

5-1-1975

Countryman: The Judicial Record of Justice William O. Douglas

David A. Thomas

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

David A. Thomas, *Countryman: The Judicial Record of Justice William O. Douglas*, 1975 BYU L. Rev. 324 (1975).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1975/iss1/22>

This Book Review is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

THE JUDICIAL RECORD OF JUSTICE WILLIAM O. DOUGLAS. By Vern Countryman. Cambridge, Mass.: Harvard University Press. 1974. Pp. viii, 382. \$15.00.

To those unacquainted with the place of the United States Supreme Court in American affairs, an entire book on the judicial record of one justice may seem like rather bland literary fare. But one familiar with the Court cannot approach a book on the judicial record of Justice Douglas without anticipating the spice of controversy and even partisanship. Strive as one might for objectivity, an investigation of Mr. Douglas' contribution inevitably leads to some kind of judgment, either applauding or condemning the man's influence on American law.

Author Vern Countryman¹ strives for an objective, or — as he puts it — an “honest” report, but still admits that his presentation is sympathetic.² The book is in response, he says, to the dislike for the Douglas judicial record underlying impeachment charges which Representatives Gerald R. Ford and Louis C. Wyman tendered against Mr. Douglas in 1970. Countryman does not treat the political controversy surrounding the Justice. Rather, he tries to set out a dispassionate description of the positions espoused by Justice Douglas on systematically presented constitutional issues and concludes that Douglas is “one of the most effective justices.”³

This mechanical approach to the Douglas record, while admirably avoiding overt polemics, is unfortunately deadly dull. It is roughly equivalent to an annotated bibliography of Douglas' opinions classified by subject heading. It presents Douglas' work at its face value, interspersed only with pithy historical summaries of Court action on the issue at hand, all virtually free of editorializing. Such a treatment is concededly “honest,” perhaps even objective; it does not argue the individual Douglas views. But likewise it does not acknowledge or evaluate any areas of substantial disagreement with those views. The book, then, will not satisfy one who is willing to be convinced that Justice Douglas is rated “among the great Supreme Court Justices on the basis of his record to date,”⁴ and the skeptic will still harbor suspicions that there really is another point of view.

The book also fails where perhaps it could have made a significant contribution. The lively language and views expressed by Justice Douglas in his opinions and frequently quoted in this book deserve elucidation, and Professor Countryman would seem to be well suited to the

¹Royall Professor of Law, Harvard Law School.

²V. COUNTRYMAN, THE JUDICIAL RECORD OF JUSTICE WILLIAM O. DOUGLAS vi (1974) [hereinafter cited as COUNTRYMAN].

³*Id.* at 3.

⁴*Id.* at 382.

task. Where Mr. Douglas, for instance, refers to "political" trials⁵ and "political prisoners"⁶ or finds unforeseen civil liberties implications in a case,⁷ the author's comments explaining the significance Douglas attaches to particular words or issues would have been most helpful. Yet Countryman's "objective" approach admits no such elucidation or explanation.

Countryman does reveal several of Justice Douglas' predispositions in the concluding and most interesting part of the book, the Epilogue. In the author's words,

[Justice Douglas] reads the Constitution to confer broad powers on government to regulate the economy . . . [and] is more consistent and persistent than most in also reading government's economic regulation broadly to limit private power to control the economy.

[He] also reads broadly those constitutional guarantees that require the government to proceed fairly whether the one against whom the government is proceeding is an accused in the criminal dock, a suspected "subversive" before a loyalty board or a legislative committee, a government contractor, or a voting registrar suspected by the Civil Rights Commission of depriving blacks of the franchise.

He is equally vigorous in giving full scope to the Constitution's substantive limits on governmental power, particularly those provisions of the Bill of Rights designed to protect the franchise and political and religious freedom and to insure equal protection of the laws.⁸

Also in the Epilogue the author suggests criteria for evaluating the Douglas record and, indeed, the performance of any jurist. While labeling the concepts of "strict constructionist" and "judicial self-restraint" as misleading evaluative criteria,⁹ the author sets forth other requirements, including a high degree of technical competence, independence from narrow interest groups, and diligence. Countryman gives his sub-

⁵*Illinois v. Allen*, 397 U.S. 337, 352 (1970) (separate opinion); COUNTRYMAN 22.

⁶*Adderley v. Florida*, 385 U.S. 39, 49 (1966) (dissenting opinion); COUNTRYMAN 59.

⁷*Chandler v. Judicial Council*, 398 U.S. 74, 129 (1970) (dissenting opinion); COUNTRYMAN 16.

In this case, the Tenth Circuit's Judicial Council found that Judge Chandler was unable or unwilling to perform his duties efficiently and sought to prohibit or restrict further assignment of cases to him. The judge resisted on the grounds that his constitutional powers as a judge would be thus infringed and the impeachment powers of Congress usurped. Justice Douglas took the viewpoint that the Constitution did not give federal judges collectively such power over any one of their number individually, and asserted that what happened here "has happened to other federal judges who have had perhaps a more libertarian approach to the Bill of Rights than their brethren." 398 U.S. at 137. After further discussion of the necessity for permitting judges full freedom to judge according to their personal views, he described this as "the crucial issue at the heart of the present controversy." *Id.* There is, however, no indication in the record of this case that Judge Chandler was under fire because of his personal or his judicial philosophy or that the power exercised by the Judicial Council could be wielded in the manner suggested by Justice Douglas.

⁸COUNTRYMAN 381-82.

⁹*Id.* at 379-80.

ject high marks on all of these with only a grudging acknowledgment that there are those who claim the Douglas judicial style of "blunt and bold" language has "led him frequently into error."¹⁰

In summary, this book sets forth Douglas' opinions on 30 major sets of constitutional issues grouped under the headings of Democratic Government, Fair Governmental Procedures, and The Economy. Professor Countryman as a rule does not signal his approval of individual judicial statements, but indicates his general agreement with the positions taken. Thus the gauntlet has been cast at the feet of those to whom the enduring presence of William O. Douglas on the High Court has been an affliction. Many believe that Justice Douglas has at times been neither lucid nor consistent in his opinions, and this deliberate, restrained, yet favorable review of the Douglas judicial record ought to evoke a response from those who see that record differently.

DAVID A. THOMAS*

¹⁰*Id.* at 380-81.

*Assistant Professor of Law, Brigham Young University. B.A., Brigham Young University; J.D., Duke University.