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Book Reviews: The Court Years: 1939-1975

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BOOK REVIEW

THE COURT YEARS: 1939-1975. By William O. Douglas. Random House, New York, New York. 1980. Pp. 434. Reviewed by Seth A. Davidson.†

The 1970's were marked by a growing public awareness of the role of law and lawyers in shaping American society. In particular, led by Watergate and the rise of single-issue politics, attention focused more sharply on the behind-the-scenes activities of the decision makers. Thus, it is not surprising (especially when one considers the legal profession's traditional fascination with itself) that two of the more eagerly awaited books in recent years have purported to provide an inside look at that highest altar of the law — the United States Supreme Court. The first of these books, Woodward and Armstrong's *The Brethren*,¹ achieved best-seller status. Yet, in the long-run, it disappointed those who expected it to lay bare the inner workings of the Court. Now, with the publication of the long-awaited second volume of Justice William O. Douglas' autobiography, *The Court Years: 1939-1975*, such expectations again have gone unfulfilled.

In many respects, *The Court Years* is more disappointing than *The Brethren*. To be sure, Woodward and Armstrong trivialized the Court by substituting cocktail party level chatter for an understanding of institutional processes. But Douglas, who presumably knew better, has trivialized not only the Court but also his own undeniable accomplishments as a member of that tribunal.

In his classic work, *The Nature of the Judicial Process*, Benjamin Cardozo offered the following description of the limitations on the exercise of judicial power:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life."²

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1. B. WOODWARD & S. ARMSTRONG, *THE BRETHREN* (1979).

2. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1971).

Writing in 1921, Cardozo could hardly have dreamt that in depicting what a judge is not, he would, in large part, describe the man who would become the longest-sitting justice in the history of the United States Supreme Court.

William O. Douglas' life could have made a great autobiography. Writing in recognition of Douglas' achievement in serving on the Supreme Court longer than any other person, Earl Warren observed that

[i]f it is true, as said by de Tocqueville almost a century and a half ago, that in a period of time every public problem in American life eventually reaches the Supreme Court, certainly Justice Douglas has served through such a period, and he has written on every one of those problems without reservation or equivocation.³

Of course, it was more than his mere longevity on the Court that made the life of William O. Douglas so fascinating. Unlike most of his colleagues on the bench, Douglas was not content simply to opine on the problems of the day as they arose before the Supreme Court. He espoused his causes zealously and tirelessly, authoring some thirty books and countless speeches. Indeed, during his career, Douglas openly and passionately participated in the shaping of public issues to a greater degree than most elected politicians. And, to a greater degree than most politicians, Douglas found himself at the center of controversy, whether it was due to his outspoken political views or to his somewhat irregular personal life.

Douglas, therefore, had a unique vantage point from which to observe and comment upon the transformation of American society during his years on the Court — a period that stretched from the Depression through Watergate. Yet, *The Court Years* contains little in the way of insight or analysis. It is more a collection of anecdotes and memories and a rather messy collection at that.

To begin with, the book lacks a sense of organization. Chapters seem to have been thrown together randomly. People, events, and cases may be mentioned in one place, only to be cross-referenced to a later discussion halfway through the book. Douglas rarely orders his recollections in any chronological fashion.⁴ Most of the time, he rambles from one period to the next and then back again. Even a casual reader will find himself beset with a sense of déjà vu as the narrative frequently traces back over some previously covered issue or event. The absence of any thread of continuity is likely to scare off many readers at the outset.

3. 74 COLUM. L. REV. 342 (1974).

4. One exception is Chapter XIV, where Douglas discusses, seriatim, the six presidents who served while he was on the Court.

Adding to the book's stylistic shortcomings is Douglas' writing style. While Douglas, for all of his writing, was never known as a particularly compelling wordsmith, it is still surprising to find that *The Court Years* occasionally borders on the unreadable. For example, in discussing substantive due process, Douglas offers the following bit of confused composition:

In 1917 a state law was struck down providing that employment agents were not allowed to receive fees from workers for whom they found jobs, as it interfered with the agents' "liberty" protected by the Fourteenth Amendment. A minimum-wage law for women in the District of Columbia was likewise invalidated for that reason in 1923.⁵

The description of *Holtzman v. Schlesinger*⁶ (the Cambodian bombing case) is so garbled that most readers may have to try three or four times before they are able to figure out who stayed what and when.⁷

The book's technical sloppiness, which also includes miscitations and other errors, could have been corrected by more careful editing.⁸ However, the book's fundamental flaws arise from its tone and its substance. For these, responsibility must rest on Douglas' shoulders alone.

The tone of *The Court Years* is unmistakable, even to the point of being noted by the press.⁹ Throughout the book, Douglas comes across as snappish and arrogant — a sour, if not senile, old man. Yet, it is really no secret that Douglas could be abrasive. His massive egotism appeared in other books — most notably in *The Brethren* and, to a lesser degree, in *Go East Young Man*, the first volume of Douglas' autobiography.

In *The Court Years*, however, this egotism gives way to a disturbing pettiness. To be sure, some of Douglas' attacks are predictable: Richard M. Nixon is characterized as an "immoral man";¹⁰ and Spiro T. Agnew is said to have "Mafia-like tendencies."¹¹ Other caustic assertions, however, seem to come out of nowhere. For example, Douglas concludes that Felix Frankfurter suffered from a deeply felt sense of inadequacy that caused him, among other things, to attempt to humiliate the Court's pages.¹²

5. THE COURT YEARS at 46.

6. 414 U.S. 1316 (1973).

7. THE COURT YEARS at 235. In describing his actions on the Court, Douglas even lapses in and out of the first person. *E.g.*, *id.* at 95.

8. Possibly the best evidence of the lack of care taken by those who put the book together was the fact that, at least on the review copy, they did not even get the title right. This reviewer's edition reads "The Court Years: 1937-1975."

9. *E.g.*, Washington Post, Sept. 11, 1980, § A, at 1, col. 5-6.

10. THE COURT YEARS at 351.

11. *Id.* at 350.

12. *Id.* at 22-23.

He finds Harry S. Truman guilty of "abysmal ignorance" of world affairs.¹³ And Lyndon Johnson emerges at one point as the President whose conservation program "gave the heritage of America away to the fat cats and the official vandals who have despoiled us."¹⁴ In the end, Douglas seems compelled to seek out some flaw in virtually every individual whose position in history might threaten his own.

Furthermore, Douglas' polarized "we" vs. "them" approach leads him, on occasion, to play a little fast and loose with the record. One example involves, of all people, Richard Nixon. As a member of Congress in 1947, Nixon participated in the House Un-American Activities Committee's (HUAC) witch-hunt against Hollywood writers. At one point during the House's deliberations concerning contempt citations against the so-called "Hollywood Ten," Representative Rankin of Mississippi made a crude, thinly veiled anti-Semitic attack on a number of prominent Hollywood figures. Relating this incident, Douglas suggests that Nixon was the first to exploit Rankin's anti-Semitic innuendo.¹⁵ In fact, while Nixon was the next person to speak on the floor, he carefully avoided any reference to Rankin's tirade. Rather, Nixon cloaked himself in the mantle of "the law," arguing that, since being a Communist was not a criminal offense, the witnesses had no basis for objecting to HUAC's inquiry into their political beliefs.¹⁶ It would have been far more interesting if Douglas had described the episode more carefully and used it as a springboard for reflecting on Nixon's misconceived ideas concerning the constitutional rights of the individual vis-à-vis the government.

The reasons for Douglas' acrimony never clearly emerge. Certainly his growing isolation, both physically, due to illness, and philosophically, due to change in the Court's personality, played a role. Yet, *The Court Years* was begun in the 1960's, while the Warren Court was flourishing and Douglas had his health.¹⁷ Whatever the reason for his judgmental attitude toward others, Douglas never turns that same critical gaze inward. His own actions and motives go uninspected and, therefore, unexplained. The absence of any discussion of his controversial personal life, particularly his marriages, is likely to be viewed by many as a glaring omission.

In addition, so many of Douglas' observations focus on the

13. *Id.* at 291.

14. *Id.* at 318.

15. *Id.* at 341-42.

16. 93 CONG. REC. 10792 (1947).

17. See W. DOUGLAS, *GO EAST YOUNG MAN* at xi (1974). Douglas does not indicate when particular segments of *The Court Years* were first written. A somewhat cryptic footnote to the discussion of Lyndon Johnson indicates that the original version of that section was stolen in 1968, suggesting that, at least in part, Douglas relied on his contemporaneous accounts of events as well as his memory.

trivial and obvious that one begins to question his aptitude for judging other people's personalities. For example, Douglas' understanding of Lyndon Johnson, based on thirty years of friendship, consisted of the following unimpressive "insights": Johnson needed to be loved; he craved money and power; and he had a "barnyard quality" in his conversation.¹⁸ Nor does Douglas offer much in the way of new information or understanding regarding the Court. Indeed, one begins to suspect that the then-unpublished manuscript of *The Court Years* may have been one of Woodward and Armstrong's major sources in writing *The Brethren*.

Despite its failings, *The Court Years* is not without redeeming features. Some of Douglas' reflections on the Court and on his life are rather revealing. For example, Douglas suggests that the best legal argument made during his years on the bench was by Abe Fortas as counsel in *Gideon v. Wainwright*.¹⁹ He also offers a perfunctory, but nonetheless interesting, chapter regarding the impeachment efforts directed against him in 1970.

Nor is Douglas all malice. He attempts to play down his fabled disagreements with Felix Frankfurter and, in later years, with Hugo Black. Indeed, he includes both Frankfurter and Black on his "All-American" team of the seven most outstanding men with whom he served.²⁰ Douglas is particularly respectful of Black, whom he describes as being "true-blue, honest and never double-dealing."²¹ He even offers the intriguing theory that Black's reluctance during the latter part of his life to extend his otherwise absolutist first amendment stance in cases involving picketing and sit-in demonstrations grew out of Black's personal experience at the time of his nomination to the Court, when his house was picketed because of his Klan affiliation.²² Unfortunately, however, Douglas never expands on this thought, leaving the reader unaware both of the magnitude of the dramatic split that occurred in their views²³ and of the effect the split had on their personal relationship.

18. THE COURT YEARS at 312.

19. 372 U.S. 335 (1963); THE COURT YEARS at 187.

20. THE COURT YEARS at 42.

21. *Id.* at 8.

22. *Id.* at 20.

23. One of Hugo Black's biographers has described the emergence of the sit-in case dissents as "like lightning out of a summer sky." Dunne, *Hugo L. Black*, in 5 THE JUSTICES OF THE UNITED STATES SUPREME COURT 182 (L. Friedman ed. 1978).

Additionally, some aspects of the book should cheer those who favor breaching the wall of silence that has surrounded the Court's work for so long. Douglas' attempt to provide an "inside" view of the Court reinforces a fact that is often overlooked: strict legal principles are not necessarily the bottom line of many momentous Court rulings. The Court is composed of nine individuals, each with human foibles as well as strengths, each with human loyalties as well as prejudices, all of which inevitably shape the collective decision-making process.

The passions that inspired Douglas for so long — his love of the wilderness, his advocacy of peace, his devotion to equal rights and, above all, his belief in absolute freedom of speech — occasionally emerge in *The Court Years*. When they do, we are reminded of how fragile freedom is and how important it is for America to have a voice such as Douglas' represented on the Supreme Court. While, to borrow Cardozo's phrase, Douglas may have been a "knight-errant," there is much merit in his admonition: "We need be bold and adventuresome in our thinking to survive."²⁴ It is both ironic and sad that Douglas could not capture his own vision, his own "bold and adventuresome" spirit, in his final work.

24. *Adler v. Board of Educ.*, 342 U.S. 485, 511 (1952) (Douglas, J., dissenting).