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Review of The Court Years, 1939-1975

David S. Cohen

Pace Law School, scohen2@law.pace.edu

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BOOK REVIEWS

THE COURT YEARS, 1939 to 1975: The Autobiography of William O. Douglas, by William O. Douglas, New York: Random House, 1980. Pp. xi, 434. \$16.95. — At a time when Canadian lawyers are debating the merits and demerits of constitutional reform, and specifically the entrenchment of a Charter of Human Rights, the story of the judicial career of an American jurist who sat as a Justice of the United States Supreme Court during four decades should have made for enlightening and provocative reading. Mr. Justice William O. Douglas's sculpting of constitutional rights in a society remarkably similar to our own might have provided the reader with an enormous wealth of information as to the role of a Supreme Court as a constitutional institution. In particular, the autobiography of Justice Douglas might have offered the reader a remarkably candid view of the role of the Supreme Court, and of its members, in the creation and transformation of constitutional values during three wars, seven presidents, and two decades of internal civil crisis in the United States. Our own debate has conscientiously ignored both the potential role of the Supreme Court of Canada and the nature and character of the Canadian judiciary in the forthcoming era of constitutional litigation. Nowhere in the proposed constitution does one find reference to the existence of the Court, to the process of judicial appointment, or to the method of judicial removal. Yet the proposed Charter of Human Rights leaves enormous scope for judicial activism, creativity or reactionism as the case may be. One might have suspected that the story of Mr. Justice Douglas's judicial career would have offered considerable insight as to the issues which Canadians ought to be facing now, and it is disappointing that this autobiography fails to meet that goal.

Before engaging in constitutional theorizing, however, one must understand the place of this autobiography. It is the second of two parts. *Go East, Young Man: The Early Years*,¹ the autobiography

¹ (1974).

of William O. Douglas published almost six years ago, detailed Douglas's youth in Washington state, his law school education, teaching at Columbia and Yale, and chairmanship of the Securities Exchange Commission under President Roosevelt. It made fascinating reading, offering insight into the character, intellect and emotions of the author. Few who read the book can fail to remember Douglas's admonitions as a law professor that "training lawyers as mechanics . . . is fatal to the concept of a university",² or his concern that he was spending his life "teaching bright youngsters how to do things that should not be done".³

The only connection between the two books, however, is that of Douglas's personality. The constant throughout his life was his refusal, perhaps inability, to compromise his personal or legal values. The disconnection is that the major theme of *The Court Years* is not the life of the author, but rather, in Douglas's own words, it is an attempt "to show why it was that my generation became politically bankrupt".⁴ This book is political history, not biography. One is left at the end with no more understanding of the man than one had at the outset.

But that is not to say that political-legal history is not valuable. For instance we see in Justice Douglas's career the influence of political connections, career, and values in judicial appointments; the second important theme of the book is the close relationship between the executive branch of government and the judiciary in the United States. Douglas's reference to judges as Nixon's men,⁵ Chief Justice Warren's risk of professional disapproval concomitant to his resignation from the American Bar Association,⁶ Justice Skelly Wright's aborted opportunity to be appointed to the Supreme Court,⁷ President Truman's mediocre judicial appointments,⁸ and the disturbing history of judicial appointments as rewards for past services in at least two administrations,⁹ are merely the most obvious examples of executive influence over the judiciary. The lesson to be learned is simply that the process of judicial appointment is likely

² *Id.*, at 169.

³ *Id.*, at 165.

⁴ *THE COURT YEARS* (1980) at 286.

⁵ *Id.*, at 236.

⁶ *Id.*, at 229.

⁷ *Id.*, at 127, 128.

⁸ *Id.*, at 246.

⁹ *Id.*, at 251, 252.

to be as central to the ultimate definition of constitutional rights in Canada as is the drafting of the Constitution itself.

Yet the linkage between the executive and judiciary does not end with the appointment process. Justice Douglas tells us all too clearly of judicial conspiracies with the executive during the Cold War persecutions;¹⁰ his personal attachment to President Roosevelt during his years on the Bench,¹¹ often as an advisor;¹² his pervasive dislike of the Nixon administration (which ran from antitrust issues,¹³ to advocacy¹⁴ and freedom of the press¹⁵ and the Burger/Nixon connection originating in the 1950s);¹⁶ and the *ongoing consultation* between the judiciary and the executive during the Eisenhower, Roosevelt and Johnson administrations.¹⁷ The point here is that what passes for judicial independence in the United States Supreme Court appears, in fact, to be judicial cooperation, and anyone who views the judiciary as a counter-balance to the executive, or to majoritarian values in the Canadian context, must reflect on the similarities between our two supreme judicial institutions. Recent Supreme Court Justices in Canada have had lengthy careers as political advisors, crown corporation chairmen, and cabinet advisors. The Ontario Court of Appeal has recently seen the appointment of a former federal constitutional advisor, and the Federal Court has been graced with a Liberal member of parliament. The connection is obvious.

What then is the unique political role of the Court which Justice Douglas obviously holds in such high esteem? In the first place, it allows individuals with provocative ideas and views of society, Justice Douglas being a prime example, to express those ideas and shape social values in unqualified terms without risk of sanction; for decades, Justice Douglas's dissents expressed his unblemished idealism. His views as to a constitutionally entrenched *absolute* right of freedom of speech; his admission that he rarely, if ever, proselytized; never attempted to persuade other members of the Court of

¹⁰ *Id.*, at 102.

¹¹ *Id.*, at 285.

¹² *Id.*, at 267.

¹³ *Id.*, at 159.

¹⁴ *Id.*, at 179.

¹⁵ *Id.*, at 200.

¹⁶ *Id.*, at 231.

¹⁷ *Id.*, at 244.

the rightness of his views;¹⁸ his personal and legal views on the preservation of the natural environment;¹⁹ and his stand on capital punishment²⁰ suggest ideals which may not have reflected majoritarian values, and certainly would not have withstood the electoral process from 1939 until 1975. Secondly, Justice Douglas describes the Court as a stabilizing influence in the ongoing transformation of constitutional values, simply through the relative permanence of its membership — a characteristic quite foreign to the political arena. We also see the use of constitutional law as a political tool at the Supreme Court, most notably in the desegregation cases epitomized by *Brown v. Board of Education*,²¹ and the use of the structural injunction as a remedial tool in constitutional law-making.²² Moreover we see the Supreme Court, particularly in the case of constitutional decision-making, attempting to achieve a delicate balance between adherence to objective, perhaps historically justified, constitutional values,²³ individual moral judgment,²⁴ and majoritarian values.²⁵ Rarely have these points been expressed so vividly. Finally, Justice Douglas points out that the political independence of the Supreme Court and of its judges is established not through the appointment process, nor by isolating the judiciary from government, but rather through constitutional protection from attempts to remove judges from the Bench. The next to last chapter of his autobiography describes the various attempts which were made to impeach his tenure at the Court; it is here that we can appreciate the very real significance of judicial independence.

Perhaps the most important insights gained from the autobiography are those relating to the judicial *process* at the Supreme Court. A notable example is Douglas's description of the role of the Chief Justices, to whom an entire chapter is devoted, in structuring judicial opinion writing, and in orchestrating the work of nine very powerful and often intransigent men. Another is the process of Chief Justice appointments, in respect of which administrative ability, political character, social values and legal scholarship, as well as

¹⁸ *Id.*, at 88.

¹⁹ *Id.*, at 236, 282.

²⁰ *Id.*, at 390.

²¹ *Id.*, at 113; 344 U.S. 1 (1952).

²² *Id.*, at 123.

²³ *Id.*, at 132.

²⁴ *Id.*, at 1, 195.

²⁵ *Id.*, at 145.

seniority, are taken into account. Another important and often overlooked aspect of judicial decision-making by the Supreme Court is that of the "first-order" decision carried out through the leave to appeal process. It is here that the Court's workload is set, the number of cases to be heard determined, and the nature of those cases decided upon. Very little has been written in Canada about this process, reasons for decisions to grant or deny leave to appeal are not given, and thus Justice Douglas's comments, relating for example to the timeliness of certiorari applications to the United States Supreme Court, become relevant beyond national borders.

The book, as I said, is not biography, but rather political-legal history, and some of the more obvious failings in this respect should be briefly noted. Justice Douglas's analysis of cabinet decision-making in a parliamentary system of government is either outdated or simply inaccurate in the Canadian context.²⁶ Another shortcoming is Douglas's inconsistent²⁷ and exceedingly brief analysis of his position on affirmative action. Finally, his abhorrence of the Nixon administration and the political values of those times pervades the biography to such an extent that one fears that he may, unconsciously, have been engaging in hyperbole.²⁸

To put it simply, the book is not what one might have expected from Mr. Justice Douglas. After waiting patiently for half a decade after the wonderful anecdotes and penetrating analysis of *Go East, Young Man*, we are greeted with a menagerie of chapters on disparate topics revealing nothing of the man, and little of the Court. The Supreme Court, like most courts in Western societies, is a secret institution. Cases are argued in public, but the decisions are arrived at *in camera*. And while reasons for decisions are usually given, there is no assurance that those published reasons reveal the true forces operating on the judges' intellect and emotions. It may, in fact, be impossible for a judge to tell us why he chose a particular course over another. Be that as it may, judicial autobiography offers the reader the opportunity to assess judicial decisions having had the opportunity to consider and reflect upon the extra-judicial opinions and beliefs of the judge. That is not to say that Justice Douglas

²⁶ *Id.*, at 286, 287.

²⁷ *Id.*, at 119, 120, 146, 147.

²⁸ President Nixon is the subject of comment on 65 pages throughout the book, as well as the subject of extensive criticism at 237-254. The topics range from the war in Vietnam, to environmental issues, advocacy, Chief Justice Burger, "law and order" and desegregation, political manoeuvres relating to Chief Justice Warren's appointment and much more.

ought to have told us directly why he voted this way or that way on a particular case, or why he wrote a particular judgment. Rather, had he told us what he is, he would have offered his readers the opportunity to understand the complexities and subtleties of a particular judicial mind and character. The first volume could not have fulfilled this ideal any better than it did; the second did not even begin the task.

DAVID COHEN†

† Of the Faculty of Law, University of British Columbia.

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