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On June 17, 1953, Mr. Justice Douglas granted a stay of execution for Julius and Ethel Rosenberg. Two days earlier the Supreme Court, on the eve of adjournment, had refused to grant any further stay.[1] The Rosenbergs had appeared before the Court seven times over a period of nine months. In addition, their many applications for review had been given painstaking consideration by the Chief Justice as well as by several individual justices.[2]

The point of law on which Mr. Justice Douglas granted the stay was the applicability to the proceedings against the Rosenbergs of the penal provisions of the Atomic Energy Act of 1946. The point was raised by one Edelman, a stranger to the Rosenbergs but no stranger to the United States Supreme Court.[3] The Attorney General, outraged by Douglas' unexpected move, asked the Supreme Court to meet at once in special session. Although the justices had already begun to scatter on their vacations, the Chief Justice recalled them to Washington. The special term convened with the approval of all the associate justices except Mr. Justice Black. The Court sat on June 18 to hear oral argument; the decision and several opinions were handed down on June 19.

All of the justices were in agreement that Mr. Justice Douglas was within his right and power in issuing the stay. Six of them, however, without endorsing the wisdom or appropriateness of a death sentence, maintained that the execution was fully covered by law — and so they vacated the stay. Justices Frankfurter and Black entered separate dissents. Both stated that they considered the time allowed for oral argument and subsequent determination inadequate. Mr. Justice Douglas also dissented. His simple explanation is characteristic of his judicial philosophy: "I know deep in my heart that I am right on the law. Knowing that, my duty is clear."[4]

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[1]Rosenberg v. United States, 345 U.S. 989 (1953).

[2]For a review of the judicial history of the case see Rosenberg v. United States, 346 U.S. 273 (1953).

[3]See Edelman v. California, 344 U.S. 357 (1953).

[4]Rosenberg v. United States, 346 U.S. 273, 313 (1953).

APPOINTMENT TO THE BENCH

William Orville Douglas was appointed to the United States Supreme Court by the late President Roosevelt in 1939 to succeed Mr. Justice Brandeis. He was then forty-one years old, the youngest Supreme Court appointee since Mr. Justice Story. His previous experience in public office was in the Securities Exchange Commission. He had initially come to Washington on leave of absence from Yale Law School, where he was Sterling Professor of Law.

It is interesting to note that the appointment was viewed somewhat askance by the left wing. *The Nation,* for example, commented, "We wonder how hardy Mr. Douglas's liberalism would prove to be in the cold isolation of the Supreme Court."[5] *The Nation* was suspicious of this corporation law expert who had so successfully used a "hand-in-hand technique" in the adjustment of Wall Street to the Securities Exchange regulations.

Senator Frazier talked for two days in the Senate against confirmation of the appointment. The chairman of SEC had vigorously attacked the New York Stock Exchange only the day before President Roosevelt laid the nomination before the Senate. The Senator recalled that until the denunciation, so fortuitous politically, SEC had operated very smoothly on the Washington-Wall Street axis; he noted in particular the close personal relationship between President Martin of the Stock Exchange and Chairman Douglas of SEC. He found even more damaging the facts that Douglas had shown no marked interest in the current issues on agriculture and labor and that his views on civil liberties were unknown.[6]

Senator Maloney, speaking on behalf of Douglas, explained that Douglas had a special ability to draw the co-operation of business; under his chairmanship SEC had not found it necessary to fight compliant corporations. On the matter of civil liberties Senator Maloney spoke firmly: "I know that there is no one within or without the Senate who has a greater concern for the civil liberties of this nation than has Mr. Douglas."[7] The nomination was confirmed 62 to 4.

It seems fair to conclude that the appointment of Douglas to the Supreme Court, though not actually displeasing, was somewhat dis-

[5] 148 The Nation 278 (1939).
[6] 84 CONG. REC. 3706 (1939).
[7] *Id.* at 3782.

appointing to the liberals of the 1930's. His field of specialization in the Yale Law School was corporation law; his experience as a lawyer had been mainly with the famous "Cravath" firm in New York, whose clientele included some of the biggest names in American finance, commerce, and industry.

His academic colleagues, however, had some prescience of what "Bill Douglas" might be like on the Supreme Court. Professor Karl Llewellyn of the Columbia Law School pointed out that Douglas was the first justice on the Supreme Court to be schooled in the modern human approach to law. Arthur L. Corbin of the Yale Law faculty remarked, ". . . whatever comes up, Bill Douglas will pass judgment of his own mind, without regard to man, God, or devil, and he will make up his mind as he sees what is legally right. He will think of rules that will work, of applying the best that there is in human experience. He is a square shooter with an able and a reasonable mind."[8]

Douglas was one of the pioneers in the functional approach to law which was "The New Yale Program" in the 1930's. As a professor of corporation law he taught his students the importance of empiricism. He rejected categorical thinking and turned his classes toward factual analysis of social and economic forces, "from static theology to postulates stated in terms of human behavior."[9] His lectures in exposition of case law and business practice were drawn from a broad background of politics, economics, government, and psychology. Law for him was a dynamic, vital, social science.

On the Court Mr. Justice Douglas continued this legal realism through an earthy, practical approach to every case. For example, although no man on the Court distrusted more than he the practices of "big business," he was impelled to dissent in *Standard Oil Company of California v. United States.*[10] The Court sustained under the Clayton Act an injunction prohibiting Standard Oil from entering into exclusive supply contracts for petroleum products and automobile accessories with independent dealers. Douglas felt that these buying agreements were actually the means of keeping small and local businesses alive and that the injunction would merely provoke the big oil companies into building their own chains of service stations. "Our

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[8]N.Y. Times, March 26, 1939, §8, pp. 4, 21.

[9]Douglas, *A Functional Approach to the Law of Business Associations,* 23 ILL. L. REV. 673 (1928).

[10]337 U.S. 293 (1949).

choice," he explained, "must be made on the basis not of abstractions but on the realities of modern industrial life."[11]

Stare Decisis and Flexibility

Douglas' brief experience as a practicing lawyer made him somewhat cynical of the legal profession. He observed that too often the lawyer served as high priest to finance and industry and too seldom acted as justice and guardian of the public interest. He thought also that the courts gave comfort and confidence to those whose wealth came from manipulation and appropriation of other peoples' money. His research on bankruptcy and reorganization led him to believe that the real enemies of the public frequently were the corporation lawyers who acted as go-betweens for the investment houses and business enterprises.[12] He charged bar and bench alike with resistance to basic change, with opposition to any alteration of the so-called ancient absolutes.[13]

Years later, when a justice on the Court, Douglas amplified his views on stare decisis. He recognized that the law should not be susceptible to whim or caprice: "It must have the sturdy qualities required of every framework that is designed for substantial structures."[14] He conceded that stare decisis offers stability to society: "It is a strong tie which the future has to the past."[15] Uniformity and certainty are desirable expedients in law; but outworn concepts which no longer fit the facts must be vacated. The judge should fit his decision to the facts; if he cannot find the proper precedents he must create new precedents.

As professor of law at Yale Douglas showed little interest in public law. But his experience in public administration with SEC, and his association in Washington with the group of young lawyers that acted as "privy council" to the White House, gave him new perspectives in government and law. An ardent New Dealer, believing with Roosevelt that the American people have a rendezvous with destiny, Douglas was profoundly shocked by the Supreme Court's use of stare decisis to obstruct "the dynamic component of history."[16]

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[11] *Id.* at 320.

[12] Douglas, *The Lawyer and the Federal Securities Act*, 3 Duke B.A.J. 66 (1935).

[13] Douglas, *The Lawyer and the Public Service*, 26 A.B.A.J. 633 (1940).

[14] Douglas, *Stare Decisis*, 49 Col. L. Rev. 735 (1949).

[15] *Id.* at 736.

[16] *Id.* at 737.

Looking realistically at the role of the judge, Mr. Justice Douglas declared: "Precedents are made or unmade not on logic and history alone. The choices left by the generality of a constitution relate to policy."[17] The "Roosevelt Court" in little over a decade would reverse nearly thirty cases in constitutional law. Douglas would be a leading spirit in this remaking of constitutional history. As he saw it, the Court was but removing the gloss that the previous justices had laid over the original document. He considered the return of governmental power over social and economic affairs and the broad extension of national authority quite consonant with the interpretations of that great chief justice, John Marshall. That constitutional law was unsettled and in a state of flux did not disturb him. The Constitution "must never become a code which carries the overtones of one period that may be hostile to another."[18]

Socio-Economic Philosophy

When Chief Justice Stone died Mr. Justice Douglas wrote his eulogy in the *Columbia Law Review*[19] and in the *California Law Review*.[20] Douglas had long been an admirer of Harlan Stone, first as his student in the Columbia Law School, later as a colleague on the Columbia law faculty, and finally as his associate on the Supreme Court. He rated Stone one of the very best law teachers he had ever known; in particular he respected the keen, precise mind which was always skeptical of absolutes and inquisitive as to origins of principles. Stone's courses at Columbia were in the field of private law, which does not have the reach of constitutional law. But when the law professor went to the bench he moved surely into the tradition of Holmes and Brandeis. As Chief Justice, Stone could not act as advocate for any class, party, or race but administered equal justice under the law. Yet it was true of him, as of all the Court, remarked his junior associate, that "Judges are human. The social philosophy which they had before they ascended the bench is not suddenly sloughed off."[21]

Certainly Mr. Justice Douglas took his social philosophy with him to the bench, where it has been the steadfast framework of his

[17] *Id.* at 739.
[18] *Id.* at 737.
[19] *Chief Justice Stone*, 46 Col. L. Rev. 693 (1946).
[20] *Harlan Fiske Stone — Teacher*, 35 Calif. L. Rev. 4 (1947).
[21] Douglas, *Chief Justice Stone*, 46 Col. L. Rev. 693, 694 (1946).

judicial decisions. Douglas has always been conscious of the fact that he was chosen to succeed Louis Brandeis. The succession was spiritual as well as physical. Brandeis on and off the Court fought "the curse of bigness"; so also has Douglas, who makes an equation of size and power, be it in government or business. Thus he remarked in *United States v. Paramount Pictures:* "[S]ize carries with it an opportunity for abuse. And the fact that the power created by size was utilized in the past to crush or prevent competition is potent evidence that the requisite purpose or intent attends the presence of monopoly power."[22]

Like Brandeis, Douglas hits hard at all monopoly, especially the "giants of industry," who he fears would transform our democratic people into a nation of clerks. Douglas, in cases involving the Sherman Act, is a judge to be feared by all combinations in restraint of trade. His dissent in *United States v. Columbia Steel Co.* illustrates his main socio-economic thesis:[23]

> "We have here the problem of bigness. Its lesson should by now have been burned into our memory by Brandeis. *The Curse of Bigness* shows how size can become a menace — both industrial and social. It can be an industrial menace because it creates gross inequalities against existing or putative competitors. It can be a social menace — because of its control of prices. Control of prices in the steel industry is powerful leverage on our economy. For the price of steel determines the price of hundreds of other articles. Our price level determines in large measure whether we have prosperity or depression — an economy of abundance or scarcity. . . . In final analysis, size in steel is the measure of the power of a handful of men over our economy. . . . [A]ll power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. . . . That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it."

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[22]334 U.S. 131, 174 (1948).
[23]334 U.S. 495, 535 (1948).

The dissent in *Columbia Steel* is also illuminative of the justice's predilection toward regionalism rather than nationalism. For all his years of public experience in the East, Douglas in private life is a Westerner. Thus he points out that he might have viewed the proposed purchase of Consolidated Steel in California somewhat differently had the purchaser been an independent west coast producer instead of United States Steel:[24]

> "The purchase might then be part of an intensely practical plan to put together an independent western unit of the industry with sufficient resources and strength to compete with the giants of the industry. Approval of this acquisition works in precisely the opposite direction. It makes dim the prospects that the western steel industry will be free from the control of the eastern giants."

Economic Liberalism

When Mr. Justice Douglas first came to the Court his interests were still focused chiefly upon the financial and business problems which he had considered as a professor of corporation law and actually dealt with as administrator for SEC.[25] In the 1930's it was the greater part of "liberalism" for the Roosevelt Court to indulge in a heavy presumption of constitutionality for all legislation regulating business and social affairs. Over many years the Supreme Court had not only acquiesced in the triumph of the business community in American government but had given strong constitutional sanction to the political position of vested interests. Efforts of state legislatures to experiment with economic regulation in the form of prescribing hours of labor, conditions of labor, minimum wages, prohibiting child labor, or requiring certificates of convenience and necessity were nullified by Supreme Court decisions as depriving persons, usually corporations, of liberty or property without due process of law. In vain the liberals quoted Justice Waite: "For protection against abuse by legislatures the people must resort to the polls, not to the courts."[26]

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[24]*Id.* at 539.

[25]By the late 1940's, however, Douglas was increasingly concerned with the issues of civil liberties, especially with the problems which cluster around the First, Fourth, and Fifth Amendments. In this area he was particularly influenced by the tradition of Holmes; perhaps even more notable is his close association with Justice Black.

[26]Munn v. Illinois, 94 U.S. 113, 134 (1876).

The "New Supreme Court," which by 1940 included Black, Frankfurter, Reed, Murphy, and Douglas, with striking rapidity began to operate on the laissez faire philosophy that had become so embedded in constitutional law after 1900. *West Coast Hotel Co. v. Parrish*[27] overruled *Adkins v. Children's Hospital*,[28] which forbade legislation establishing minimum wages. *Sunshine Anthracite Coal Co. v. Adkins*[29] virtually overruled *Carter v. Carter Coal Co.*[30] and thereby opened the door to federal regulation of mining. *United States v. Darby*[31] in upholding minimum wage levels in effect overruled *Hammer v. Dagenhart*[32] on child labor. And so it went. In the cases that marked this trend the particular contribution of Mr. Justice Douglas was the opinion in *Olsen v. Nebraska*,[33] which overruled *Ribnik v. McBride*[34] on the matter of price fixing. Declaring that the Court had at long last departed from the philosophy and approach of the majority in the *Ribnik* case, he urged that notions of public policy embedded in earlier Court decisions not be read into the Constitution. "Since they do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states is to be determined."[35]

Civil Liberties

While the liberals on the Court are inclined to exercise judicial restraint in cases involving the constitutionality of economic regulation, they are much more likely to review legislation affecting civil rights. When Douglas first went on the Court economic problems were paramount and civil rights were rarely at issue. The dichotomy of policy based on philosophical differentiation of "property rights" and "human rights" was not yet conspicuous, although it had been suggested by Chief Justice Stone in his footnote four in *United States v. Carolene Products*:[36]

[27]300 U.S. 379 (1937).
[28]261 U.S. 525 (1923).
[29]310 U.S. 381 (1940).
[30]298 U.S. 238 (1936).
[31]312 U.S. 100 (1941).
[32]247 U.S. 251 (1918).
[33]313 U.S. 236 (1941).
[34]277 U.S. 350 (1927).
[35]Olsen v. Nebraska, 313 U.S. 236, 247 (1941).
[36]304 U.S. 144, 152 (1937).

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."

The "age of the common man," hailed so joyously by the New Deal liberals of the 1930's, had produced something of a political Frankenstein, a "majoritarian" democracy prone to override the rights of minorities and to disregard the liberties of the individual. The true liberal is of course genuinely distressed when the operation of popular government tends not only to equalize but to standardize our way of life. Thus Mr. Justice Black, a pragmatic New Dealer but also a natural individualist, reacts with a constitutional interpretation that gives a preferred position to free thought and liberty of conscience. Douglas joins with Black in belief in the absolute priority of the First Amendment. In *Beauharnais v. Illinois*,[37] which involved group libel under an Illinois statute, Douglas in a strong dissent explains his judicial position:[38]

> "In matters relating to business, finance, industrial and labor conditions, health and the public welfare, great leeway is now granted the legislature, for there is no guarantee in the Constitution that the *status quo* will be preserved against regulation by government. Freedom of speech, however, rests on a different constitutional basis. The First Amendment says that freedom of speech, freedom of press, and the free exercise of religion shall not be abridged. That is a negation of power on the part of each and every department of government. Free speech, free press, free exercise of religion are placed separate and apart; they are above and beyond the police power; they are not subject to regulation in the manner of factories, slums, apartment houses, production of oil, and the like."

Just as the "Old Court" could be charged with glossing the Constitution with the theories of a classical economy, so it might be said that Black and Douglas have tried to improve upon the Constitution

[37]343 U.S. 250 (1952).
[38]*Id.* at 286.

with their own values of human rights. They not only give a preferred position to the substantive rights granted by the First Amendment but read into the Fourteenth Amendment a guarantee in the state courts of those procedural rights which are specified for the federal courts. In *Adamson v. California,* involving self-incrimination, Black's dissent,[39] in which he was joined by Douglas, was a historical essay to show that the Fourteenth Amendment was intended to make the whole Bill of Rights applicable to the states. Murphy and Rutledge agreed with Black and Douglas, with the discerning deviation, however, that the Fourteenth Amendment is not entirely or necessarily to be limited by the Bill of Rights. In *Bute v. Illinois,*[40] concerning right to counsel, the same four dissented, with Douglas this time speaking for all: "I do not think the constitutional standards of fairness depend on what court an accused is in. I think that the Bill of Rights is applicable to all courts at all times."[41] The proposition, however, has never been accepted by the majority of the Court that the Fourteenth Amendment includes all of the guarantees of the first ten amendments or that it is limited by them.

On still another point of historical interpretation of the Fourteenth Amendment Black and Douglas have agreed but have not been able to persuade the majority of the Court to their opinion. Mr. Justice Black, after careful research, came up with an exciting dissent in 1938: "I do not believe the word 'person' in the Fourteenth Amendment includes corporations."[42] In *Wheeling Steel Corporation v. Glander*[43] Douglas, in a dissent joined by Black, recalled the early cases on the Fourteenth Amendment to show that it was not originally intended or soon anticipated that corporations would be covered by the equal protection and due process clauses of the Fourteenth Amendment. Douglas concluded:[44]

> "It may be most desirable to give corporations this protection from the operation of the legislative process. But that question is not for us. It is for the people. If they want corporations to be treated as humans are treated, if they want to grant corpora-

[39]332 U.S. 46, 68 (1947).
[40]333 U.S. 640 (1948).
[41]*Id.* at 678.
[42]Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 85 (1938).
[43]337 U.S. 562 (1949).
[44]*Id.* at 581.

> tions this large degree of emancipation from state regulation, they should say so."

To date, however, only Black and Douglas have followed this particular policy in constitutional interpretation.

No one can call Douglas one of the "hollow men" of our times. He writes his convictions into all of his opinions. Regardless of personal views as to those convictions, his intellectual integrity and moral strength command respect.

The "preferred position" of the First Amendment is truly a matter of higher law to Mr. Justice Douglas. In the first flag salute case, *Minersville School District v. Gobitis*,[45] both Douglas and Black concurred with Frankfurter, whom they respected as a long-standing champion of civil rights. Frankfurter thought it was more important that the state have power to evoke a unifying sentiment of patriotism than that the individual be absolutely protected in his religious liberty. He cloaked his opinion with the argument of democracy that had been so persuasive to the economic liberals of the 1930's: "To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people."[46]

The press, the professors, and the lawyers were sharply critical of the Frankfurter opinion, but state legislatures and local councils relied on the decision to enforce Americanism in the schools. Murphy, Black, and Douglas were soon deeply disturbed by the repercussions of the decision.

Less than a year later in *Jones v. Opelika*,[47] involving the requirement of a municipal license for the peddling of books by Jehovah's Witnesses, these three made public confession of their repentance. "Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided."[48]

Shortly thereafter the appointment of Justice Rutledge to the Court turned the minority to a majority. The question of whether a municipality could demand a license for Jehovah's Witnesses arose

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[45]310 U.S. 586 (1940).
[46]*Id.* at 610.
[47]316 U.S. 584 (1942).
[48]*Id.* at 623.

again in *Murdock v. Pennsylvania.* Douglas spoke for the Court:[49]

> "The hand distribution of religious tracts is an age-old form of missionary evangelism — as old as the history of printing presses.
>
> ". . .
>
> "The fact that the ordinance is 'nondiscriminatory' is immaterial. . . . Freedom of press, freedom of speech, freedom of religion are in a preferred position."

A few weeks later, in *West Virginia State Board of Education v. Barnette,*[50] Mr. Justice Jackson, speaking for the new majority, overruled the *Gobitis* decision. Black, Douglas, and Murphy concurred. Frankfurter dissented, saying, "Of course patriotism cannot be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation."[51] But the "liberals" on the Court had modified their own formula of judicial restraint.

More recently the issue of religious establishment has been raised with respect to public education. In *Everson v. Board of Education*[52] the Court upheld a state statute which allowed the local school board to reimburse parents for money spent for public transportation to schools, including Catholic parochial schools. Black, who delivered the opinion for the Court, saw no breach in the wall between church and state. "[The legislation] does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[53] Douglas joined in this decision; Jackson, Frankfurter, Rutledge, and Burton dissented.

In *Illinois* ex rel. *McCollum v. Board of Education*[54] Black again spoke for the Court. The case concerned released time for religious instruction authorized in the public schools of Champaign, Illinois. The Court found that state taxes were being used to disseminate religious doctrines in public schools and that the state was offering sectarian groups invaluable aid by providing pupils for religious classes through its compulsory public school machinery. Douglas

[49] 319 U.S. 105, 108, 115 (1943).
[50] 319 U.S. 624 (1943).
[51] *Id.* at 670.
[52] 330 U.S. 1 (1947).
[53] *Id.* at 18.
[54] 333 U.S. 203 (1948).

associated himself with this decision. Frankfurter, Jackson, Rutledge, and Burton also concurred, a position consistent with their dissent in the *Everson* case. Only Reed dissented.

In *Zorach v. Clauson*[55] Justices Black and Douglas parted company, a rare occurrence. The question of released time for religious instruction was again considered, this time in the New York City public schools. In Champaign the religious classes were ordinarily held in the public school buildings; in New York City the pupils were dismissed to receive religious instruction in their own churches. Douglas, writing the majority opinion, upheld the New York system:[56]

> "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State.
>
> ". . .
>
> "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary.
>
> ". . .
>
> "We cannot read into the Bill of Rights such a philosophy of hostility to religion."

Black, Frankfurter, and Jackson each wrote separate dissents.[57]

From the outset Black and Douglas have been in almost complete agreement, whether in the heyday of the Roosevelt Court, when they were with the majority on social legislation, or more recently, when they are likely to be determined dissenters on civil rights. Douglas now holds the all-time record for dissents, over fifty during the last term.[58] Holmes, "the great dissenter," never dissented more than sixteen times in any one term. On the present Court, however, dissenting is the vogue. Dissents have been written in approximately two thirds of the cases decided during the last several terms. Nearly always Black and Douglas, and frequently Frankfurter, stand out as articulate champions of unpopular minorities. In these totalitarian times it takes courage to speak for an unpopular minority.

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[55]343 U.S. 306 (1952).

[56]*Id.* at 312, 313, 315.

[57]*Id.* at 315, 320, 323, respectively.

[58]It should also be noted that the hard-working Mr. Justice Douglas usually writes more majority opinions than any other justice.

Communism and Totalitarianism

In a lecture delivered at Brandeis University in January 1952 Mr. Justice Douglas exposed "The Black Silence of Fear."[59] The speech, which was widely reported, subsequently received the Lauterbach Award as the most substantial contribution to the cause of civil liberties during the year. Douglas, who had been on one of his round-the-world expeditions, on returning to the United States was[60]

> ". . . shocked at the arrogance and intolerance of great segments of the American press, at the arrogance and intolerance of many leaders in public office . . . . [T]hought is being standardized, . . . the permissible area for calm discussion is being narrowed, . . . the range of ideas is being limited . . . .
>
> ". . .
>
> "Irresponsible talk by irresponsible people has fanned the flames of fear. Accusations have been loosely made. Character assassinations have become common. Suspicion has taken the place of good-will.
>
> ". . .
>
> "This fear has stereotyped our thinking, narrowed the range of free public discussion, and driven many thoughtful people to despair.
>
> ". . .
>
> "The great danger of this period is not inflation, nor the national debt, nor atomic warfare. The great, the critical danger is that we will so limit or narrow the range of permissible discussion and permissible thought that we will become victims of the orthodox school."

Sitting on the Court, Douglas has seen the ultimate sanction given to political uniformity and social conformity in the name of national security. In the cold war against communism "majoritarian" democracy has tended to adopt the tactics of totalitarianism. Douglas has voiced his objections again and again. In *Dennis v. United States*[61] the majority of the Court sustained the conviction of the Communist Party leaders under the Smith Act. Only Black and

[59]Reprinted in N.Y. Times, Jan. 13, 1952, Sec. VI, p. 7.
[60]*Id.* at 7, 37, 38.
[61]341 U.S. 494 (1951).

Douglas dissented. Douglas spoke in the tradition of Holmes:[62]

> "Full and free discussion has indeed been the first article of our faith. . . . We have counted on it to keep us from embracing what is cheap and false; we have trusted the common sense of our people to choose the doctrine true to our genius and to reject the rest.
>
> ". . .
>
> "The First Amendment makes confidence in the common sense of our people and in their maturity of judgment the great postulate of our democracy. Its philosophy is that violence is rarely, if ever, stopped by denying civil liberties to those advocating resort to force. . . . The political censor has no place in our public debates. Unless and until extreme and necessitous circumstances are shown, our aim should be to keep speech unfettered and to allow the processes of law to be invoked only when the provocateurs among us move from speech to action."

Douglas likewise refuses to concur in the spreading doctrine of guilt by association. In *Joint Anti-Fascist Refugee Committee v. McGrath*[63] Mr. Justice Burton, speaking for the majority of the Court, declared that organizations listed as subversive by the Attorney General have a right to judicial review. Douglas concurred on procedural grounds but could not refrain from amplifying the constitutional issues, adding a typical touch of his political philosophy: "In days of great tension, when feelings run high, it is a temptation to take short cuts by borrowing from the totalitarian techniques of our opponents. But when we do, we set in motion a subversive influence of our own design that destroys us from within."[64]

As to the validity of the requirement of the loyalty oaths which have cropped up everywhere in the public service Douglas is likewise judicially skeptical. "I have never been able to accept the recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights."[65] This view compelled his dissents in *Garner v. Board of Public Works*,[66] involving municipal employees

[62] *Id.* at 584, 590.
[63] 341 U.S. 123 (1951).
[64] *Id.* at 174.
[65] Adler v. Board of Educ., 342 U.S. 485, 508 (1952).
[66] 341 U.S. 716, 731 (1951).

in California, and *Adler v. Board of Education,*[67] concerning New York City schoolteachers.

To Douglas the First Amendment is absolute. In *Terminiello v. Chicago,*[68] speaking for the Court in upholding the right of a Roman Catholic priest to stir up an angry mob with phrases fostering fascism and anti-Semitism, he said, "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."[69] In *Feiner v. New York* his dissent covered the harangue of a university student who called President Truman "a bum" and likened the American Legion to a Nazi Gestapo: "When a speaker mounts a platform it is not unusual to find him resorting to exaggeration, to vilification of ideas and men, to the making of false charges."[70] Dissenting in the *Beauharnais* case, he would have extended the right of free press to a lithograph which was offensively anti-Negro:[71]

> "My view is that if in any case other public interests are to override the plain command of the First Amendment, the peril of speech must be clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster."

In *United States v. Rumely,* in a concurring opinion, he pointed up the constitutional issue which Frankfurter had carefully avoided: "Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and over the press. Congress could not do this by law."[72] In *Poulos v. New Hampshire* the majority were willing to accept a reasonable requirement for a license to speak in public parks; Douglas dissented:[73]

> ". . . when a legislature undertakes to proscribe the exercise of a citizen's constitutional right to free speech, it acts lawlessly . . . .
> "The command of the First Amendment (made applicable to

[67]342 U.S. 485, 508 (1952).
[68]337 U.S. 1 (1949).
[69]*Id.* at 4.
[70]340 U.S. 315, 331 (1951).
[71]Beauharnais v. Illinois, 343 U.S. 250, 284 (1952).
[72]73 Sup. Ct. 543, 551 (1953).
[73]73 Sup. Ct. 760, 775 (1953).

> the States by the Fourteenth) is that there shall be *no* law which abridges those civil rights. The matter is beyond the power of the legislature to regulate, control, or condition."

In every case the position of Mr. Justice Douglas is predictable; he never deviates to favor the right or the left or to placate public opinion.

Admirers of Bill Douglas point out with pride — his critics view with alarm — the fact that he uses his judicial position to implement his personal philosophy. The American way is for him a free society of free men. Freedom to him means above all else freedom of thought and expression. In the face of official witch hunts and popular hysteria he remains calm but adamant: "Our real power is our spiritual strength, and that spiritual strength stems from our civil liberties. If we are true to our traditions, if we are tolerant of a whole market place of ideas, we will always be strong."[74] This is no cliche or labeled thinking. This is what the man believes and how the justice acts — no matter how blow the winds of public opinion. "Judges," he said once in a contempt of court case, "are supposed to be men of fortitude, able to thrive in a hardy climate."[75] Possessed of shrewd intelligence, driving energy, an indomitable will, and immense courage, William Orville Douglas does not always exercise judicial restraint when he feels that the freedom of his country calls for positive policy from the highest court.

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[74]Address by William O. Douglas, Philadelphia Bulletin Forum, Mar. 3, 1952.
[75]Craig v. Harney, 331 U.S. 367, 376 (1947).

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