

MR. JUSTICE DOUGLAS

*Steven Duke**

Conceiving of a Supreme Court without Douglas, J. dissenting is almost like trying to ring a clapperless bell, or watching hockey played without a puck. He has provided much of the Court's luster for as long as I have known that a Court existed.

This is not the time or the place for a careful canvass of his civil rights and civil liberties opinions, which number in the hundreds. It should be enough to note that when he became a Justice in April, 1939, the Bill of Rights had hardly been discovered by the Court. Criminal convictions were regularly obtained by arrests and searches on the flimsiest hope or suspicion, followed by fraudulent, coercive, incommunicado interrogations. The defendant thus treated was forced through the mockery of a trial where, if he was black, members of his own race were often excluded from the jury. His conviction could be obtained while denying him counsel, a transcript, and an appeal. Police and prosecutors could suppress and fabricate evidence, self-incrimination could be compelled, and the accused denied access to defense witnesses. He could even be refused the right to testify in his own behalf. Trial could be without a jury or an unbiased judge; double jeopardy and cruel and unusual punishments could be imposed; a speedy trial could be denied.

Nearly half the Nation, including the armed services, was racially segregated under the protection of law. Blacks were denied access to schools, trains, buses, restaurants, hotels, and voting lists.

More than any other Justice, Douglas courageously, correctly and relentlessly railed against these and other outrages. He did it through five Chief Justices, seven Presidents, three wars, Senator Joseph McCarthy, and at least three efforts to impeach him.

Many of my colleagues don't like his opinions; even, they say, when they accept his results. There is too much reliance upon the raw facts of life, generalities about human liberty and dignity, the tendencies and trends of unchecked officials, suspicion of a military unhobbled by civilian control, too much Magna Carta and American Revolution, too little lucubration over the dicta of other decisions.

But it is a judge's view of the nature of humankind, and of the institutions with which we surround and sometimes try to smother our-

*Professor of Law, Yale Law School. Law Clerk to Mr. Justice Douglas, 1959 Term.

selves that are the fodder from which decisions flow; not some mistake of an earlier Court, or a decision right for its time but wrong for the present. Mr. Justice Douglas is not unique in recognizing this, but he is almost alone in the consistency of his refusal to conceal it.

As Holmes said, the best test of truth is the power of the thought to get itself accepted. It is by this test that Mr. Justice Douglas' place in the history of the Court will ultimately be assigned. And since his basic beliefs about the Bill of Rights have stood the trials of time and are now accepted by the entire Court, the verdict of history seems secure.

Few persons alive, on or off the bench, have a clearer claim to understanding the wellsprings of life, the nature of people, or the quality and character of our institutions than does Mr. Justice Douglas. He predicted Watergate and the crimes of the C.I.A., just as he told us a generation ago what would happen to our rivers and streams, our air, our salmon and our trout. He nearly got himself impeached a decade or so ago by suggesting recognition of China. Whether it was conservation, foreign affairs, civil rights, or civil liberties, his prescience has bordered on the superhuman. We could have preserved an unrestorable quality of life, avoided countless tragedies, grasped many lost opportunities had we only listened to him earlier.

A catalogue of his written contributions could fill a book. It would reveal only a few of his qualities. Had he written no opinions protecting civil rights or civil liberties, the examples he has set may have meant more in the preservation of freedom than a shelf of treatises on liberty. He taught us about courage in countless ways, the most memorable of which was his stay of the Rosenbergs' execution. He taught us much by the way he has lived his life. He has dared to be free.

The larger-than-life qualities of the man, which can't be described, but must be experienced, are such that many of us who have felt them found it hard to believe that any illness could bring him down. Indeed, one friend who visited him shortly before his retirement reported to me that he was in good health. I dispatched a note expressing my relief at the inaccuracy of the news reports. Two weeks later, wrenched with pain, he retired. If full recovery is possible, however, he will achieve it. We will be hearing and learning much more from Mr. Justice Douglas, in any event, as he completes the second volume of his autobiography and moves on to other mountains to conquer. Even if they must be mountains of ignorance, rather than those he prefers, his adventures and our enrichments are far from over.