropriate to equate Douglas with the "average American." He was, as his more than forty years of public service demonstrated, one of the extraordinary Americans in our history.

At the convocation honoring him shortly after he passed Justice Field's record tenure, Douglas spoke of his father, who died when Douglas was six. In those few short years his father, William Douglas, Sr., a Presbyterian minister, managed to make a significant impression on his son. He drilled into the boy a lasting lesson on the importance of "self-reliance and hard work."[2] Probably no words better catch the essence of the man.

Work and grim determination were with him from the beginning. After overcoming polio as a child, he worked variously at washing windows, sweeping out stores, searching for scrap iron, and harvesting crops. On arrival at Whitman College he found three jobs to provide meals, expenses, and money for his mother.[3] Arriving in New York City with six cents to begin Columbia Law School, he immediately sought work and missed six weeks of classes during the first semester.[4] He was a whiz while on Wall Street and a brilliant scholar during his teaching days; he revolutionized the field of corporate law and was a Sterling Professor of Law at Yale at the age of thirty-two.[5] At the Securities and Exchange Commission, he rose from head of a staff study to Chairman of the Commission in three years. Hard work was never a deterrent.

On the Court his prodigious work product is legendary. No one comes

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1. Statement of Justice Douglas, *quoted in* Rodell, *Bill Douglas, American*, 61 AM. MERCURY 656, 665 (1945).

2. Statement of Justice Douglas at the convocation honoring him at the time he passed Justice Field's tenure record (November 3, 1973).

3. W. DOUGLAS, GO EAST, YOUNG MAN 97–98 (1974) [hereinafter cited as GO EAST, YOUNG MAN].

4. *Id.* at 133–36.

5. Rodell, *Bill Douglas, American, supra* note 1, at 660–61. *See also* Jennings, *Mr. Justice Douglas: His Influence on Corporate and Securities Regulation*, 73 YALE L.J. 920, 921–34 (1964).

close to having written so many opinions in the *United States Reports*. They are neatly balanced between majorities and dissents, the latter being disproportionately high in the early 1950's and the 1970's. On the side, he hiked, traveled, lectured, and wrote. He authored a book virtually every year from 1950 until his retirement. To some, his incredible extrajudicial feats—which would remain extraordinary if he never had sat a day on the bench—led to the conclusion that he was shirking his Court duties. But for those who knew, the charge was laughable. Douglas was always at the Court ready to work, arriving in chambers before eight in the morning, working every Saturday, and even coming in with some frequency on Sundays.

Once during a long oral argument when Justice Frankfurter kept interrupting with questions, Douglas turned to Justice Reed and whispered, "Why can't the little bastard keep his big mouth shut and let us get on with it?"[6] He, unlike others who would complain about overwork and lack of efficiency, knew the key to efficiency was getting things done quickly and well. Once his assignments were received there would be no stopping until the draft opinion was circulating. If he were not in the majority and intended to write, the dissent would be done immediately and ready to circulate long before the author of the majority had his draft prepared. By always working, never delaying, he could call for the Court to do more, not less.[7]

The compulsiveness of his work marked the man. In the spring of 1971, Douglas left Washington during the term to have a new pacemaker placed in his heart. The operation, normally simple, became complicated. Two days later a second operation was performed (and within ten days it would be learned that this one too was unsuccessful). Yet two days later he was up by 6:30 and on the morning flight to Washington. On arrival he went right to the Court even though he needed rest and it was a Saturday. He looked terrible and he must have felt even worse, but the compulsive worker in him required him to clean his desk before going home. It was a rare performance. Indeed it was foolish, but for Douglas there could be no choice. If there was work to do—and almost a week's work had piled up—it had to be done. He was incapable of even thinking of an excuse for not working. So strongly was the Calvinist ethic drilled into him that he felt uncomfortable, probably even guilty, if he was not moving on the job.

6. Rodell, *As Justice Bill Douglas Completes His First Thirty Years on the Court: Herewith a Random Anniversary Sample Complete with Casual Commentary, of Divers Scraps, Shreds, and Shards Gleaned From A Forty-Year Friendship*, 16 U.C.L.A. L. Rev. 704, 706 (1969) [hereinafter cited as Rodell, *Divers Scraps, Shreds, and Shards*].

7. Tidewater Oil Co. v. United States, 409 U.S. 151, 174–78 (1972) (dissenting opinion). *See also* Go East, Young Man, *supra* note 3, at xii.

But Douglas was not merely a hard worker: he may have had the finest mind ever to grace the Court.[8] His brethren from Harlan[9] to Fortas[10] classified him as a legal genius. As Fortas relates, Douglas' method in conference was not the "stone wall of logic and stern assurance" of Hugo Black, nor the "calm and impressive scholarship" of John Marshall Harlan; rather it was the "penetrating, irresistible, jugular stroke."[11]

With this combination of intellectual genius and indefatigable work habits, it was hardly surprising that Douglas would rely almost exclusively on himself. After all, who could keep up with him? But there was more. His youthful bout with polio made him a loner.[12] Without a father there was no one to whom he could express his "inner turmoil and tension."[13] He learned to rely solely on himself. He was a problem solver, and if a problem could be solved he would do so alone.

Nor did he back off from his solution. He was tough enough to act on the basis of his principles, and his toughness often was highly visible. When President Nicholas Murray Butler of Columbia appointed a new law school dean without consulting the law school faculty, Douglas resigned. He did so on principle, without first lining up another job. Subsequently, he met Robert M. Hutchins, the dean of Yale Law School, and so impressed Hutchins that a day later the Yale faculty offered him an appointment as an associate professor.[14]

As Chairman of the SEC, he once remarked: "It's goddamned lonely in the front-line trenches these days."[15] But he did not retreat from controversial problems involving the New York Stock Exchange and the "death sentence" of the Utility Holding Company Act. On the Court he was the same. He and Black alone would brave the McCarthy hysteria and dissent in *Dennis v. United States*.[16] He was the Justice who granted the Rosenbergs their stay of execution because he was impressed with a

8. Brennan, *Dedication to William O. Douglas*, 55 WASH. L. REV. 283, 283–84 (1980).

9. Statement of Professor Norman Dorsen at the convocation honoring Justice Douglas at the time he passed Justice Field's record tenure (November 3, 1973).

10. Statement of former Justice Abe Fortas at the convocation honoring Justice Douglas at the time he passed Justice Field's record tenure (November 3, 1973).

11. Fortas, *Chief Justice Warren: The Enigma of Leadership*, 84 YALE L.J. 405, 406 (1975).

12. Of his preference for solitude, Douglas stated:

> Throughout my life I have enjoyed company but seldom sought it out. I preferred to eat lunch alone. I preferred to walk or exercise alone. I became a very lonely, introspective person. While I enjoyed select boyhood friends, I was not a bit gregarious. And that characteristic carried through all my life.

GO EAST, YOUNG MAN, *supra* note 3, at 34.

13. *Id.*

14. *Id.* at 161–63.

15. Statement of Douglas *quoted in* Rodell, *Bill Douglas, American*, *supra* note 1, at 661.

16. 341 U.S. 494 (1951) (conviction for conspiracy to organize the Communist Party of the U.S. as a group to overthrow the government by force and violence upheld).

newly raised argument. Despite the subsequent effort to impeach him because of the stay, he looked wiser and more judicious than most of the Justices as Chief Justice Vinson rushed them into special session to reverse Douglas and allow the executions to proceed on schedule.[17] Two decades later it was Douglas who would order a halt to the bombing in Cambodia,[18] only to be overruled by a questionable telephone poll of his brethren.[19] He already had been the focal point of hostility towards the Supreme Court (along with Earl Warren) for many years when Ford and Nixon sought to have him impeached. Douglas was undeterred. Although he had considered retiring prior to this impeachment effort, Douglas would not withdraw from the field of battle. When convinced he was correct nothing would stop him from what he was doing.

Douglas worked hard, he worked alone, and he was tough. He got things done. It is no great secret that he had little tolerance for those around him who worked at a slower pace or who were sloppy in their work. He was quick to criticize and virtually never offered praise. His was the old religion, that work well done is its own reward. Even more than his libertarian views, the Calvinist ethic was his defining quality.

The Calvinist ethic propelled Douglas through his career. That and his shyness may explain his harsh treatment of those with whom he worked. As a law teacher he apparently demonstrated studied contempt for his students.[20] As a Justice he developed no warm relationships with the other Justices or his law clerks. Indeed, his clerks would spend a year living in constant fear of him and the immeasurable wrath that could instantaneously descend upon them. His relations with the other Court employees were better only because he had no sustained contact with them. They too might respect his independence and position, but they could easily do without him as a person. The common everyday courtesies, such as saying "hello," smiling occasionally, or knowing the name of a person with whom one has contact for years on end, were simply ignored.

17. Rosenberg v. United States, 346 U.S. 273 (1953).

18. Holtzman v. Schlesinger, 414 U.S. 1316 (1973) (stay of district court decision holding bombing of Cambodia unconstitutional vacated by Justice Douglas).

19. Schlesinger v. Holtzman, 414 U.S. 1321 (1973) (stay of district court decision holding bombing of Cambodia unconstitutinal reinstated by Justice Marshall on the basis of telephone conversations with the other members of the Court).

20. Douglas noted:

> When I was at Yale, I carried into the classroom the teaching techniques I had acquired at Columbia. In retrospect it was a rather hard-bitten approach, fashioned on the Socratic method and based on the premise that in the forums of the law the soft-spoken, philosophical advocate had no high place. So I bore down hard, treating each student as if it were irrelevant that his father or grandfather was a "great man." I tended to treat the class as the lion tamer in the circus treats his wards.

GO EAST, YOUNG MAN, *supra* note 3, at 164.

Douglas, the loner, sought spiritual rebirth in the mountains and wilderness. As soon as his work was completed each term he would leave for the Cascades, "his" wilderness.[21] His relationship with the Cascades was a long one. At his father's funeral, Douglas was impressed deeply by Mount Adams:

> It was dark and purple and white in the August day and its shoulders of basalt were heavy with glacial snow. It was a giant whose head touched the sky.
>
> . . Suddenly the mountain seemed to be friend, a face for me to tie to, a symbol of stability and strength.[22]

Later the rugged foothills of the Cascades provided the therapy that renewed his physical strength after polio.[23]

> The boy makes a deep imprint on the man. My young experiences in the high Cascades have placed the heavy mark of the mountains on me. And so the excitement that alpine meadows and high peaks created in me comes flooding back to make each adult trip an adventure. As the years have passed I have found in these experiences a spiritual significance that I could not fully sense before.[24]

Douglas was an established conservationist decades before the current advocates of environmental preservation realized there was a problem. He saved and attempted to save countless streams, canyons, forests, and beaches as sanctuaries from man's alleged progress, whether it be dams, highways, or industry. A quarter century ago Douglas mobilized public opinion by leading a group of journalists, botanists, and others on a hike along the 184–mile expanse of the scenic and historic Chesapeake and Ohio Canal. This gave the C & O a reprieve from a proposed highway. For years, even after the first pacemakers were implanted into his heart, Douglas would renew the hike each spring as a reminder to all that the battle to save the wilderness is never over.[25] Douglas knew his debt to the wilderness and was determined to repay it.[26]

Although gifted with a mind few could equal, Douglas was not a man of abstractions. He dealt in a world where results, not finely spun theo-

21. W. Douglas, My Wilderness: The Pacific West (1960).

22. Go East, Young Man, *supra* note 3, at 13.

23. *Id.* at 31–40.

24. W. Douglas, Of Men and Mountains xi (1950) [hereinafter cited as Of Men and Mountains].

25. The C & O is, thanks to Douglas, a National Historical Park. *See* Chesapeake and Ohio Canal Development Act of 1971, 16 U.S.C. § 410y (1971). His bronze bust marks its beginning, the C & O being, in turn, dedicated to him. Act of Mar. 15, 1977, Pub. L. No. 95–11, 91 Stat. 21.

26. Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (dissenting opinion).

ries, counted. Law is a tool and to be effective it must be used with an appreciation for consequences. He knew what an antitrust decree could and could not do;[27] he knew rate regulation as if he had invented the concept.[28] Dissenting from a decision granting the Federal Power Commission the authority to set prices at which an independent gas producer could sell its gas,[29] he predicted that the decision would have "profound effects on the rate of production, the methods of production, the oil wells that are continued in production, the new ones explored, etc."[30] Of course he was right, but typically he was ahead of his time. A quarter century later an oil-dependent America joined his dissent.

Douglas knew the realities of administrative agencies. What became common sense in the 1970's was apparent to Douglas during the New Deal: "The regulated groups tend to take over their regulators. If it were not, of course, impractical, every regulatory bureau ought to be abolished after ten years of life and some new machinery set up in its place."[31] Still, he supported a wide latitude for the administrative agencies, hoping they might accomplish their objectives. But when time proved his prediction correct, he changed and argued for tighter controls.[32] Because administrative agencies are unlikely to serve the public interest, and unlikely to receive appropriate supervision by either the executive or the legislature, they must be supervised judicially.[33] The result, more than the theory, was important.

Douglas' deepest concern was for the individual. As an administrator with the SEC he worried about the average investor. As a thinking New Dealer his concern was more broadly with the type of society that was evolving in the United States. He feared bigness, its stifling bureaucracy, and its clear tendency to submerge the individual. He stated:

> [W]hen a nation of shopkeepers is transformed into a nation of clerks enormous spiritual sacrifices are made. Communities everywhere lose men of stature and independence. Man loses opportunities to develop his personal-

27. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

28. *See* Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944).

29. Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 687 (1954) (dissenting opinion).

30. *Id.* at 690.

31. Statement of Justice Douglas, *quoted in* Rodell, *Bill Douglas, American, supra* note 1, at 663.

32. *See* Northern Indian Pub. Serv. Co. v. Porter County Chapter of the Izaak Walton League of America, 423 U.S. 12 (1975) (concurring opinion); Wyman v. James, 400 U.S. 309, 335 (1971) (dissenting opinion); NLRB v. Wyman Gordon Co., 394 U.S. 759, 775–80 (1969) (dissenting opinion); Douglas, *Law and the American Character*, 37 CAL. ST. B.J. 753, 759–60, 762–65 (1962).

33. *See* Douglas' dissents from two denials of certiorari: 2606.84 Acres of Land v. United States, 402 U.S. 916 (1971) and Named Individual Members of the San Antonio Conservation Soc'y v. Texas Highway Dep't, 400 U.S. 968 (1970).

> ity and his capacities. He is denied a chance to stand on his own before man and God. He is subservient to others and his thinking is done for him from afar. His opportunities to become a leader, to grow in stature, to be independent in mind and spirit, are greatly reduced. Widespread submergence of the individual in a corporation has as insidious an effect on democracy as has his submergence in the state in other lands.[34]

These worries never left him while he was on the Court. The antitrust laws had no greater friend. His efforts were always to see that the individual American would be given a chance to "take a swing on his own."

Unlike many New Dealers who only feared corporate power, Douglas came to know that the state itself might pose a great threat to individual liberties. With this knowledge, Douglas gradually became a firm champion of individual rights under the Constitution,[35] and came to epitomize the Court's proud tradition of liberal dissent: the elder Harlan, Holmes, Brandeis, Black, and most recently Brennan.

Douglas had a remarkably coherent and succinct philosophy: "The essential scheme of our Constitution and Bill of Rights was to take Government off the backs of the people."[36] Douglas, like John Marshall, never forgot it was a constitution he was expounding.[37] Just as the powers provisions of the Constitution were entitled to a generous construction to achieve their broad objectives, so too the Bill of Rights was entitled to generous contruction to achieve its broad objectives within a changing society.[38] Douglas saw that as society changes, the nature of governmental abuses changes. Thus he sought in the Constitution governing principles rather than specific, limited, eighteenth century intent.

Implementing his philosophy, Douglas applied the Bill of Rights to the states[39] and the equal protection clause to the federal government.[40] Believing that the Bill of Rights as interpreted was not an ample guarantee of individual protection in a highly complex twentieth century society,[41] he fashioned a new concept of equal protection to open the political pro-

34. W. DOUGLAS, DEMOCRACY AND FINANCE, 15–16 (1940).

35. Powe, *Evolution to Absolutism: Justice Douglas and the First Amendment*, 74 COLUM. L. REV. 371 (1974).

36. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 162 (1973) (concurring opinion).

37. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

38. *See* C. BLACK, THE PEOPLE AND THE COURT 96–100 (1960).

39. *See* Adamson v. California, 332 U.S. 46, 86 (1947) (Black, J., dissenting opinion in which Douglas, J., joined).

40. *See* Schneider v. Rusk, 377 U.S. 163 (1964).

41. *See* Poe v. Ullman, 367 U.S. 497 (1961) (dissenting opinion); Douglas, *The Bill of Rights is Not Enough*, 38 N.Y.U. L. REV. 207 (1963).

cesses[42] and assist disadvantaged minorities.[43] With his fond memories of the Wobblies and other outcasts he knew as a youth, he focused the Court on the need for protecting minorities from dragnet-style loitering ordinances.[44]

Nowhere is Douglas better known and appreciated than in the area of freedom of expression. Often he seemed too shrill and too alarmist. Before a single Watergate revelation—and indeed before the break-in that would give the official Nixon encroachment on civil liberties its name—Douglas wrote:

> [W]e are currently in the throes of another national seizure of paranoia, resembling the hysteria which surrounded the Alien and Sedition Acts, the Palmer Raids, and the McCarthy era. Those who register dissent or who petition their governments for redress are subjected to scrutiny by grand juries, by the FBI, or even by the military. Their associates are interrogated. Their homes are bugged and their telephones are wiretapped. They are befriended by secret government informers. Their patriotism and loyalty are questioned.
>
> When the Executive attempts to excuse these tactics as essential to its defense against internal subversion, we are obliged to remind it, without apology, of this Court's long commitment to the preservation of the Bill of Rights from the corrosive environment of precisely such expedients.[45]

His sensitivity to the climate in which a truly free people live and his long commitment to see that such a climate flourishes in this country led him early to the "injudicious" chastizing of an overreaching chief executive.

Less appreciated, but essential to the vigorous demand that the Bill of Rights, especially the first amendment, be a vital force in American society, was his rejection of the so-called "passive virtues" that allow judges to avoid constitutional questions. As the name "passive virtues" suggests, these are doctrines that excuse the Court from acting.[46] Their application often means that repressive state legislation is allowed to achieve its intended purpose. Douglas realized that delays in vindicating rights of freedom of expression often mean that these rights are lost.[47]

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42. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting as a fundamental right); Gray v. Sanders, 372 U.S. 368, 381 (1963) ("one person, one vote").

43. *See* Levy v. Louisiana, 391 U.S. 68 (1968); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Skinner v. Oklahoma, 316 U.S. 535 (1942). *See* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. REV. 716 (1969).

44. *See* Papachristou v. Jacksonville, 405 U.S. 156 (1972).

45. United States v. United States Dist. Ct., 407 U.S. 297, 329–32 (1972) (concurring opinion).

46. A. BICKEL, THE LEAST DANGEROUS BRANCH ch. 4 (1962).

47. *Cf.* Younger v. Harris, 401 U.S. 37 (1971); Boyle v. Landry, 401 U.S. 77 (1971) (Justice Douglas' dissenting opinion, 401 U.S. at 58, applied to both cases).

The longer the Court waits before declaring a law an infringement on freedom of expression, the longer the law serves as an inhibiting force in the community, and the longer minorities fear its selective enforcement. No abstract concept of federalism would ever have been sufficient for Douglas to conclude that an individual claimant must wait additional years (assuming the money and the perseverance) to have a constitutional claim vindicated.[48] For Douglas that was a system of mindless abstractions, not one that offered equal justice under law.

To comprehend problems and seek legal solutions a man must know the society in which he lives. Douglas, like no other Justice, made every effort to understand his society. He read voraciously and traveled extensively. He sought out all types of people—the hobo riding the rails, the lonely mountaineer, the small businessman, the civil servant—and he listened as they told him their goals and aspirations. Answers to constitutional questions would not necessarily be found in text, precedent, historical practice, or narrowly focused intent. He believed in the need to broaden the focus, and his opinions occasionally relied less on the Constitution than on the statement of the ideas and ideals of the best of our culture: among them Thomas Jefferson,[49] Abraham Lincoln,[50] Walt Whitman,[51] and William Shakespeare.[52]

Douglas will be the easiest of men to remember. To remember him physically is to remember the whole man: large, rugged, a full head of hair with a cowlick that evaded control, and steel blue eyes as pure as the wilderness he loved so much. His understanding of what it means to be free, his highest ideal, survives him as an inspiration to us all.

> There is an eagerness, touched at times with tenseness, as man moves ahead into the unknown. Walking the wilderness is indeed like living. The horizon drops away, bringing new sights, sounds, and smells from the earth. When one moves through the forests, his sense of discovery is quickened. Man is back in the environment from which he emerged to build factories, churches, and schools. He is primitive again, matching his wits against the earth and sky. He is free of the restraints of society and free of its safeguards too.[53]

48. *See* Cameron v. Johnson, 390 U.S. 611, 622 (1968) (dissenting opinion); Harrison v. NAACP, 360 U.S. 167, 179 (1959) (dissenting opinion).
49. *See* Gray v. Sanders, 372 U.S. 368, 381 (1963) (Declaration of Independence).
50. *See Id.* (Gettysburg Address).
51. *See* Papachristou v. Jacksonville, 405 U.S. 156, 164 (1972) ("Song of the Open Road").
52. *See* Levy v. Louisiana, 391 U.S. 68, 72 n.6 (1968) (*King Lear*).
53. Of Men and Mountains, *supra* note 24, at x.

We will sorely miss the leadership of this lone man who matched our mountains.[54]

54. And methinks our Great Fate, from the hills to the sea,
Has sent forth this call to the years yet to be:—
Bring me men to match my mountains, . . .
S. Foss, *The Coming American*, in WHIFFS FROM WILD MEADOWS 253, 260 (1895).