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A TRIBUTE TO MR. JUSTICE DOUGLAS

STEVEN DUKE*

On November 12, 1975, Mr. Justice Douglas resigned as an active Associate Justice of the Supreme Court. Thus ended not only the longest but, in the minds of many, the most lustrous period of service on the Court.

Racked with pain in an arm and leg resulting from a stroke suffered almost a year before, he had characteristically hung on in the hope that his remarkable will and recuperative powers would win out as they have so many times before. But the demands of the Court’s business could not wait for nature’s healing powers, and realist that he is, he stepped aside.

It was my life’s greatest privilege to have served as the Justice’s law clerk in the 1959 Term, and to have counted him a friend. Yet writing a tribute to him on his retirement is as difficult as some of the tasks he gave me as his clerk. One strains for words that can reflect his incandescence, his elan, his courage and capacity for work; the complexities and paradoxes of his personality. Some comfort comes from the fact—which all who know him will acknowledge—that nothing he has written in his thirty books or his thousand-plus opinions, and nothing written about him, fully conveys the uniqueness or the greatness of the man. His essence is elusive and cannot be captured in a conventional verbal harness.

When casting about for historical comparisons, the mind comes upon such diverse characters as Holmes and Hemingway, Franklin and Thoreau, Altgeld and Sandburg. Douglas is reminiscent of all, yet as different from each as they were from each other. He can only be experienced, not described.

His is a highly disciplined mind that when at work moves at electric speed, devouring facts and ideas like a giant threshing machine, and concentrating simultaneously on several subjects. And as though they were seeds from the same machine, his pen pours forth a stream of opinions, books, speeches and articles on topics almost as diverse as life itself. It is an awesome, humbling, even fearsome thing to behold. Yet when the work is done, his fondness for fun appears as the sun after a heavy rain. A raconteur of easy wit and charismatic charm, he makes all around him feel warm and worthy, when moments before they had felt slow and stupid, mesmerized by his dynamic drive and brilliance.

The Justice’s opinions are delightfully denigrated by professors, because

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they do not laboriously rationalize the result with prior decisions and rest on broad generalizations. They are pithy and to the point. Many of them frankly rely less upon legal principles allegedly derived from past decisions than on beliefs about the state and direction of the country or the world. Like every intelligent judge, Mr. Justice Douglas believes that the nature of institutions and the quality and direction of our lives are relevant to judicial decision making, but he differs from most in that he puts his premises out front. The real reasons for his judgments are found in his opinions, and not obfuscated by pirouettes around precedents. Often, his are the only opinions containing a reference to the world outside the doors of doctrine. In short, the main defect in his opinions, from the perspective of academia, seems to be their honesty.

However history may hold his opinions, it is likely that Mr. Justice Douglas will be ranked as one of our greatest justices for the simple reason that he was right. About our basic liberties, he has been more often and more consistently right than any other justice in history. While serving under five Chief Justices and seven Presidents, more of his dissents have become law than those of any Justice; and, despite hyperbolic cries that the current Court is repealing the fourteenth amendment, it is all but certain that no Court in this century will attempt to return our Constitutional liberties to the shrivelled state they were in when Douglas’ judicial career commenced.

When he came on the Court in April, 1939, nearly half of the country was racially segregated by force of law. Police regularly ransacked homes and convicted the occupants with what they found. The problems of the poor were frequently solved by banishing them from town. The States were free to compel self-incrimination, to make unreasonable searches and seizures, to deny speedy trials, to inflict cruel and unusual punishments, to keep blacks out of schools and off juries and voting lists, to inflict double jeopardy, and to convict a penniless accused of a felony while denying him counsel. Douglas protested against these injustices, and hundreds more. In many instances, he denounced them in dissent after dissent before his protests were heeded. But when he retired, the bulk of his beliefs about the Bill of Rights had acquired not only respectability but acceptance by virtually the entire Court. That he dissented until the end should not obscure the fact that the major legal battles he waged have long been firmly and finally won.

He was right not merely or even mainly because he was blessed with one of the best brains ever to grace the Court, but because he loved and lapped up life, and thus learned about people, high and low, at home and in the Himalayas.

He learned how to conquer adversity, when as a youth he lost his
father and was stricken with polio, and again when a disastrous accident broke twenty-three ribs and ruined a lung. He learned about poverty by experiencing it. He learned about bureaucracies by helping to build one—the SEC, and he never stopped learning.

An internationalist of deep understanding and worldwide repute, he has probably been right about the course of the world and the solutions to its problems more consistently, over a longer period, than any expert in the State Department.

As everyone knows, he is a life-long conservationist. By his books, speeches, and marches to prevent obliteration of our natural beauty and wildlife, he may well have contributed more to our current concern about ecology than any living person. Few know as much about the conflicts between technology and conservation, about the dreadful costs of pollution and atomic fallout, or about the bounteous beauty of our remaining wilderness than he does.

I last visited Mr. Justice Douglas during a celebration of his thirty-five years on the Court. The cat-quick mind, the restlessness, the impish grin and the warm wit; the soft, boylike voice, the hint of shyness and the awesome extrusions of power and fearlessness were intact in all their contradictory colorations. His gait had slowed a bit since we last hiked the C & O Canal, but his energy and zest were undimmed. If his present illness can be overcome, he will conquer it. In any event, we shall be hearing more from him as he completes the second volume of his autobiography and looks for new mountains to climb.