Douglas of the Supreme Court. By Vern Countryman. New York: Doubleday & Co., Inc., 1959. Pp. 401, $5.95.

Vern Countryman, Dean of the University of New Mexico Law School, has edited this volume of opinions of Justice Douglas. It consists of a modest, twenty-page biographical sketch of its subject and excerpts from sixty-nine majority and dissenting opinions of the Justice's six hundred. The editing of the opinions by Dean Countryman is the best job anyone has yet done in that branch of esoterica; I speak as an expert, having done a less good job in this respect in my own *Mr. Justice Black, The Man and His Opinions*, published some ten years ago. Dean Countryman's essays on the cases, including their settings and their consequences, have not been equalled by anyone who has presented a particular Justice. The result is a brilliant adjunct to any constitutional law course.[1]

At the same time, Dean Countryman's portion of the work does not easily lend itself to review, and is in any case less important than the Justice's. To concentrate on what Countryman has done would be to review the frame of the picture, and omit the real subject matter. It is more interesting to consider, from this volume, what Mr. Justice Douglas himself thinks of the tasks he performs and the Constitution he interprets.

As to this there is only one proper source, and that is the Justice himself. There will be a few variations of verbal detail to fit grammatical context, but substantially everything in the remainder of this sketch comes from the words of Mr. Justice Douglas as set forth in this volume.

I. Where the Justice Stands

The policy of legislation, its wisdom, its needs, or the appropriateness of the remedy chosen are no matters of judicial concern. Differences of opinion on such scores are for Congress or the states; the Court does not sit as a super legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. Even as to delegation of legislative power, whether a particular grant of authority to an officer or agency is wise or unwise raises questions not of judicial concern.

And yet . . . and yet . . . whereas usually, when Congress describes what job must be done, who must do it, and what is the scope of his authority, it does not abdicate its functions. Still, where activities or enjoyment, natural and often necessary to the well being of the American citizen, such as travel, are involved, the Court will construe narrowly all delegated powers that curtail or dilute them. The delegation must never be unlimited; for law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some similar military official, some bureaucrat. Discretion is a ruthless master, more destructive of freedom than any of man's other inventions.

[1] The only lapse from excellence is Doubleday's—see the allusion, p. 170, to that well known decision, Benjamin v. Cohen.

In approaching his task, the judge must respect precedent without being awed by it. One hesitates to overrule cases, even in the constitutional field, that are of an old vintage; but the Court has always been willing to re-examine and overrule constitutional precedents which history has shown had outlived their usefulness or were conceived in error. Hence, for example, it is regrettable that *Eisner v. Macomber* (taxability of stock dividends) dies a slow death; Douglas thinks it should be overruled. So should *Brown v. Walker* (Fifth Amendment inapplicable if immunity granted), and the view of the minority there should be adopted. The decision in *Fong Yue Ting v. United States* (control of aliens) is inconsistent with our philosophy of constitutional law. Douglas would be rid of *United States v. General Electric Company* (patents and price fixing), and he does not believe that *South Carolina v. United States* (tax immunities of state on proprietary activities) states the correct rule. Neither do the *Schwimmer*, *MacIntosh* and *Bland* (naturalization) cases. In this approach, the Justice is at his best in a case of first impression, one with no precedents to construe or principles previously expounded to apply. He loves to write on a clean slate.

This does not mean reckless innovation; the Justice harkens to the lessons of history. Among his predecessors he draws first and oftenest on Brandeis, as in rate making (Mr. Justice Brandeis concurring); antitrust (where the lessons Brandeis taught on the Curse of Bigness have largely been forgotten in high places); on Brandeis the Justice in his classic statement of freedom of speech, and on Brandeis the private citizen. Holmes is less of a household god; his pernicious dictum on the privilege of public employment gives a distortion to the Bill of Rights.

And one learns from English and early American history, whether dealing with an historic civil liberty like the right to trial by jury; or contempt of court in the light of the experience of Judge Peck; or from James Otis on the writs of assistance; or the long history, traced to Lillburn and the Levellers, behind the decision that the law should not be used to pry open one's lips and make him a witness against himself.

And yet to Douglas the realities of a situation are more common mentors than the history books. The necessity of broadly delegated powers depends on the hard-headed practicality that Congress cannot otherwise perform its functions. In working out the relation of trespass and the old doctrine of *usque ad coelum*, of course planes in the air lanes do not trespass; common sense revolts at the idea. And in the antitrust field, choices must be made not on the basis of abstractions but of the realities of modern industrial life. Such practical considerations may occasionally trench even on basic values; for example, to say that the military should have taken the time to weed out the loyal from the disloyal Japanese-Americans at the beginning of World War II would be to assume that the nation could have afforded to have them take the time to do it.

This practical perception is most often used to sustain, not limit, individual

rights. The fact that the very thought of a particular procedure is certain to raise havoc with academic freedom is a reason for not permitting it, particularly when youthful indiscretions, mistaken causes, misguided enthusiasms—all long forgotten—will thereby become the ghosts of a harrowing present.

This is particularly true where basic civil liberties are involved which have earned a preferred place under the Constitution. The paramount issue of the age is to reconcile security and freedom, but this must be done with the preferred status always in mind—where civil liberties are infringed there is no redemption for the individual whom the law touches. The vitality of civil and political institutions in our society depends on free discussion.

II. The Nature of Free Speech, and Its Limitations

Freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest. There is no room under our Constitution for a more restrictive view. The amendment itself is couched in absolute terms—freedom of speech shall not be abridged. Because of this absolute status, which is a negation of power on the part of each and every department of government, speech has had a preferred position as contrasted to some other civil rights. Free speech, free press, free exercise of religion are placed separate and apart; they are above and beyond the police powers; they are not subject to regulation in the manner of factories, slums, apartment houses, production of oil and the like.

Full and free discussion is the first article of our faith. Free speech has occupied an exalted position because of the high service it has given our society. Its protection is essential to the very existence of a democracy. When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents.

There are some limitations. Hitler and his Nazis showed how evil a conspiracy could be which was aimed at destroying a race by exposing it to contempt, derision, and obloquy. Douglas would be willing to concede that such conduct directed at a race or group in this country could be made an indictable offense, for such a project would be more than the exercise of free speech. Like picketing, it would be free speech plus. The teaching of methods of terror and other seditious conduct should be beyond the pale, along with obscenity and morality. Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it. When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt. Yet free speech is the rule, not the exception.

Over and over again Douglas stresses that the state is to punish deeds, not thoughts or words. When the thought passes beyond discussion and becomes action against the state, Douglas is fully prepared to be stern. He will not make

justice truly blind to make the way easy for the traitor. Control of espionage and sabotage may involve stern measures. Speech plus acts of sabotage or unlawful conduct can surely be punished. The school systems of the country need not become cells for Communist activities, and the classrooms need not become forums for propagandizing the Marxist creed. But the guilt of the teacher must turn on overt acts. Anyone who plots against the government and moves in treasonable opposition to it can be punished. Douglas is by no means laggard in giving such punishments.

III. Other Basic Rights

The list of basic rights of a citizen, entitled to preferred status and vigilant enforcement, is a long one. 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. The Federal Loyalty Program violates a host of rights. The Loyalty Board conflicts on evidence which it cannot even appraise. The critical evidence may be the word of an unknown witness who is "a paragon of veracity, a knave, or the village idiot." His name, his reputation, his prejudices, his animosities, his trustworthiness are unknown both to the judge and to the accused. The accused has no opportunity to show that the witness lied or was prejudiced or venal. Without knowing who the accusers are, he has no way of defending.

Almost at the level of constitutional right is the privilege of being tried by a jury of both men and women, for the truth is that the two sexes are not fungible; the subtle interplay of influence of one on the other is among the imponderables. Far more basic as a safeguard against conviction and prosecution and as a safeguard of conscience and human dignity and freedom of expression as well is the freedom from self-incrimination. Also vital is the right to counsel both at the trial and the pretrial stage, for a defendant desperately needs a lawyer to help extricate him if he is innocent. In protecting against unlawful searches and seizures, the Court should throw its weight on the side of the citizen and against the lawless police. And above all, in the realm of procedure, the historic writ of habeas corpus is one of the basic safeguards of personal liberty. The statutes governing its use must be generously construed if the great office of the writ is not to be impaired.

At the same time Douglas recognizes other less conventional but equally basic rights. He regards the right of privacy as one of the unique values of our civilization. Liberty as used in the Fifth Amendment must include privacy as well if it is to be a repository of freedom. Even more important is the right to work, the most precious liberty that man possesses. Man has as much right to work as he has to live, to be free, to own property. Immediately connected with both of these—*i.e.* the right to be let alone and the right to work—is the right to be free of wrongful deportation, for deportation visits a great hardship on the individual and deprives him of the right to stay and live and work in this

land of freedom. The right to travel is a part of the "liberty" of which the citizens cannot be deprived without due process of law under the Fifth Amendment. Freedom of movement across frontiers in either direction, and inside frontiers as well, is a part of our heritage.

Just below these basic liberties in the Douglas hierarchy is freedom of competition. He is against having little, independent units gobbled up by bigger ones. Such power as that of the United States Steel Company, for example, can be benign, or it can be dangerous; it should not exist. A company such as that, with its tremendous leverage on our economy, is big enough. It is bad for the country to allow the independents to be swallowed up by absentee owners. There follows a serious loss of citizenship. He who is a leader in the village becomes dependent on outsiders for his action and policy. Clerks responsible to a superior in a distant place take the place of resident proprietors beholden to no one. And so whenever he can, Douglas would resolve the ambiguities of the antitrust laws in favor of the maintenance of free enterprise. This is particularly true in the patent field, where he would harmonize the statutes as closely as possible with the policy of the antitrust laws.

IV. The Power to Govern

Douglas wants power in the hands of the elected representatives of the people, not in the hands of an industrial oligarchy. If that power is in the hands of such elected representatives, and if it is not used to restrict basic liberties, then Douglas is prepared to give government all the power it practically needs. For example, price control is one of the means available to the states and to the Congress in their respective domains for the protection and promotion of the welfare of the economy. Douglas came to the Court as a consequence of the political revolution of the depression, and he certainly believes that Congress under the Commerce Clause can deal with what it considers to be dire consequences of *laissez-faire*. The police power of the states extends to all the great public needs. Fundamentally both Congress and the states have a broad and inclusive power to promote the public welfare which includes values spiritual, physical, esthetic, and monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.

There remains the problem of the system of administration under which these objectives are to be achieved, and here the great problem of federalism is one in which the interest of the Justice is less than passionate. The foremost problem is the practical one of effectiveness. Thus, in the problem of federal taxation of state money-making activities, he believes the fear of depriving the national government of revenue if the tax immunity of the state is sustained is an idle spectre. He believes that expanding state activity holds no prospect of crippling the federal government in its search for needed revenues, and so he would uphold the states.

V. The English Language, and Ways of Using It

A portion of Douglas's force and effectiveness is in his manner of expression. As the only regularly best selling author ever to sit on the Supreme bench, he gives to his judicial work much of the same flair which he displays in the book stalls. This includes the power to emphasize with brevity as in the *Steel* case where he said, "Today a kindly President uses the seizure power to effect a wage increase and to keep the steel furnaces in production. Yet tomorrow another President might use the same power to prevent a wage increase, to curb trade unionists, to regiment labor as oppressively as industry thinks it has been regimented by this seizure."

When the case is in the criminal law and turns on simple facts, Douglas makes the story vivid, as for example, in the case of a confession obtained from a fifteen year old Negro boy after an all night interrogation. Douglas observed, "Age fifteen is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overwhelm a lad in his early teens. This is a period of great instability which the crisis of adolescence produces . . . Mature men possibly might stand the ordeal from midnight to five a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic."

Douglas often makes his point with a single sentence. Referring to community standards as a test of obscenity, he said, "It creates a regime where in the battle between the literati and the Philistines, the Philistines are certain to win." Or of the Communists, "In America they are miserable merchants of unwanted ideas; their wares remain unsold." Or of the exclusion of a doctor from the practice of his profession in New York, "When a doctor cannot save lives in America because he is opposed to Franco in Spain, it is time to call a halt and look critically at the neurosis that has possessed us."

Conclusion

Dean Countryman has quarried from his immense mine of manuscript much which it is good for us to have. The sight which emerges is of a Justice who has never lost his courage. It should give renewed courage to the faint-hearted among us and renewed inspiration to those already brave.

John P. Frank*

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