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*United States Court of Appeals for the Seventh Circuit*

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# Mr. Justice Douglas

JUDGE ROBERT A. SPRECHER\*

On November 12, 1975, Mr. Justice William O. Douglas concluded 36 years and almost seven months of extraordinary service on the Supreme Court of the United States, the longest tenure in the 186-year history of the Court.<sup>1</sup> It was fitting that one of his last judicial acts, concurring in the reversal of a Court of Appeals judgment halting the construction of a nuclear power plant, advanced one of his most persistent themes—protecting against the abuse of discretionary power by administrative agencies. Perhaps a brief examination of this and other positions he took can provide an insight into the temperament and philosophy of this brilliant jurist.

In this latest case, the Atomic Energy Commission, by general regulation, limited the location of nuclear power plants to sites at least a specified number of miles from population centers. After issuing a construction permit which the Court of Appeals held violated those regulations,<sup>2</sup> that agency's successor, the Nuclear Regulatory Commission, amended the regulations in order to permit the deviation.

Although the Supreme Court's reversal did not rely upon the revised regulations, Mr. Justice Douglas said on November 11:

[T]he entire federal bureaucracy is vested with a discretionary power, against the abuse of which the public needs protection. . . .

[T]he power to change the rules after the contest has been concluded would once more put the promotion of nuclear energy ahead of the public's safety.<sup>3</sup>

Whereas in his dissent in *Power Reactor Development Co. v. International Union of Electrical Workers*<sup>4</sup> he had described the construction given the Atomic Energy Act by the Commission as "a light-hearted approach to the most awesome, the most deadly, the most dangerous

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\* United States Court of Appeals for the Seventh Circuit.

<sup>1</sup> John Marshall, Stephen J. Field, John M. Harlan, and Hugo L. Black had each served 34 years.

<sup>2</sup> Porter County Chapter of the Izaak Walton League of America, Inc. v. Atomic Energy Comm'n, 515 F.2d 513 (7th Cir. 1975).

<sup>3</sup> Northern Ind. Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of America, Inc., 44 U.S.L.W. 3276, 3276-77 (U.S. Nov. 11, 1975) (Douglas, J., concurring).

<sup>4</sup> 367 U.S. 396, 416 (1961) (Douglas, J., dissenting).

process that man has ever conceived,"<sup>5</sup> in his last opinion he added that "[i]f the rules can be changed by the Commission at any time—even after the hearing is over—the protection afforded by the opposition of scientific and environmental groups is greatly weakened."<sup>6</sup>

Mr. Justice Douglas not only sought to protect the individual from big government but also from monopoly and big business. In *Jackson v. Metropolitan Edison Co.*<sup>7</sup> he would have held that a public utility furnishing electric service constituted state action and was subject to the due process clause of the fourteenth amendment. In *Bell v. Maryland*,<sup>8</sup> in concurring in the vacation of convictions of black customers "sitting-in" a white restaurant, he would have held that state judicial action is state action and that corporate ownership could not be immunized from fourteenth amendment standards.

Closely related to his views on nuclear energy was his concern for the environment. In *Illinois v. City of Milwaukee*,<sup>9</sup> his opinion for the unanimous Court announced that "when we deal with air and water in their ambient or interstate aspects, there is a federal common law. . . ."<sup>10</sup>

In his dissent in *Sierra Club v. Morton*,<sup>11</sup> he revealed judicially his consuming interest in nature:

The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. . . .

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation soul—a creature of ecclesiastical law—is an acceptable adversary and large fortunes ride on its cases. The ordinary corporation is a "person" for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.

So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains

<sup>5</sup> *Id.* at 419.

<sup>6</sup> 44 U.S.L.W. at 3277.

<sup>7</sup> 419 U.S. 345, 359 (1974) (Douglas, J., dissenting).

<sup>8</sup> 378 U.S. 226, 242 (1964) (Douglas, J., concurring).

<sup>9</sup> 406 U.S. 91 (1972).

<sup>10</sup> *Id.* at 103.

<sup>11</sup> 405 U.S. 727, 741 (1972) (Douglas, J., dissenting).

or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.

. . . .

The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.

. . . .

. . . That is why these environmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life which it represents will stand before the court—the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams. Those inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community.<sup>12</sup>

Mr. Justice Douglas' fierce devotion to the first amendment was manifested in every conceivable way, but possibly most sharply in the area of libel law. He joined Mr. Justice Black in concurring in *New York Times Co. v. Sullivan*<sup>13</sup> on the basis that the first and fourteenth amendments "completely prohibit" a state from awarding damages to a public official against critics of his official conduct, and thus eliminated the Court's loophole—unless plaintiff proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.<sup>14</sup>

The Black-Douglas theory of absolute immunity for the press<sup>15</sup> and for others speaking out on public issues enabled them to agree

<sup>12</sup> *Id.* at 741, 742-43, 749-50, 752 (citations omitted).

<sup>13</sup> 376 U.S. 254, 293 (1964) (Black, J., concurring).

<sup>14</sup> *Id.* at 279-80.

<sup>15</sup> *See, e.g.,* Curtis Publishing Co. v. Butts, 388 U.S. 130, 170 (1967) (Black, J., concurring and dissenting):

[T]he *New York Times* constitutional rule concerning libel is wholly inadequate to save the press from being destroyed by libel judgments. . . .

[I]t is time for this Court to abandon *New York Times Co. v. Sullivan* and to adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments.

*Id.* at 171-72.

easily in favor of libel defendants as the Court struggled to define "public official" as including "at the very least . . . those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over governmental affairs."<sup>16</sup> Mr. Justice Douglas perceived that "[w]e now have the question as to . . . how far down the hierarchy we should go."<sup>17</sup> He saw "no way to draw lines that exclude the night watchman, the file clerk, the typist, or, for that matter, anyone on the public payroll."<sup>18</sup> Black and Douglas were again able to agree readily in favor of libel defendants when the *New York Times* rule was expanded to candidates for office<sup>19</sup> and "public figures."<sup>20</sup>

When *Gertz*<sup>21</sup> was decided, holding that a publisher or broadcaster of defamatory falsehoods about an individual who is neither a public official nor a public figure may not claim the *New York Times* protection against liability, Mr. Justice Douglas dissented and stated his position on libel in the broadest possible terms:

I have stated before my view that the First Amendment would bar Congress from passing any libel law. . . .

With the First Amendment made applicable to the States through the Fourteenth, I do not see how States have any more ability to "accommodate" freedoms of speech or of the press than does Congress.<sup>22</sup>

He refused to go so far as to say that the first amendment prohibited all libel actions, but he did conclude that it certainly prohibited all libel actions involving "public affairs," which he defined as "a great deal more than merely political affairs," and including matters of "science, economics, business, art, literature, . . . all matters of interest to the general public, . . . any matter of sufficient general interest to prompt media coverage, . . . police killings, 'Communist conspiracies,' and the like . . . ."<sup>23</sup>

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<sup>16</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

<sup>17</sup> *Id.* at 88 (Douglas, J., concurring).

<sup>18</sup> *Id.* at 89.

<sup>19</sup> *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971) (Black, J., concurring in judgment). The Court itself greatly broadened "official conduct" as well, saying:

Any test adequate to safeguard First Amendment guarantees in this area must go far beyond the customary meaning of the phrase "official conduct." Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks.

*Id.* at 275-76.

<sup>20</sup> *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170 (1966) (Black, J., concurring and dissenting); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 24 (1970) (Black, J., concurring in judgment).

<sup>21</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>22</sup> *Id.* at 356-57 (Douglas, J., dissenting).

<sup>23</sup> *Id.* at 357 n.6.

When the Court applied the *New York Times* rule of knowing or reckless disregard to criminal libel as well as to civil libel, Mr. Justice Douglas concurred:

I am in hearty agreement with the conclusion of the Court that this prosecution for seditious libel was unconstitutional. Yet I feel that the gloss which the Court has put on "the freedom of speech" in the First Amendment to reach that result . . . makes that basic guarantee almost unrecognizable.<sup>24</sup>

When the Court applied the *New York Times* rule to non-defamatory invasions of privacy, Mr. Justice Douglas concurred but added:

The exception for "knowing and reckless falsity" is therefore, in my view, an abridgment of speech that is barred by the First and Fourteenth Amendments.<sup>25</sup>

He reiterated his absolute immunity position in invasion of privacy cases in *Cox Broadcasting Corp. v. Cohn*,<sup>26</sup> where he said in concurring that "the First Amendment, made applicable to the States through the Fourteenth, prohibits the use of state law 'to impose damages for merely discussing public affairs. . . .'"<sup>27</sup>

It was this broad interpretation of first amendment rights that led him to concur only in the result when the Court applied the *New York Times* rule by analogy to libels committed during labor disputes, through the use of the doctrine of partial pre-emption of state rights by federal labor law,<sup>28</sup> and to concur only in the judgment when the Court applied the *New York Times* test to reverse the dismissal of a public high school teacher for critical statements about the school board.<sup>29</sup>

<sup>24</sup> *Garrison v. Louisiana*, 379 U.S. 64, 80 (1974) (Douglas, J., concurring). In *Ashton v. Kentucky*, 384 U.S. 195 (1966), Mr. Justice Douglas wrote the opinion for a unanimous Court holding a Kentucky criminal libel law unconstitutional, but for vagueness. However, he wrote:

Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulatory conduct that is reachable by the police power, freedom of speech or of the press suffer.

*Id.* at 200.

<sup>25</sup> *Time, Inc. v. Hill*, 385 U.S. 374, 402 (1967) (Douglas, J., concurring).

<sup>26</sup> 420 U.S. 469 (1975).

<sup>27</sup> *Id.* at 500 (Douglas, J., concurring). See also his dissent in *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 254 (1974), where the Court upheld a jury verdict for compensatory damages for invasion of privacy. It is interesting to note that although Mr. Justice Douglas was known as the crystallizer if not the creator of the right of privacy, when that right collided with freedom of speech, he opted for the latter.

<sup>28</sup> *Letter Carriers Branch 496 v. Austin*, 418 U.S. 264, 287 (1974) (Douglas, J., concurring in the result).

<sup>29</sup> *Pickering v. Board of Educ.*, 391 U.S. 563, 575 (1968) (Douglas, J., concurring in judgment).

Mr. Justice Douglas also believed that *any* state or federal ban on, or regulation of, obscenity is prohibited by the Constitution.<sup>30</sup> He also believed that the Constitution prohibits retroactive application of judicially improvised obscenity standards.<sup>31</sup>

In all of these areas where the first amendment operates, he took the strongest possible position favoring free speech and free press. Together with Mr. Justice Black, while he was on the Court, Justice Douglas believed that the first amendment freedoms held a preferred position among the constitutional rights inasmuch as the first amendment begins with "Congress shall make *no* law respecting . . ." while the other amendments tend to be equivocal, speaking of *unreasonable* searches and seizures, deprivations without *due* process of law and the taking of private property without *just* compensation.<sup>32</sup>

Of even more immediate importance to the development of the law than his first amendment views was Mr. Justice Douglas' opinion for the Court in *Griswold v. Connecticut*,<sup>33</sup> where he announced "the new constitutional right of privacy."<sup>34</sup> *Griswold* held that a Connecticut statute forbidding the use of contraceptives as applied to married persons violated the fourteenth amendment. In a remarkably concise and pertinent opinion, Justice Douglas held that "the First Amendment has a penumbra where privacy is protected from governmental intrusion."<sup>35</sup> Drawing also upon penumbras of the third amendment prohibition against the quartering of soldiers, the fourth amendment protection against unreasonable searches and seizures, the fifth amendment guarantee against self-incrimination, and the other retained rights of the ninth amendment, but primarily upon freedom of association, drawn in turn from the right to assemble of the first amendment, he developed and crystallized the then novel<sup>36</sup> but now highly significant right of privacy, reasoning that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give

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<sup>30</sup> In this regard, he developed an almost uniform dissent to the denial of certiorari in obscenity cases. *Cf.* *New Orleans Book Mart, Inc. v. United States*, 419 U.S. 1007 (1974); *Ayre v. Maryland*, 419 U.S. 1073 (1974). He would state that he would grant certiorari and summarily reverse the judgment, citing *Roth v. United States*, 354 U.S. 476, 508 (1957) (Douglas, J., dissenting); *Miller v. California*, 413 U.S. 15, 42-47 (1973) (Douglas, J., dissenting); and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 70-73 (1973) (Douglas, J., dissenting).

<sup>31</sup> *Divine v. Amato*, 419 U.S. 1014, 1015 (1974) (Douglas, J., dissenting).

<sup>32</sup> W.F. MURPHY & C.H. PRITCHETT, *COURTS, JUDGES AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS* 627 (1961).

<sup>33</sup> 381 U.S. 479 (1965).

<sup>34</sup> *Id.* at 530 n.7 (Stewart, J., dissenting).

<sup>35</sup> *Id.* at 483.

<sup>36</sup> Douglas himself viewed the right of privacy as "older than the Bill of Rights—

them life and substance" and the "[v]arious guarantees create zones of privacy."<sup>37</sup>

Mr. Justice Douglas' strong view of the independence of judges reflected his own independence, as well as giving nourishment and comfort to all federal judges. In *Chandler v. Judicial Council*<sup>38</sup> he said:

An independent judiciary is one of this Nation's outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign. But neither one alone nor any number banded together can act as censor and place sanctions on him. Under the Constitution the only leverage that can be asserted against him is impeachment, where pursuant to a resolution passed by the House, he is tried by the Senate, sitting as a jury.<sup>39</sup>

He also spoke of the hardiness of judges, in terms which sounded like self-description. He said in *Craig v. Harvey*:<sup>40</sup>

[T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.<sup>41</sup>

Lawyers throughout the country, many of whom are frequently called upon to draft court rules, must have been interested and possibly amused by Mr. Justice Douglas' view of the court rule-making function. 28 U.S.C. § 2072 provides that "the Supreme Court shall have the power to prescribe by general rules . . . the practice and procedure of the district courts and courts of appeals of the United States in civil actions . . . ."

Justices Black and Douglas said:

The present rules . . . are not prepared by us but by the Committees of the Judicial Conference designated by the Chief Justice, and before coming to us they are approved by the Judicial Conference . . . . It is they . . . who do the work, not we, and the rules have only our imprimatur . . . . [T]he Supreme Court should not have any part of the task; rather the statute should be amended to substitute the Judicial Conference. . . .<sup>42</sup>

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older than our political parties, older than our school system." *Id.* at 486.

<sup>37</sup>*Id.* at 484.

<sup>38</sup> 398 U.S. 74, 136 (1970).

<sup>39</sup> *Id.* at 136 (Douglas, J., dissenting).

<sup>40</sup> 331 U.S. 367 (1947).

<sup>41</sup> *Id.* at 376.

<sup>42</sup> Amendments to Rules of Civil Procedure for the United States District Courts, 374 U.S. 861, 879 (1963). Mr. Justices Black and Douglas also added: "[W]e are opposed to the submission of these rules to the Congress under a statute which permits them to 'take effect' and to repeal 'all laws in conflict with such rules' without requiring any affirmative consideration, action, or approval of the rules by Congress or the President." *Id.* at 865. In recent years Congress has taken aggressive action in regard to court rules.



A few years ago 65 law school deans and professors were asked to evaluate all the justices of the Supreme Court in order to create five categories from "great" to "failure."<sup>43</sup> As might be expected, the 12 justices ranked as great were all then deceased. Mr. Justice Douglas was included in the category of "near great."<sup>44</sup> Now that he has retired, legal historians will begin to reassess his impact on American law.

One begins with his record length of service and his prodigious capacity for opinion writing. He wrote 1,282 opinions, or an average of 35 opinions per year.<sup>45</sup> Each justice has traditionally written from ten to fifteen opinions for the Court each year,<sup>46</sup> and in the 26 years that the *Harvard Law Review* has reviewed the Supreme Court terms, Douglas fell into the traditional yield insofar as opinions of the Court were concerned. His super-abundance came in the form of dissenting opinions (as many as 53 in the 1972 term) and concurring opinions (as many as 14 in the 1971 term).

In addition, however, he also wrote an inordinately large number of dissents from the denial of certiorari. Inasmuch as it is well-known to the bar that denial of certiorari is without precedential meaning, to write a dissent therefrom is an act of pure principle, done with knowledge that it cannot be effectively used or cited, and will possibly never even be read.

It has been implied on occasion that Mr. Justice Douglas' prolificacy has been at the sacrifice of craftsmanship, and perhaps in such things as the virtually meaningless dissents from the denial of certiorari this is true. However, his opinions for the Court and his major dissents, although often brief, are effectively incisive. In all areas of endeavor the Justice has been both forceful and fearless.

Mr. Justice Douglas has been a judicial activist, a great civil libertarian, and the foremost defender of first amendment rights. Without question history will place him on the list of great jurists.

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<sup>43</sup> Blaustein & Mersky, *Rating Supreme Court Justices*, 58 A.B.A.J. 1183 (1972).

<sup>44</sup> John Marshall received the highest rating; the most contemporary of the 12 were Hugo L. Black, Felix Frankfurter, and Earl Warren. *Id.*

<sup>45</sup> Justice Douglas also wrote 26 books, at a rate of one a year since 1950.

<sup>46</sup> In the 1973 term, Mr. Justice White wrote 19 opinions of the Court; Justices Stewart and Rehnquist each wrote 17, and Mr. Justice Powell wrote 16. This, however, is an unusually heavy yield.