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Dedication to the Late Mr. Justice William O. Douglas

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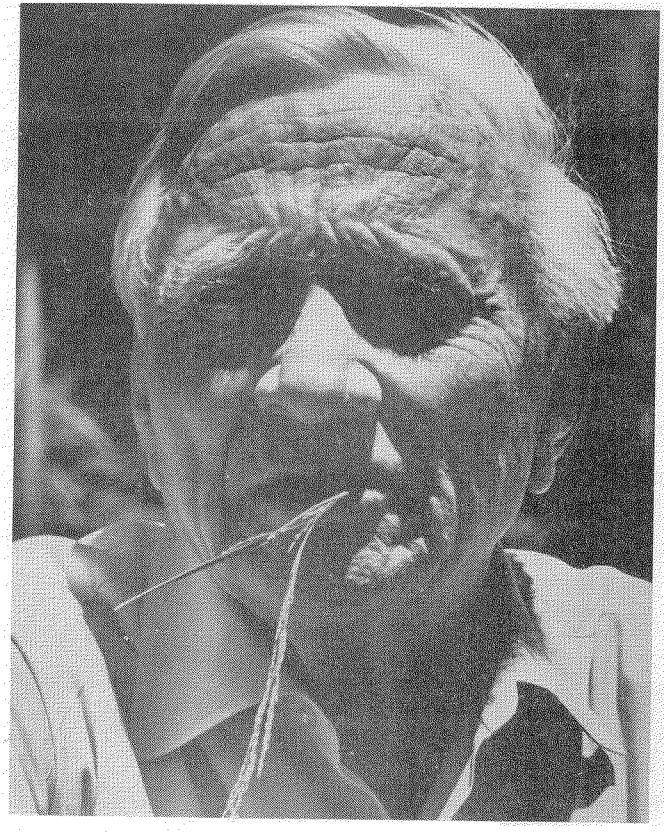

William O. Douglas
1898-1980

The Editors

Dedication to the Late Mr. Justice William O. Douglas

The Nebraska Law Review takes great honor in dedicating this issue to the memory of the late Mr. Justice William O. Douglas. Upon the retirement of the late Mr. Chief Justice Earl Warren, the Nebraska Law Review solicited contributions from his brethren in order to dedicate an issue to his illustrious career on the bench. Associate Justice William O. Douglas submitted a letter in response.[1] The following is a passage from that letter:

> The law of the Constitution, as applied by the Court, is not to be found in books alone but through insight into the actual operation of principles as vague as 'due process' and 'equal protection.' The law books give a measure of the thinking of the prior age on these problems. Yet each generation faces not maintenance of the *status quo* but adaptation and change to new conditions. It is that resilience in our Constitution that has made it enduring. The process is timeless and ageless.[2]

As students of the law, we are familiar with Mr. Justice Douglas' approach to his work. "His opinions lay bare the issues, come quickly to the point, and dispose of the case in language that is frequently blunt and bold."[3] For example, he once wrote that the design of the Constitution was to "keep the government off the backs of the people."[4] His simplicity of style and concern for a concise disposition of the issues has endeared him to students while often enraging legal academicians.

This is the legacy of William O. Douglas. May the next generation of lawyers benefit by his unclouded insight into the operation of the Constitution.

1. *Dedication To Chief Justice Earl Warren*, 48 NEB. L. REV. 5 (1968).
2. *Id.*
3. *Introduction*, THE DOUGLAS OPINIONS xiii (V. Countryman ed. 1978).
4. Laird v. Tatum, 408 U.S. 1, 28 (1971) (Douglas, J., dissenting).

By Harry A. Blackman*

Dedication to the Late Mr. Justice William O. Douglas

It is, of course, highly appropriate that the Nebraska Law Review dedicates this issue to the memory of Mr. Justice William Orville Douglas. The Justice's long tenure on the Court (from 1939 until his retirement in late 1975), and his depth of beliefs served to make him an influential figure in the jurisprudence of his day. His convictions were not only deep, but they were strongly held. This necessarily involved him in conflict. Yet, as was so aptly said at his memorial service, William O. Douglas was a man of peace, though he chose to live in conflict.

With the many honors that have come his way in recent years, all that one might say about the Justice has been said already. His wide-ranging interests; his facile pen; his capacity for work; his critical view of the bureaucracy; his sympathy for people and the humane approach; his abolutist view of the First Amendment; his antipathy, in his last years, for the tax collector;[1] his love of nature and the outdoors;[2] and his wide travels, bespeak the individual. He could be critical and impatient, but he also could be understanding. He was an iconoclast in his special way. Often he was a burr under the saddle, but the discomfort he produced usually resulted not only in the reexamination of principles far too long assumed, but also in a welcome strengthening of the Country and the Court as an Institution.

Bill Douglas' long presence on the Court was a most significant one. He will be missed.

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* Associate Justice, United States Supreme Court.

1. *See* Wolfman, Silver & Silver, *The Behavior of Justice Douglas in Federal Tax Cases*, 122 U. PA. L. REV. 235 (1973).
2. Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (Douglas, J., dissenting).

By Richard S. Harnsberger*

Dedication to the Late Mr. Justice William O. Douglas

William O. Douglas, educated as a youngster in Yakima, Washington, was a member of Phi Beta Kappa at Whitman College in Walla Walla from which he graduated in 1920. For the next two years he taught at the Yakima high school, then went east to attend Columbia law school. He had little money and during the first year defrayed expenses by writing a correspondence law course. After graduation, he practiced with the Cravath firm in New York City and later taught at the Columbia and Yale law schools. In 1936, he was appointed to the Securities Exchange Commission and a year later became its chairman.

When Douglas was forty, Franklin Roosevelt appointed him to succeed Louis Brandeis as an Associate Justice. He was the youngest person to take a seat on the Court since Madison chose thirty-two year-old Joseph Story in 1811. During his tenure which extended from April 1939 until November 1975, Douglas sat with twenty-eight percent of the Associate Justices who have served since the first appointments in 1789, and with five of the Court's fifteen Chief Justices—Charles Evans Hughes, Harlan Stone, Fred Vinson, Earl Warren and Warren Burger. In all, he was on the Court over thirty-six years, longer than any one else in history.

Students of the Court complain that the Douglas opinions are frequently "result oriented" and short on the reasoned elaboration which law professors never seem to find in any judge's writings. Perhaps he could have been a bit more meticulous. Maybe analytical coherence was lacking at times. Nevertheless, if (as Lord Chesterton said) the important thing about a man is his philosophy, William O. Douglas should receive high marks.

He probably will be best remembered for creating a constitutional framework to assure that individuals have a right to privacy, and for his 531 dissents—the ideas of which often became the majority view at a later time. Notable among the many examples are the right to counsel in a criminal proceeding,[1] and one-man, one

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1. Gideon v. Wainwright, 372 U.S. 335 (1963); Betts v. Brady, 316 U.S. 455 (1942).

vote.[2]

I recall him standing on the ramparts to raise his voice against the hue and cry in some very trying times. He believed our most precious and enduring moral values are inscribed in the Bill of Rights and that none should be diluted by the momentary passions of the executive and legislative branches.

He saw the role of the Court as the preservation and advancement of a free society and he dreamed of a world in which the mind of man is free—his ideas, his prayers, his beliefs, his ideology and his philosophy placed beyond the reach of government. He taught that unless the government is threatened by imminent danger from someone's conduct, it should get off the backs of the people.

I am happy the students are dedicating this issue of the law review to the ideals which the Justice stood for. Repeating what Justice Douglas wrote in *An Almanac of Liberty* about one of our state's most distinguished human beings, George W. Norris:

> I remember him as he stood in my office one winter afternoon. He seemed bent and broken, and there was deep sadness in his voice. 'I have fought the good fight with all that was in me,' he said. 'Now there is no strength left. Other hands must take up the burden. Remember, the battle against injustice is never won.'

Likewise, those who believe that the Bill of Rights contains more than shibboleths must continue the battle William O. Douglas fought all his life.

The following passages typify the spirit of Mr. Justice Douglas:

Courts

> The judiciary is in a high sense the guardian of the conscience of the people as well as the law of the land . . . . Its decisions are more apt to reflect first principles than political expediency.[3]

* * *

Judicial Review

> Judicial review gives time for the sober second thought.[4]

* * *

Procedural Safeguards

> It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to

2. Baker v. Carr, 369 U.S. 186 (1962); Colegrove v. Green, 328 U.S. 549 (1946).
3. W. DOUGLAS, WE THE JUDGES 445 (1956).
4. *Id.*

strict procedural safeguards is our main assurance that there will be equal justice under law.[5]

* * *

Justice

The aim of law in its civilized sense is justice.[6]

* * *

Danger of Government Oppression

The problem of man in the field of political science has been not merely the establishment of a government, but also the protection of the people against the government which was established.[7]

* * *

Common Sense

That seems to us to be the common sense of the matter; and common sense often makes good law.[8]

* * *

Religion

[A person] may not be compelled against his will to attend a religious service; he may not be forced to make an affirmation or observe a ritual that violates his scruples; he may not be made to accept one religious, political, or philosophical creed as against another. Freedom of religion and freedom of speech guaranteed by the First Amendment give more than the privilege to worship, to write, to speak as one chooses; they give freedom not to do nor to act as the government chooses. The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. To think as one chooses, to believe what one wishes are important aspects of the constitutional right to be let alone.[9]

* * *

Liberty

We often boast of our advance over the totalitarian regimes. We have tremendous advantages that they do not enjoy. Those advantages are not in material things such as technology and standards of living. They relate to matters of the mind and the spirit. They relate to the inalienable rights of man proudly proclaimed in our Declaration of Independence, and in part engrossed in our Constitution . . . . [Natural rights] have a broad base in morality and religion to protect man, his individuality, and his con-

5. Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).
6. Douglas, *Foreword*, 55 YALE L.J. 865, 867 (1946).
7. W. DOUGLAS, *supra* note 3, at 256.
8. Peak v. United States, 353 U.S. 43, 46 (1957).
9. Public Utilities Comm'n v. Pollack, 343 U.S. 451, 467-68 (1952).

science against direct and indirect interference by government . . . . These human rights were the products both of political thinking and of moral and religious influences. Man, as a citizen, had known oppressive laws from time out of mind and was in revolt. Man, as a child of God, insisted he was accountable not to the state but to his own conscience and to his God. Man's moral and spiritual appetite, as well as his political ideals, demanded that he have freedom. Liberty was to be the way of life—inalienable, and safe from intrusions by government. That, in short, was our beginning.[10]

* * *

The strength of democracy is its recognition of the rights of each and every minority in society. The smallest minority of all is one man's conscience. There can be no real freedom unless the conscience is free to express itself and unless man is free to obey its small voice.[11]

* * *

[T]he liberties of none are safe unless the liberties of all are protected. But even if we should sense no danger to our own liberties, even if we feel secure because we belong to a group that is important and respected, we must recognize that our Bill of Rights is a code of fair play for the less fortunate that we in all honor and good conscience must observe.

. . . .

[T]he courts and the law can, at best, give only a minimum protection to our liberties. They can deal, for the most part, only with actions of government officials. They normally have no authority to protect minority groups and opinions from unpopularity and social ostracism by private groups. We need a spirit of liberty which extends beyond what a court can supply, and which accepts in our daily living and behavior the attitudes of toleration of unorthodox opinions and respect for the dignity and privacy of each human being, which our Bill of Rights reflects. Our spiritual health depends on our attitudes and habits at the village and city level and the vigor with which we react to injustices.[12]

* * *

Nonconformity

In the final analysis, freedom is the way we think about and treat a non-conforming neighbor, a dissenter, the holder of a minority view among us, and the liberty he actually enjoys.[13]

* * *

The curious man—the dissenter—the innovator—the one who taunts and teases or makes a caricature of our prejudices is often our salvation. Yet throughout history he has been burned or booed, hanged or exiled, imprisoned or tortured, for pricking the bubble of contemporary dogma.

The writer and the thinker are the ones who frequently show that a current attitude is little more than witchcraft. They may do in art, in business, in literature, in human relations, in poltical theory what Darwin did with biology, Freud and Jung with the subconscious, Einstein and Ruther-

10. W. DOUGLAS, THE RIGHT OF THE PEOPLE 89-90 (1958).
11. W. DOUGLAS, *supra* note 3, at 353.
12. W. DOUGLAS, A LIVING BILL OF RIGHTS 64-66 (1961).
13. *Id.* at 25.

ford with physics. This folklore or mythology by which we all live needs challengers, doubters, and dissenters lest we become prisoners of it. We need those who provoke us so that we may be warned of the fate that our prejudices or ignorance or wishful thinking may hold in store for us. It was Keynes, I believe, who said that 'the difficulty lies, not in the new ideas, but in escaping from the old ones.'

Ideas are more dangerous than armies. Ideas have immortality, ideas cross impassable frontiers, ideas penetrate any Maginot line of conformity. Voices can be stilled; men and women imprisoned; books burned. But their ideas live on to torment the executioners, jailers, and censors.

It was a tumult and a clash of ideas, speeches, arguments, and debate, challenge and counter-challenge that hammered out on the anvil of public debate all structural and substantive features of our form of government. The question whether the Constitution should be adopted was a see-saw contest of opposed ideas.[14]

14. W. DOUGLAS, FREEDOM OF THE MIND 32 (1962).