

## BOOK REVIEW

POINTS OF REBELLION. BY WILLIAM O. DOUGLAS. New York: Random House, Inc., 1970. Pp. 97. \$1.95 paperbound.

*D. Grier Stephenson, Jr. †*

The first months of 1970 witnessed two events of significance for the United States Supreme Court: the Senate rejection of Judge G. Harrold Carswell,<sup>1</sup> the second Nixon nominee for the seat previously held by Abe Fortas, and the publication of *Points of Rebellion*<sup>2</sup> by William Orville Douglas, the second most senior justice on the Court. The former event indeed heightened the interest accorded the latter, for Judge Carswell's proponents seemed especially annoyed at their inability to place a "conservative" on the Court while Mr. Justice Douglas allegedly had filled the pages of his most recent book with advocacy of revolution. The failure to secure Judge Carswell's confirmation coupled with the appearance of *Points of Rebellion* rekindled the smoldering talk of Justice Douglas' impeachment in the House of Representatives.<sup>3</sup> If Judge Carswell was not fit for service on the High Court, argued the advocates of impeachment, neither was Justice Douglas. If Judge Carswell's nomination threatened to provide judicial sanctuary for unacceptable ideas of the American right, Justice Douglas' tenure continued to offer aid and comfort to claims from the far left. Justice Douglas' congressional critics were not reacting merely to *Points of Rebellion*. They were calling for an impeachment based on his performance of more than three decades on the Court. Publication of the book and the Senate's rejection of Judge Carswell provided the catalyst for a renewed impeachment attempt. While the threats of impeachment have apparently died,<sup>4</sup> the appearance of the volume presents a rich opportunity to reopen debate on a major question of judicial ethics: the appropriateness of off-the-bench political commentary.

---

† Assistant Professor of Government, Franklin and Marshall College. A.B. 1964, Davidson College; M.A. 1966, Ph.D. 1967, Princeton University.

<sup>1</sup> The vote was 51 to 45. 116 CONG. REC. 5307 (daily ed. Apr. 8, 1970).

<sup>2</sup> W. DOUGLAS, POINTS OF REBELLION (Vintage Books ed. 1970) [hereinafter cited as DOUGLAS].

<sup>3</sup> Representative Gerald R. Ford was the principal spokesman in the House for the group supporting impeachment. Vice President Spiro Agnew added to the debate by noting that Judge Carswell had been denied a seat on the bench "for statements that are much less reprehensible than those made . . . by Justice Douglas." N.Y. Times, Apr. 14, 1970, at 1, col. 4.

<sup>4</sup> The possibility of Douglas' impeachment seems remote in view of the report of the special House Judiciary Subcommittee. The five Democratic members of the seven-man subcommittee concluded that no grounds for impeachment existed. 28 CONG. Q. 3020 (1970).

The thesis of *Points of Rebellion* can be stated best in the author's own words.

The tense and perilous times in which we live demand an invigorating dialogue. Yet we seem largely incapable of conducting one because of the growing rightist tendencies in the nation that demand conformity—or else. . . .

. . . .

The dissent we witness is a protest against the belittling of man . . . .

This period of dissent based on belief in man will indeed be our great renaissance.<sup>5</sup>

Underlying the ninety-seven page work is Justice Douglas' firm belief in basic freedoms, especially those encompassed within the first amendment. This amendment, he states in chapter one, "How America Views Dissent," "creates a sanctuary around the citizen's beliefs. His ideas, his conscience, his convictions are his own concern, not the government's."<sup>6</sup> Although constitutional guarantees protect dissent, protest against present societal and political conditions meets resistance from the Establishment. Justice Douglas never specifically identifies the individuals and institutions comprising the Establishment, and one is left with the impression that the targets of protest—particularly youthful protest—are by default part of or a product of it. The implicit definition, therefore, must be functional, unless Justice Douglas is willing to classify himself as a member of the Establishment. In any event, for purposes of the book the Establishment is on the wrong side.

The Establishment threatens dissent and protest through perpetuation of the "corporation state" and the weakening of first amendment traditions.

The interests of the corporation state are to convert all the riches of the earth into dollars. Its techniques, fashioned mainly on Madison Avenue and followed in Washington, D.C., are to produce climates of conformity that make any competing idea practically un-American. The older generation has in the main become mindless when it comes to criticism of the system. For it, perpetuation of the corporation state and its glorification represent the true Americanism.<sup>7</sup>

In this political climate dissent suffers. Not even in our classrooms do we achieve the "full flowering of First Amendment traditions."<sup>8</sup>

---

<sup>5</sup> DOUGLAS 31, 33.

<sup>6</sup> *Id.* 3.

<sup>7</sup> *Id.* 10.

<sup>8</sup> *Id.* 12.

Adept and enterprising, the Establishment maintains its hold on the thoughts of most people through its control of education, particularly in colleges and universities. Justice Douglas summarizes the plight of American higher education in a sentence: "[F]aculties are subordinate to the orthodoxy of the trustees and the students have little voice in affairs that vitally affect their interests."<sup>9</sup>

The Establishment compels individuals to conform even after the period of formal education through the use of such devices as personality tests and congressional loyalty hearings. The latter, says Justice Douglas, "have resulted in a bureaucracy more staid, more conservative, and more timid than a nation can afford in a revolutionary world."<sup>10</sup> But one must not be misled by its timidity because, as the Justice later observes, the "bureaucracy now runs the country."<sup>11</sup> In Justice Douglas' view, big government has developed at the expense of individual privacy.

Big Brother in the form of an increasingly powerful government and in an increasingly powerful private sector will pile the records high with reasons why privacy should give way to national security, to law and order, to efficiency of operations, to scientific advancement, and the like.<sup>12</sup>

In his second chapter, "The Legions of Dissent," Justice Douglas examines the motivating force of the Establishment. The Pentagon has become the principal force in politics. "Its officer elite is of course subject to some controls; but those controls are mostly formal."<sup>13</sup> The mass media, "the voice of the Establishment," reflect "the mood of the Pentagon and the causes which the military-industrial complex espouses."<sup>14</sup> As a result, "the people are relentlessly pushed in the direction that the Pentagon desires."<sup>15</sup> Heeding the call of the Pentagon, the Government ignores the nation's pressing needs. Racism is rampant and the alarms of environmental disaster go unnoticed. "[T]he Establishment has despoiled the earth."<sup>16</sup>

But as the title of the chapter indicates, the Establishment has not succeeded in fooling everyone. The young see through the thin grandeur around them, and demand change and a concomitant re-ordering of priorities. But the changes necessary are beyond the immediate powers of the political process. "Political action that will recast the balance will take years."<sup>17</sup> The inability of our govern-

---

<sup>9</sup> *Id.* 14 (quoting J. Kenneth Galbraith).

<sup>10</sup> *Id.* 20.

<sup>11</sup> *Id.* 54.

<sup>12</sup> *Id.* 29.

<sup>13</sup> *Id.* 42.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* 49.

<sup>17</sup> *Id.* 54.

mental institutions to deal effectively with pressing national problems has generated a pervasive feeling of hopelessness and frustration. Chapter two closes with Justice Douglas' observation that "where there is a persistent sense of futility, there is violence . . ."<sup>18</sup>

Justice Douglas completes his short book with a chapter entitled "A Start Towards Reconstructing Our Society." In essence, a societal reconstruction is necessary to solve our vital problems. A reallocation of resources and the development of a technique for controlling key administrative agencies are prerequisites for such a reconstruction. Only when this is achieved will our society be in a position to deal effectively with environmental problems and to cripple militarism decisively. Who will accomplish these tasks remains somewhat vague in the text but, as noted earlier, Justice Douglas has little confidence that the political process will be of much assistance. The futility of attempting peaceful revolutionary change overnight again leads to violence because "where grievances pile high and most of the elected spokesmen represent the Establishment, violence may be the only effective response."<sup>19</sup> The cumbersome mechanisms of majority rule may prove to be the Achilles' heel of democracy.

Justice Douglas contends that we have "only two choices: A police state in which all dissent is suppressed or rigidly controlled; or a society where law is responsive to human needs."<sup>20</sup> Because he does not consider the latter choice realistic at present, Justice Douglas apparently concludes that we are committed to the first. There is little or nothing between heaven and hell.

The book concludes on an ominous note. The youth of America are determined to make revolutionary changes: to cripple the corporation state and to teach bureaucracy to serve the ends of man.

That revolution—now that the people hold the residual powers of government—need not be a repetition of 1776. It could be a revolution in the nature of an explosive political regeneration. It depends on how wise the Establishment is. If, with its stockpile of arms, it resolves to suppress the dissenters, America will face, I fear, an awful ordeal.<sup>21</sup>

It is thus insufficient for the Establishment merely to tolerate dissent; the enlightened youth have not only the right to speak but also the right to prevail. The vocal expressions warn the Establishment of perils to come if the dissent goes unheeded.

*Points of Rebellion* is not a scholarly work, and Justice Douglas doubtless did not intend it to be. In fact, the book is a polemic, and this too the Justice no doubt intended. Among knowledgeable people,

---

<sup>18</sup> *Id.* 56.

<sup>19</sup> *Id.* 88-89.

<sup>20</sup> *Id.* 92.

<sup>21</sup> *Id.* 97.

the volume will change few minds. Those to whom much of the anti-intellectual rhetoric of the "New Left" appeals will find heart-warming comfort. Those who do not accept this rhetoric, but who nevertheless share many of Justice Douglas' concerns, will find the book an embarrassment. It is expected that college sophomores will write in this manner, but it is troubling to discover an Associate Justice of the United States Supreme Court doing so. To those who do not share the Justice's concerns or who at least do not view them with equal urgency, the book offers little to stimulate a reconsideration of position. Charges and claims abound, but one searches in vain in the ninety-seven pages for sufficient supporting data.

The book also suffers from its failure to set forth viable means to deal with the conditions it so severely criticizes. *Points of Rebellion* echoes Justice Douglas' past visions of a police state<sup>22</sup> and his criticisms of America's unwieldy bureaucracy.<sup>23</sup> He condemns the modern state's failure to assure an open and responsive bureaucracy and a society totally receptive to and tolerant of all manner of distinctions and dissimilarities among individuals. But he substitutes bleak and ominous despair for concrete proposals for reform. Presumably, more bureaucracy fastened onto the present structure would only aggravate our problems. Perhaps the reforms which Justice Douglas advocates involve a change in the outlooks and perceptions of individuals as well as an improved science of public administration. We may discover that many of our difficulties are unavoidable concomitants of our nation's size. In this light, the societal frustrations Justice Douglas describes may be relieved more by an altered perspective than by a reconstruction of society.

Our social problems provide fertile soil for the seeds of violence, and when Justice Douglas speaks of violent outbursts in one breath, he usually follows with a reminder of revolution in the second. As the Justice observed in a recent opinion:

The word "revolution" has of course acquired a subversive connotation in modern times. But it has roots that are eminently respectable in American history. This country is the product of revolution. Our very being emphasizes that when grievances pile high and there are no political remedies, the exercise of sovereign powers reverts to the people.<sup>24</sup>

This statement is an appropriate antecedent to the comment in *Points of Rebellion* that "today's Establishment is the new George III. Whether it will continue to adhere to his tactics, we do not know. If it does, the redress, honored in tradition, is . . . revolution."<sup>25</sup>

<sup>22</sup> *Osborn v. United States*, 385 U.S. 323, 341-43, 354 (1966) (dissenting opinion).

<sup>23</sup> *Johnson v. Avery*, 393 U.S. 483, 491 (1969) (concurring opinion).

<sup>24</sup> *DuBois Clubs of America v. Clark*, 389 U.S. 309, 315-16 (1967) (dissenting opinion).

<sup>25</sup> DOUGLAS 95.

How a revolution would remedy our sickness and heal our wounds is left unanswered. Like much of the recent "New Left" literature and rhetoric which the Justice mimics, the fundamental problems go untouched. Justice Douglas begs the real question.

It is too early to determine whether *Points of Rebellion* will succeed in reshaping public attitudes and national policies. It is possible, however, to speculate on whether this publishing venture has been a prudent exercise of the judicial function. At a time when the conduct of our governmental officials has become the subject of increased public concern, this aspect of Justice Douglas' work should not go unexamined.

William O. Douglas is not the first justice of the Supreme Court to make use of off-the-bench opportunities—whether through unofficial addresses, books, or articles—to advance personal notions of public policy. Indeed, one may surmise from the volume of writing that justices over the years have made a conscious effort to influence public attitudes, especially those of the bar. Most members of the Court have not been infected with what Alan Westin has termed "judicial lockjaw."<sup>26</sup> In his five-volume biography of George Washington,<sup>27</sup> Chief Justice Marshall devoted adequate space to a presentation of the Federalist theory of the union, and several decades later Justices Story and Baldwin recorded their theories on the Constitution in sets of commentaries.<sup>28</sup> Marshall even took to the newspapers to defend anonymously his opinion in *McCulloch v. Maryland*.<sup>29</sup> The breadth of tolerance was such that Justice John McLean maintained his seat on the Court while running perennial campaigns for the presidential nomination on the National Republican, Free Soil, and Republican party tickets. Justice McLean made known his views on a variety of subjects through letters in newspapers and went so far as to condemn publicly the conduct of the Mexican War by the Polk administration. A year later he expressed his views in a similar fashion on the power of Congress to legislate on the status of slavery in the territories.<sup>30</sup>

Although all efforts by the justices to influence public opinion did not meet with full approbation,<sup>31</sup> the practice had become so

<sup>26</sup> The term appears in the title of the introductory chapter to A. WESTIN, *AN AUTOBIOGRAPHY OF THE SUPREME COURT* 1 (1963).

<sup>27</sup> *THE LIFE OF GEORGE WASHINGTON* (1804-1807).

<sup>28</sup> J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (1833); H. BALDWIN, *A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES* (1837).

<sup>29</sup> 17 U.S. (4 Wheat.) 316 (1819). Marshall's essays published in defense of his opinion in *McCulloch* are collected in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* (G. Gunther ed. 1969).

<sup>30</sup> 2 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 269-70 (1922).

<sup>31</sup> In 1805, the House of Representatives voted impeachment charges against Justice Samuel Chase, but the Senate failed to convict. The Federalist judge was a natural target for the Republicans because of his vigorous campaigning for John

firmly established by mid-century that justices could and did make known their thoughts outside the confines of opinions in individual cases. The practice continues today tempered by the general refusal to discuss specific matters of public law and intra-Court affairs, especially when the former have been or very likely will be before the Court for decision. Justice Douglas himself certainly has been one of the most outspoken justices in the history of the Court, rivaled chiefly in degree if not in kind by Justice David J. Brewer,<sup>32</sup> whose efforts were concentrated around the turn of this century. Justice Douglas has authored a series of books and articles dealing with constitutional government, civil liberties, the Supreme Court, and ecology.<sup>33</sup> It is not unlikely that the Justice has written for more than pure recreation; that he has written with an aim toward influencing popular and legal thinking in the United States.

But the publication of *Points of Rebellion* raises an issue of judicial propriety far more subtle and difficult to resolve than questions of open participation in political activity. Resolution of the problem requires a balancing of our system's need for judicial objectivity and moderation on the one hand, and the individual judge's right to address problems of national concern on the other.

As we have seen, any notion that justices should maintain absolute silence off the bench is historically insupportable. Yet a formidable body of opinion maintains that the justices should not engage in sharp nonjudicial political debate—as Justice Douglas has done in *Points of Rebellion*—lest the independence of the Court and judicial power be sacrificed in the process. When members of the Court voice opinions on controversial matters they run the risk of sapping the

Adams and his political charges from the bench. On June 11, 1803, the *Virginia Argus* asked:

"Was this man placed in his high office by the people to become the calumniator of the government of their choice; or was he not rather placed there to administer justice conformable to the Constitution of the United States? Is it proper, is it decent that this man should be forever making political speeches from the Bench? . . . I hope, for the honor of the Federal Judges, that he is singular in his political tenets. If he be not, they will prove a curse instead of a blessing to this country."

1 C. WARREN, *supra* note 30, at 277 n.1.

Justice John McLean published a letter in 1848 outlining his views on the power of Congress to regulate slavery in the territories. This evoked such sharp congressional reaction that the Justice's supporters found it necessary to disassociate themselves from his statement. Senator Reverdy Johnson said:

"The judgment of the public, in its almost universal censure of the step, will effectually guard against its repetition. A Judge should be separated, not only while he is upon the Bench, but forever, from all the agitating political topics of the day. Once a Judge, he should ever be a Judge."

2 C. WARREN, *supra* note 30, at 271.

<sup>32</sup> For examples of Brewer's expressions of views, see Brewer, *The Nation's Safeguard*, 16 N.Y. ST. B. ASS'N PROCEEDINGS 37 (1893); Brewer, *Protection of Private Property from Public Attack*, 10 RY. & CORP. L.J. 281 (1891).

<sup>33</sup> Justice Douglas' book-length efforts include, among others: *DEMOCRACY'S MANIFESTO* (1962); *AMERICA CHALLENGED* (1960); *THE RIGHT OF THE PEOPLE* (1958); *WE THE JUDGES* (1956); *BEING AN AMERICAN* (1948).

strength of the institution. Justice Hugo L. Black has emphasized this point:

One of the interesting features of service as a member of the Supreme Court is that before us there must eventually come most, if not all, of the problems of the nation. There is no phase of the struggle of society for its own improvement, no aspect of the clashing relations of men to one another that cannot provoke litigation and require judicial settlement. . . . [This] imposes a sharp limitation on . . . [a justice's] freedom of discussion in his unofficial capacity. The first requisite of a judicial system is that its judges be fair. Fairness means many things, but above all it means that no issue may be prejudged—that judges must keep open minds upon genuine issues which they may be called upon to determine.<sup>34</sup>

Recent commentaries on judicial ethics by two members of the federal bench reflect this concern for the institutional image of the courts. Former Judge Simon Rifkind emphasizes the legitimacy of the public's interest in a judge's private life and urges members of the judiciary to avoid the danger of diminished respect for judicial institutions resulting from too prominent identification with other pursuits.<sup>35</sup> He notes that "consciously or unconsciously, the public recognizes that a judge ought to represent one of the forces of stability: moderation."<sup>36</sup> But Judge Rifkind also suggests that the judge need not be a prisoner of his office:

[W]hen the issue is of sufficient significance, the command of conscience insistently imperative, and the public clamor is adjudged irrational, a judge ought not to hesitate to lend his aid, his voice and his presence to a great cause even as he would unhesitatingly render an unpopular judgment.<sup>37</sup>

Judge Edwards, of the Court of Appeals for the Sixth Circuit, echoes Judge Rifkind's observations concerning public scrutiny of judicial behavior.

The truth of the matter is that, aside from the confines of his home, a judge really has no truly private life. Everything he does is considered by the public—not by its ordinary standard as to human conduct, but by the public's much stricter standard as to what it thinks a judge should or should not do. Those . . . who choose the judiciary as a vocation

---

<sup>34</sup> Black, *Address*, 13 Mo. B.J. 173 (1942).

<sup>35</sup> Rifkind, *A Judge's Nonjudicial Behavior*, 38 N.Y.S.B.J. 22, 23 (1966).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* 25.

simply have to accept this as a fact of life and seek to avoid excesses in conduct, including some which might be tolerated in other occupations.<sup>38</sup>

But Judge Edwards, too, argues against isolation. In his view, legal writing and lecturing are "antidotes to judicial atrophy"<sup>39</sup> and a means of preventing the judiciary from becoming "a grey bureaucracy completely remote from the life and problems of the nation."<sup>40</sup>

Justice Douglas' book does not, in my opinion, strike an adequate balance between the competing needs described by Judges Rifkind and Edwards. The unofficial writings of Justice Black are more appropriate. Justice Black has not bound and gagged himself. His views on the relationship between the fourteenth amendment and the first nine amendments to the Constitution and on the central importance of the first amendment have found expression in a series of unofficial publications.<sup>41</sup> No litigant before the Supreme Court need be ignorant of Justice Black's oft-repeated belief in the "absolute" nature of freedom of speech, or unsure of his reaction to an argument urging application of a specific provision of, say, the fifth amendment to state criminal processes.<sup>42</sup> The Justice's language in these instances has been stern, but only rarely has he voiced out-of-court opinions on various societal concerns and national policy choices.<sup>43</sup> Off the bench, and outside the confines of particular cases, Justice Black has had little to say about Alabama politics, clean air, or the Grand Tetons.

With all due respect for Justice Douglas' right to express himself, I submit that proper regard for the Supreme Court as an institution calls for him to follow the more prudent example of his senior colleague when deciding the tone and content of his personal writings. In any event *Points of Rebellion* should stimulate a renewed dialogue on the propriety of, and limits to, off-the-bench commentary, and its relationship to what Harlan Fiske Stone once termed the judicial "instinct of self-preservation."<sup>44</sup>

<sup>38</sup> Edwards, *Commentary on Judicial Ethics*, 38 *FORD. L. REV.* 259, 273 (1969).

<sup>39</sup> *Id.* 275.

<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 *N.Y.U.L. REV.* 549 (1962).

<sup>42</sup> See Black, *The Bill of Rights*, 35 *N.Y.U.L. REV.* 865 (1960).

<sup>43</sup> In the Carpentier Lectures at Columbia University Law School in March 1968, Justice Black repeated his familiar positions on certain constitutional questions. These lectures have recently been revised and published as H. BLACK, *A CONSTITUTIONAL FAITH* (1968).

On December 3, 1968, the Columbia Broadcasting System televised an interview with Justice Black recorded at his home in Alexandria, Virginia. The Justice discussed his stance on certain legal issues and commented on the mechanics of judicial decisionmaking. Part of the CBS transcript was reprinted in *U.S. NEWS & WORLD REP.*, Dec. 16, 1968, at 55-57. Note also the Justice's address at the dedication of new law school facilities at the University of Georgia. Black, *There Is a South of Union and Freedom*, 2 *GA. L. REV.* 10 (1967).

<sup>44</sup> Stone, *Fifty Years' Work of the United States Supreme Court*, 14 *A.B.A.J.* 428 (1928).