

# Safeguarding Judicial Integrity During the Trump Presidency: Richard Nixon’s Attempt to Impeach Justice William O. Douglas and the Use of National Security as a Case Study

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## ABSTRACT

*In April 1970, Congressman Gerald Ford called for the impeachment of Justice William O. Douglas. Although Douglas had been accused by anti-civil rights Southern Democrats of unprofessional conduct in his association with a political foundation as well as his four marriages, Ford reasoned that, in addition to the past allegations, Justice Douglas had become a threat to national security. Within two weeks of Ford’s allegations, United States military forces invaded Cambodia without the express consent of Congress. Nixon’s involvement in Ford’s attempts to have Justice Douglas impeached give rise to the possibility that, in addition to trying to reshape the judiciary and further architect the “Southern Strategy” by bringing conservative Southern Democrats into the Republican Party, the impeachment would serve as a means to divert attention away from the Cambodian invasion. Ford’s irresponsible conduct in this matter (and Justice Douglas’s overall conduct) have never been historically addressed and, as a result, did not leave to future political leaders and judges a means by which to gauge behavior that can undermine the independence of the judicial branch. This Article is intended to provide a historical model of accountability.*

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#### INTRODUCTION

On April 15, 1970, Congressman Gerald Ford, the House of Representatives' minority leader, delivered a floor speech to his colleagues in the House of Representatives and demanded the body begin impeachment proceedings against Justice William O. Douglas.<sup>1</sup> Less than two weeks later,

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1. 116 CONG. REC. 11,912-19 (1970) [hereinafter Ford Speech] (statement of Rep. Ford).

President Richard Milhous Nixon ordered a ground invasion of Cambodia.<sup>2</sup> Nixon had planned for a joint United States and South Vietnamese assault into Cambodia prior to Ford's speech, and, six months before this invasion, Nixon had initiated "Operation Menu," a secretive aerial campaign against North Vietnamese military targets in Cambodia.<sup>3</sup> The invasion into Cambodia was at odds with Nixon's earlier promise not to expand or enlarge the United States' role in the Vietnam Conflict; it led to nationwide unrest.<sup>4</sup> Oddly, for reasons of secrecy that became emblematic of Nixon's administration, the President had not conferred with Secretary of Defense Melvin Laird or Secretary of State William Rogers about his final invasion decision, but he consulted with Henry Kissinger, his national security advisor, as well as Ford and a small number of other congressmen.<sup>5</sup> Laird and Rogers earlier had presciently warned Nixon that widening the war into Cambodia would lead to domestic upheaval, and news leaks over "Operation Menu" caused Nixon to distrust Laird.<sup>6</sup>

In the speech preceding the invasion, Ford, a Republican and one of Nixon's closest congressional allies, alleged that Justice Douglas had engaged in unethical conduct, such as departing from the duty of impartiality, accepting unlawful payments, and undermining what today would be termed as "family values."<sup>7</sup> Ford also claimed that the Justice had encouraged domestic unrest and was involved in various political activities to the detriment of national security.<sup>8</sup> While it may not be possible to determine definitively whether Ford's speech was timed to provide political cover for the Cambodian invasion or occurred as a matter of coincidence,

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2. See, e.g., ANDREW L. JOHNS, VIETNAM'S SECOND FRONT: DOMESTIC POLITICS, THE REPUBLICAN PARTY, AND THE WAR 281–82 (2010).

3. *Id.* at 281–84; WALTER ISAACSON, KISSINGER: A BIOGRAPHY 268–69 (1992). Between April 29 and May 1, 1970, more than 31,000 United States soldiers and a larger contingent of Army of South Vietnam forces invaded Cambodia. See *id.*; see also Richard D. Schulzinger, *Nixon, Congress, and the War in Vietnam*, in VIETNAM AND THE AMERICAN POLITICAL TRADITION: THE POLITICS OF DISSENT 282, 287 (Randall B. Woods ed., 2003).

4. DAVID F. SCHMITZ, RICHARD NIXON AND THE VIETNAM WAR: THE END OF THE AMERICAN CENTURY 19 (2014).

5. RICHARD A. HUNT, MELVIN LAIRD AND THE FOUNDATION OF THE POST VIETNAM MILITARY, 1969–1973, at 149 (2015). Nixon limited the flow of information to a select small number of legislators including Senators Everett Dirksen, Richard Russell, and John Stennis. *Id.* And, in the House of Representatives, he notified Gerald Ford and Leslie Arends, the Republican minority whip and Nixon loyalist. *Id.*

6. *Id.* at 150.

7. Ford Speech, *supra* note 1.

8. *Id.* Ford's attack on Douglas was widely reported. See, e.g., Richard Lyons, *Ford Opens Wide Attack on Douglas*, WASH. POST, Apr. 16, 1970; see also Marjorie Hunter, *Ford Asks Douglas's Ouster*, N.Y. TIMES, Apr. 16, 1970.

there is interlinking indicia that the two events were connected as part of an ideological strategy.<sup>9</sup> This strategy, whether intended or not, politicized the federal judiciary, threatening judicial independence and encouraging deference to asserted national security needs over individual rights.

While there is uncertainty why Ford moved to have Justice Douglas impeached, there is a historic consensus that Ford acted at Nixon's behest. Most popular theories center on Nixon's desire to reshape the Supreme Court, a legacy every president would like to leave. Nixon took office in the wake of President Lyndon Johnson's failed attempt to nominate Justice Abe Fortas to replace the retiring Chief Justice Earl Warren, and that failed attempt led to Justice Fortas's resignation from the Court, leaving Nixon with the immediate opportunity to appoint two Supreme Court justices. When the Senate failed to confirm his first two nominations, Nixon and his allies sought to use the impeachment of Douglas as payback.

Although Southern Democrats in Congress had previously called for Justice Douglas's impeachment, the roots of Ford's attempt to remove Justice Douglas date to 1968. That year, Chief Justice Warren informed President Johnson that he intended to retire, but not until Johnson had successfully appointed a new chief justice.<sup>10</sup> Chief Justice Warren wanted to make sure that Nixon, Johnson's likely successor, would be deprived of the opportunity to appoint a chief justice.<sup>11</sup> This was an unusual mode of retirement, and it angered Senate conservatives like Samuel Ervin, a North Carolina Democrat who rhetorically asked whether "the refusal of Chief Justice Warren to resign until an agreeable successor [was] appointed dilute[d] the constitutional 'advice and consent' function of the Senate . . . ."<sup>12</sup> Southern segregationists, "states-rights" politicians, and

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9. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 18 (1979). According to reporters Bob Woodward and Scott Armstrong, once Nixon came into the presidency, he ordered the Internal Revenue Service and Federal Bureau of Investigation to investigate Douglas. *Id.*

10. See JOSEPH A. CALIFANO, JR., *THE TRIUMPH & TRAGEDY OF LYNDON JOHNSON* 308 (1991).

11. JOSEPH A. CALIFANO, JR., *INSIDE* 191 n.\* (2004).

12. Letter from Senator Sam Ervin to Senator Clinton Presba Anderson (Sept. 25, 1968), in CLINTON PRESBA ANDERSON PAPERS, 1938–1973, Box 734 (Library of Cong. comp., 2011). Ervin was a Southern Democrat who had opposed the Supreme Court's decision in *Brown v. Board of Education* and signed the so-called "Southern Manifesto." See PAUL R. CLANCY, *JUST A COUNTRY LAWYER: A BIOGRAPHY OF SENATOR SAM ERVIN* 173–74 (1974). However, beginning in 1970, he also became one of the Senate's staunchest opponents against the government's use of the military in the surveillance of U.S. citizens. *Id.* at 229–335. Anderson was a Democrat from New Mexico who supported integration and endorsed Justice Fortas's nomination as chief justice. See, e.g., 1 JOSEPH M. SIRACUSA, *ENCYCLOPEDIA OF THE KENNEDYS* 17–18 (2012).

national conservatives had taken issue with many of the Warren Court's decisions, and Warren's method of conditionally retiring fueled the anger against the Court.

Still, Johnson had assurances from Republican Senate Minority Leader Everett Dirksen, his deputy, Hugh Scott, and Democrat "powerhouse" Senator Richard Russell that Justice Fortas could be confirmed if Nixon appointed him for the position of chief justice.<sup>13</sup> Johnson had successfully nominated Justice Fortas to the Court in 1965 with little Senate opposition and had scant reason to believe that Justice Fortas would not be confirmed as chief justice.<sup>14</sup> But, Justice Fortas had continually provided Johnson advice on national security and foreign policy matters, such as the conflict in Vietnam and the United States's invasion of the Dominican Republic, and then denied these activities under oath.<sup>15</sup> This led to extended opposition to Justice Fortas from the chairman of the Senate Judiciary Committee, James O. Eastland, as well as several Southern Democrats and conservative Republicans. Ultimately, there were not enough legislators to override a filibuster, and Justice Fortas, unable to secure a majority of the Senate, resigned from the Court rather than face an impeachment.<sup>16</sup>

Nixon saw the opportunity to potentially appoint two Supreme Court justices and appoint the new Chief Justice, essentially reshaping the Court as he saw fit. He thought to accomplish this by taking advantage of divisions within the democratic majority. Without a Senate confirmation of Johnson's choice for the position, Chief Justice Warren's conditional retirement couldn't keep the nomination out of the hands of Johnson's successor, Richard Nixon. Nixon was sworn in as President on January 20, 1969, and while that put control of the White House in the hands of the Republican

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13. Only Senators Strom Thurmond (R-S.C.), Carl T. Curtis (R-Neb.), and John J. Williams (R-Del.) voted against Fortas in 1965. *See, e.g.*, NEIL D. MCFEELEY, *APPOINTMENT OF JUDGES* 188 n.49 (1987).

14. *Id.*

15. *See, e.g.*, BRUCE ALLEN MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* 142–49 (1988).

16. *Id.* at 514–25. Although Justice Fortas could have remained on the Court after the failed nomination, scrutiny by the news media during his confirmation forced his resignation. Reporters covering the confirmation uncovered evidence that he had received more than \$20,000 annually for serving as a consultant for a foundation created by Louis Wolfson, a wealthy financier whose appeals from a federal conviction came to the Court during Justice Fortas's tenure. RICHARD DAVIS, *JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT AND THE MEDIA* 110–11 (2011); *see also* Ford Speech, *supra* note 1; MURPHY, *supra* note 15, at 495–517. Several congressmen demanded Justice Fortas's impeachment on the basis of his engagement in unethical conflicts of interest, and Attorney General John Mitchell provided Chief Justice Warren evidence of Justice Fortas's malfeasance. *See* MURPHY, *supra* note 15, at 501–17.

Party, for the first time in modern history both houses of Congress were solidly under the control of the Democrats.<sup>17</sup> It would be reasonable to assume Democratic opposition and Republican support for Nixon's nominees, but this would overly simplify the analysis. The Democratic Party was hardly unified, as southern conservatives and party liberals clashed over civil rights and Vietnam.<sup>18</sup> While the Senate easily confirmed Chief Justice Warren Burger, Nixon's choice to replace Chief Justice, it denied confirmation to his first two nominations to replace Justice Fortas: Clement Haynsworth and G. Harrold Carswell.<sup>19</sup> A coalition of liberal Democrats and Northern Republicans in the Senate aligned to defeat both nominations to the anger of not only Nixon, but also Southern Democrats.<sup>20</sup> The timing of Haynsworth's and Carswell's confirmation failures has since led politicians and historians to conclude that Ford, at Nixon's behest, sought Douglas's impeachment as political revenge.<sup>21</sup> Ford called for Douglas's impeachment contemporaneously with Carswell's defeat, garnering support from an alliance of 104 Southern Democrats and Republicans in the House of Representatives.<sup>22</sup> Ford admitted that he was irate with the Senate over Haynsworth and Carswell but denied this was a reason for his call to

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17. See ROBERT MASON, *RICHARD NIXON AND THE QUEST FOR A NEW MAJORITY* 40 (2004).

18. See SEAN J. SAVAGE, *JFK, LBJ, AND THE DEMOCRATIC PARTY* 172 (2004).

19. JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* 12–15 (1995); see also DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* 103–08 (1999).

20. YALOF, *supra* note 19, at 107.

21. For an example of the historic consensus, see DAVID E. KYVIG, *THE AGE OF IMPEACHMENT* 106–09 (2008). See also ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 600–01 (1997); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 777–81 (2000); JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 24–28 (2001); Memorandum by Richard Sachs, Analyst, American National Government (Oct. 24, 1973), in *GERALD R. FORD VICE PRESIDENTIAL PAPERS, 1949–1973, Box 229* (Gerald R. Ford Presidential Library) [hereinafter *Memorandum by Richard Sachs*]. Sachs's memorandum was created during the House of Representatives' consideration of Ford's appointment as Vice President after Spiro Agnew's resignation. According to Sachs, Ford had coordinated with a White House aide, Clark Mollenhoff, providing evidence that the direction came from Nixon. See Memorandum by Richard Sachs, *supra*, at 2. Former Attorney General and Ohio Senator William Saxbe, a Republican, commented: "In retaliation and probably in a fit of pique, Nixon sicced GOP House minority leader Gerald Ford on Associate Justice William O. Douglas." WILLIAM B. SAXBE, *I'VE SEEN THE ELEPHANT* 110–16 (2006). Likewise, Abner Mikva, a former Democratic congressman from Illinois and federal judge, believed Ford's actions had "created a strong sense of gratitude in President Nixon." ABNER J. MIKVA & PATTI B. SARIS, *THE AMERICAN CONGRESS* 109 (1983).

22. MIKVA & SARIS, *supra* note 21.

investigate Douglas.<sup>23</sup> And, while this political animosity may well have been enough to motivate Nixon to push Ford to move forward with impeachment allegations, Nixon's personal animosity toward Douglas stoked the fire. According to John Ehrlichman, Nixon despised Douglas more than any other federal jurist. The desire to have Douglas humiliated through the impeachment process could also be translated into a revenge motive.<sup>24</sup>

While this existing political tension between the branches and accompanying personal animosities might have been one justification for Nixon seeking the impeachment of Justice Douglas through his allies in the House of Representatives, it is certainly not the only one. There has been little study as to the role of "national security" in the impeachment attempt, and this Article will seek to fill that gap.

This Article argues that the impeachment process was used as political cover to distract the public from the controversial Cambodian invasion. Ford did this by making an array of accusations against Justice Douglas, charging that Justice Douglas had worked to restore the deposed leftist leader of the Dominican Republic, Juan Bosch, to power and had consorted with organized crime leaders in the process.<sup>25</sup> Ford also claimed that Justice Douglas had empowered communists and encouraged dissent against the government.<sup>26</sup> The most damning claim was that Justice Douglas sought an end to the conflict in Vietnam by permitting the Communists to attain a total victory.<sup>27</sup>

This Article is not premised on the argument that Justice Douglas was a threat to national security; rather, it examines Ford's use of "national security" in his efforts to have Justice Douglas removed. National security, to be sure, was not the only basis Ford articulated, but it was the first time that a justice was publicly accused of undermining it.<sup>28</sup> Ford ultimately

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23. Ford Speech, *supra* note 1.

24. See JOHN EHRLICHMAN, WITNESS TO POWER: THE NIXON YEARS 116 (1982).

25. Ford Speech, *supra* note 1. According to Ford's aid, Benton Becker, Nixon had goaded Ford into making these claims, but Becker doubted that the evidence ever existed. Sam Roberts, *Benton Becker, 77, Ford Aide; Negotiated Nixon Pardon*, N.Y. TIMES, Aug. 8, 2015, at A21. On Becker's role in Ford's impeachment efforts, see Richard Reeves, *Why American Politicians Are So Bad: The Case History of Gerald Ford*, N.Y. MAG., Oct. 13, 1975, at 41.

26. Ford Speech, *supra* note 1.

27. *Id.*

28. For instance, President Abraham Lincoln might have believed that Chief Justice Roger Brooke Taney had tried to assist the Confederacy, but Lincoln apparently never concluded that he should push Congress to impeach the Chief Justice. See LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008, at 120 (2009). Powe writes that instead of pushing for Taney's impeachment, the Republicans chose to ignore him. *Id.*

failed to have Justice Douglas impeached, and, in the words of former White House counsel John Dean, the failed impeachment attempt created “an intractable resolve” in Douglas not to resign as long as Nixon remained president.<sup>29</sup>

Understanding the mechanics of the impeachment investigation and the motivations of Nixon, Ford, and Ford’s congressional allies is relevant to contemporary discussions of the judiciary for two reasons. First, their actions contributed to the politicization of the judiciary, setting an expectation that the Court must give deference to the national security needs of the country, particularly when those national security needs are in conflict with the individual rights of its citizens. This remains true, even if no directly analogous event has occurred since.<sup>30</sup> And, second, the episode evidences how easily members of the two elected branches of the federal government can attack the judiciary, often with little lasting accountability. It is true that this episode, which once gained headlines both nationally and internationally, has now faded into historical obscurity. But, the episode remains a quietly influential artifact, in part because none of the individuals leading the charge suffered as a result of it.<sup>31</sup> Ford became vice president with little congressional opposition. Although Nixon resigned under threat of impeachment, the impeachment effort against Justice Douglas was never brought forward as evidence against Nixon. And Justice Douglas, who had engaged in an unprecedented degree of political activity, remained obstinately on the Court. The lack of accountability for those involved leaves open the possibility for today’s elected officials, if they so choose, to politicize the judiciary without the constraints of historic accountability.

Constructed as a legal history, this Article examines the use of “national security” in the impeachment process. At no point in this Article is there a defense of Justice Douglas’s extrajudicial actions, notwithstanding the fact that, throughout history, several justices, including some of Justice Douglas’s contemporaries, also engaged in non-judicial activities of a political nature.<sup>32</sup> Rather, it is intended to show how those extrajudicial

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29. DEAN, *supra* note 21, at 26.

30. Perhaps the actions of the current commander-in-chief in accusing a federal judge of endangering the nation is closely analogous, but in the author’s opinion there is a difference between an allegation against a judge and a Supreme Court justice. Nonetheless, there is a danger to judicial independence in the commander-in-chief’s actions. *See, e.g.*, Eric Levitz, *Trump Just Declared the ‘Court System’ a Threat to National Security*, N.Y. MAG., Feb. 6, 2017.

31. *See* PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 101–02 (1998) (defining “legal artifact”).

32. MICHAL R. BELKNAP, *THE SUPREME COURT UNDER EARL WARREN, 1953–1969*, at 303–04 (2005).



activities, whether innocuous or not, allowed the Nixon Administration and its congressional allies to pursue impeachment of a sitting Supreme Court justice by appealing to the nationalist security fears of congressional “defense hawks.” Had the effort been successful, it would have allowed Nixon to dramatically shape the future of the Court by appointing a third justice to the bench; it also would have served as a public distraction that enabled his administration to move forward with the controversial invasion of Cambodia with far less public outcry. This Article is divided into four parts.

Part I provides a contextual overview of the political climate of the late 1960s, particularly the tension between the branches of government. It also provides a brief background on Justice Douglas’s approach to national security, including the political reaction against his judicial decisions. Part I also highlights Justice Douglas’s stridency against the use of United States military forces in the Vietnam conflict. Finally, it includes a brief analysis on the “state” of federal judicial ethics in the period leading up to the impeachment investigation.

Part II presents Ford’s claims against Justice Douglas and the creation of the House Judiciary Committee’s investigation into him. This Part also analyzes the timing of Ford’s actions in light of the United States’ military invasion into Cambodia. Further, it examines Ford’s claims that Justice Douglas had tried to undermine the stability of pro-American governments in Latin America, particularly the Dominican Republic.

Part III of this article analyzes the investigation into Douglas and the public reaction to the investigation. Part IV examines congressional and news media reactions to Ford’s claims as a means for assessing why he failed in his efforts to dislodge Justice Douglas from the Court.

Finally, this Article concludes by discussing not only why this episode should be better understood, but also how it should be used as a barrier to protect the judiciary against claims that judges have undermined the nation’s security.

#### I. THE WARREN COURT, JUSTICE DOUGLAS, AND THE VIETNAM WAR

An examination of the effort to impeach Justice Douglas must take into account the relationship between the judiciary and the legislative branch. During Chief Justice Warren’s tenure, the Court issued decisions mandating equal treatment in public education and other government institutions, restricting school prayer, and enhancing the rights of the accused in criminal

trials.<sup>33</sup> While these decisions were ultimately heralded by the majority of the population as not only constitutionally correct but also morally essential to the ideals of democracy, they angered southern politicians who claimed the Court was undermining the Constitution.<sup>34</sup> When the Court began overturning convictions and ending employment discrimination based on allegations of ties to communism (or organizations the attorney general determined to be “subversive”), right-wing organizations like the John Birch Society undertook an “impeach Warren campaign,” erecting billboards across the country claiming the Court had sided with communism.<sup>35</sup>

A more serious criticism was levelled against the Court by the American Bar Association. During its 1957 conference in London, its Special Committee on Communism claimed the Court had weakened national security.<sup>36</sup> Chief Justice Warren resigned from the American Bar Association in response.<sup>37</sup> Because Douglas was a leading voice on the Court against state and federal investigations into persons based on alleged ties to communism, he, too, was a natural target for conservatives’ accusations of communist sympathies.<sup>38</sup>

#### A. Congressional “Defense Hawks” vs. Justice Douglas

Conservative Southern Democrats began to argue that Justice Douglas was a threat to national security after he attempted to prevent the executions of Ethel and Julius Rosenberg.<sup>39</sup> The Rosenbergs had been convicted of providing the Soviet Union classified information on nuclear weaponry and

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33. DAVIS, *supra* note 16, at 104; *see also* Kermit L. Hall, *The Warren Court in Historical Perspective*, in *THE WARREN COURT* 293–312 (Bernard Schwartz ed., 1996).

34. *See* POWE, *supra* note 28, at 244–45.

35. DAVIS, *supra* note 16, at 104; KYVIG, *supra* note 21, at 35 (2008); *see also*, CHRISTINE L. COMPSTON, *EARL WARREN: JUSTICE FOR ALL* 130–32. Because its members could be considered “fringe,” the John Birch Society had at best a nominal effect on the public’s perception of the Court. ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* 389 (1997). The fringe nature of this organization, as Cray pointed out, could be found in the fact that its leaders accused President Dwight Eisenhower of sympathizing with communism, as well. *Id.*

36. ROBERT M. LICHTMAN, *THE SUPREME COURT AND MCCARTHY-ERA REPRESSION: ONE HUNDRED DECISIONS* 105–06 (2012).

37. HALL, *supra* note 33, at 307.

38. *Move To Impeach Douglas Quashed*, N.Y. TIMES, July 8, 1953.

39. *See Impeaching Justice Douglas?: Shape of the Coming Battle*, U.S. NEWS & WORLD REP., Apr. 20, 1970, at 26. In 1962, Senator John Tower cited to Douglas’s publication, “Freedom of the Mind,” as evidence that he lacked the objectivity to determine national security appeals. *Id.*

sentenced to death.<sup>40</sup> After several appeals, the Rosenbergs were executed, but only after Justice Douglas had delayed the execution by ordering a stay.<sup>41</sup>

Justice Douglas's judicial record on appeals arising from the Vietnam conflict provided his opponents with further evidence of his views on the divisiveness of war, particularly dissents in which he would have sided with parties challenging the constitutional authority of the government to conscript citizens to fight in an undeclared war. For instance, in 1968 he dissented in *Zwicker v. Boll*, a per curiam decision that upheld the denial of injunctive relief against Wisconsin's disorderly conduct statute, which had been challenged by University of Wisconsin graduate students who protested the United States' involvement in Vietnam.<sup>42</sup> The students' suit challenging the constitutionality of the statute had been dismissed by the lower court, and the Supreme Court affirmed that decision.<sup>43</sup> Justice Douglas noted that disorderly conduct statutes have been used historically to silence "unpopular groups of persons who espouse unpopular causes," and he believed that the students had "adequately alleged in their complaint that their arrests and prosecutions were effected in bad faith and in a discriminatory manner in order to punish and discourage exercise of constitutionally protected rights."<sup>44</sup>

Justice Douglas also dissented in the landmark case *United States v. O'Brien*, which upheld a conviction for the destruction of a "draft card" in protest of the war.<sup>45</sup> He took exception to the majority's view that congressional power "to raise and support armies" is "broad and sweeping" and that Congress's power "to classify and conscript manpower for military service is beyond question" without a declaration of war.<sup>46</sup> Douglas concurred with the Court's decision in *Powell v. McCormack*, which held that Congress could not refuse to seat a duly elected member who had also been accused of criminally misappropriating public funds before the election.<sup>47</sup> Douglas added that the refusal to seat a member because of anti-war views would also be unconstitutional.<sup>48</sup> And, in *O'Callahan v. Parker*,

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40. *United States v. Rosenberg*, 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838, *reh'g denied*, 344 U.S. 889 (1952) (affirming the trial court's conviction and sentence).

41. LORI CLUNE, EXECUTING THE ROSENBERGS 118 (2014).

42. *Zwicker v. Boll*, 391 U.S. 353 (1968).

43. *Id.*

44. *Id.* at 354, 356 (Douglas, J., dissenting).

45. *United States v. O'Brien*, 391 U.S. 367 (1968).

46. *Id.* at 389 (Douglas, J., dissenting).

47. *Powell v. McCormack*, 395 U.S. 486 (1969).

48. *Id.* at 551 (Douglas, J., concurring). The Court had already determined that the Georgia legislature's refusal to seat a state legislator who had been an anti-war leader was unconstitutional. *Bond v. Floyd*, 385 U.S. 116 (1966).

Douglas led a majority of the Court to significantly limit the military's jurisdiction to prosecute its servicemembers in courts-martial, even though Congress, in enacting the Uniform Code of Military Justice, had provided for universal jurisdiction over servicemembers.<sup>49</sup>

His decisions drew the ire of Congressman Felix Edward Hébert, a conservative Southern Democrat and chairman of the House Armed Services Committee.<sup>50</sup> Hébert complained to Chief Justice Burger that Justice Douglas's act of ordering the Secretary of the Army to release Captain Howard Levy from its prison at Fort Leavenworth threatened the Army's readiness and discipline.<sup>51</sup> Levy had been convicted in a contentious court-martial for mutinous-type offenses and sentenced to three years in prison.<sup>52</sup> His court-martial and subsequent appeals became a *cause celebre* in the media.<sup>53</sup> Hébert, apparently ignorant to the principle of judicial independence, asked Chief Justice Burger to disqualify Justice Douglas from "passing judgment on any cases involving Vietnam, the draft, or the military in general."<sup>54</sup>

The letter to Chief Justice Burger was not Hébert's first complaint against Justice Douglas to a member of the judiciary. He had previously written two letters to Chief Justice Warren asking him to prohibit Justice Douglas from deciding appeals arising from the Vietnam War; in all three letters, Hébert claimed Justice Douglas had empowered both domestic anti-war movements and communist forces in Vietnam by enjoining the

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49. O'Callahan v. Parker, 395 U.S. 258 (1969); see also Joshua E. Kastenberg, *Cause and Effect: The Origins and Impact of Justice William O. Douglas's Anti-Military Ideology from World War II to O'Callahan v. Parker*, 26 T. M. COOLEY L. REV. 163 (2009) (discussing Justice Douglas' overall intent in this decision).

50. See ADAM FAIRCLOUGH, RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915–1972, at 81 (1995); FRANK J. SMIST, CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY, 1947–1989, at 6–7 (2nd ed. 1994).

51. Letter from Representative Felix E. Hebert to Chief Justice Warren E. Burger (Aug. 8, 1969), in HUGO LAFAYETTE BLACK PAPERS, 1883–1976, Box 59 (Library of Cong. comp., 2000) (contained in a memorandum from Charles Morgan, Levy's attorney, to Senator Sam J. Ervin and forwarded to Justice Black).

52. Parker v. Levy, 417 U.S. 733, 736 (1974); see Robert N. Strassfeld, *The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 WIS. L. REV. 839, 841.

53. Strassfeld, *supra* note 52, at 839. In 1974, the Supreme Court, in a five-to-three decision, with Justice Thurgood Marshall not participating, upheld Levy's conviction. *Parker*, 417 U.S. at 762. Justice Douglas dissented on the basis that the offenses for which Levy had been found guilty violated the First Amendment, even in the military context. *Id.* at 766, 772 (Douglas, J., dissenting). Justice Douglas, along with Justice Brennan, also joined in Justice Stewart's dissent, which argued that the statutes under which Levy had been court-martialed were unconstitutionally vague. *Id.* at 773 (Stewart, J., dissenting).

54. Letter from Representative Felix E. Hebert to Chief Justice Warren E. Burger, *supra* note 51.

deployment of called-up reservists to Vietnam by the Department of Defense.<sup>55</sup>

*B. Justice Douglas's Political Activities*

There is historic consensus that Justice Douglas visibly mixed politics and jurisprudence to an unusual degree in comparison to the other justices of his time. Douglas was a prolific writer, and in 1952 he authored an article in *Look Magazine* titled “We Have Become Victims of the Military Mind.”<sup>56</sup> Justice Douglas’s basic premise was that following the defeat of Germany and Japan in World War II, and with the onset of the Cold War, former and active military officers staffed much of the government and, as a result, the federal government undertook a monolithic approach toward not only communism, but also toward other minority beliefs.<sup>57</sup>

In the same year, Justice Douglas also championed Ngo Diem, the president of South Vietnam, as Asia’s “hero in Central and North Vietnam,” in essence supporting the anti-democratic leader.<sup>58</sup> Justice Douglas’s detractors pointed out that, during World War II, he sided with the Court’s majority in upholding severe limits on the constitutional liberties of citizens who were of Japanese descent and in protecting President Roosevelt’s authority as Commander in Chief in a number of other significant ways.<sup>59</sup> Yet, by the late 1940s, Justice Douglas began to urge constraints on the

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55. See Letter from Representative Felix E. Hebert to Chief Justice Earl Warren (Sept. 19, 1968), in HUGO LAFAYETTE BLACK PAPERS, 1883–1976, Box 59 (Library of Cong. comp., 2000); Letter from Representative Felix E. Hebert to Chief Justice Earl Warren (Jan. 24, 1969), in HUGO LAFAYETTE BLACK PAPERS, 1883–1976, Box 69 (Library of Cong. comp., 2000); *Judicial Shop-Around*, WASH. POST, Sept. 16, 1968 (reporting on Justice Douglas’s stay that prevented the government from sending soldiers in the Army Reserves into duty for service in Vietnam).

56. William O. Douglas, *We Have Become Victims of the Military Mind*, LOOK MAG., Mar. 11, 1952, at 34.

57. *Id.*

58. SETH JACOBS, AMERICA’S MIRACLE MAN IN VIETNAM 41 (2004).

59. Robert Jerome Glennon, *Commentary: Collegialism and Change Over Time: William O. Douglas as Justice*, in “HE SHALL NOT PASS THIS WAY AGAIN”: THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 51, 55 (Stephen L. Wasby ed., 1990). A number of cases show Justice Douglas’s support for Roosevelt’s assertions of Executive Branch authority in wartime. See *Korematsu v. United States*, 323 U.S. 214 (1944); *Yakus v. United States*, 321 U.S. 414 (1944); *In re Yamashita*, 327 U.S. 1 (1946).

Executive Branch.<sup>60</sup> In 1967, he went so far as to accuse President Johnson of using conscription to punish campus activists.<sup>61</sup>

In February 1970, Justice Douglas published *Points of Rebellion*, a treatise in which he posited that people might overthrow the government—just as the colonists removed George III’s authority over them—because of an overarching military surveillance over the citizenry and the encroachment of the nation’s intelligence agencies into college campuses.<sup>62</sup> Justice Douglas used the campus terminology of the day in describing government functions as “Big Brother” and “the establishment.”<sup>63</sup> Following publication of *Points of Rebellion*, several critics called for his removal from the Court.<sup>64</sup> To conservatives like Ford, *Points of Rebellion* became a “proof point” that Justice Douglas intended to undermine national security and that his judicial decisions had to be examined alongside the book.

### C. *The House of Representatives’ Judiciary Committee*

One key to understanding how the impeachment attempt played out is to understand the inner workings and dynamics within the House of Representatives, particularly the House Judiciary Committee. The House of Representatives’ Judiciary Committee is that body’s sole committee for the regulation of the federal judiciary. Established in 1813, the Judiciary Committee is among the oldest standing committees in the House.<sup>65</sup> It is also

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60. See, e.g., *Bridges v. Wixon*, 326 U.S. 135 (1945) (setting aside an order to deport Harry Bridges, who had been affiliated with a labor union accused of communist ties); *Ludecke v. Watkins*, 335 U.S. 160, 184 (1948) (Douglas, J., dissenting) (opposing the executive branch’s assertion that classifications of aliens were non-reviewable by the courts); *Hirota v. MacArthur*, 338 U.S. 197 (1948) (Douglas, J., concurring) (arguing that Japanese prisoners of war could not be automatically deemed without redress to the United States courts); *Johnson v. Eisentrager*, 339 U.S. 763, 792 (1950) (Black, J., dissenting) (arguing that the Executive Branch could not deny habeas appeals to the federal courts for aliens—even belligerent aliens—held in captivity).

61. WILLIAM O. DOUGLAS, *POINTS OF REBELLION* 39 (1969).

62. *Id.* at 95. Douglas notably challenged, “The Pentagon has a fantastic budget that enables it to dream of putting down the much-needed revolutions which will arise in Peru, in the Philippines, and in other benighted countries. Where is the force that will restrain the Pentagon?” *Id.* at 41. It should also be noted that Random House, a New York-based publisher with a global distribution system, published Douglas’s book. *Id.* at tit. p.

63. *Id.* at 29, 97.

64. See, e.g., Israel Shenker, *Justice Douglas Says Revolution May Be Only Honorable Reply to Oppression*, N.Y. TIMES, Feb. 1, 1970; *A Justice Disgraces the Supreme Court*, CHI. TRIB., Feb. 13, 1970; Daniel Seligman, *Revolution, Rant and Justice Douglas*, LIFE MAG., May 1, 1970.

65. 1 THE U.S. JUSTICE SYSTEM: AN ENCYCLOPEDIA 45 (Steven Harmon Wilson ed. 2012).

the busiest of the House's committees. Its chairman in 1970, Emanuel Celler, noted that more than one-third of all bills considered by the House were forwarded to his committee for review and voting.<sup>66</sup> While the committee is key to understanding the impeachment effort, it is also important to recognize that it lacks the power of its Senate counterpart. Indeed, Ford lamented in his speech how little influence the House of Representatives had in the nomination of federal judges.<sup>67</sup> After all, the duty of confirming presidential nominations is wholly vested in the Senate.<sup>68</sup>

Pursuant to the House's rules in 1970, impeachment resolutions were brought to the Judiciary Committee, as were complaints of significant judicial misconduct.<sup>69</sup> However, within the committee, there was no specific subcommittee tasked with investigating judicial misconduct; when such allegations arose, the chairman of the committee and the ranking minority party member appointed members from their respective parties to conduct the investigation. For instance, between 1966 and 1968, the Judiciary Committee created a special subcommittee to review allegations of misconduct against a United States District Court judge named Stephen S. Chandler.<sup>70</sup> The subcommittee, which consisted of two Democrats and two Republicans, was not directly tasked with considering Judge Chandler's impeachment.<sup>71</sup> It concluded that both Judge Chandler and his accusers, including two judges on the Court of Appeals for the Tenth Circuit, had behaved in a manner that undermined the public's confidence in the federal judiciary.<sup>72</sup>

Usually, when a congressman or congresswoman calls for an impeachment against an Executive Branch officer or judge, the impeachment processes, including investigations, begin by assigning the matter to the

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66. MORRIS S. OGUL, CONGRESS OVERSEES THE BUREAUCRACY 129 (1976).

67. Ford Speech, *supra* note 1.

68. U.S. CONST. art. II, § 2, cl. 2.

69. MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS 26 (2d ed., Univ. of Chi. Press 2000). Gerhardt writes:

[T]he House Judiciary Committee's investigation of William O. Douglas may have begun for partisan reasons, but it ended in a report that found no grounds for impeachment. Although Justice Douglas's life-style, including his four marriages, and much of his decision making provoked hostile reactions from many Republicans, the impeachment investigation ultimately exposed and perhaps even diffused the personal or partisan motivations for his attempted impeachment.

*Id.* at 29.

70. See H.R. Res. 739, 89th Cong. (1966).

71. *Id.*

72. See *Chandler v. Judicial Council of Tenth Circuit*, 298 U.S. 74, 12425 (1970) (Harlan, J., concurring).

Judiciary Committee.<sup>73</sup> If articles of impeachment are drafted, they are provided to the full House, which must approve the articles by a majority vote before the articles can transition into the Senate for an impeachment trial.<sup>74</sup> Constitutionally, a single member of the House may initiate an impeachment vote against a president, vice president, or executive officer whose position occurred as a result of the Senate confirmation process.<sup>75</sup> But, a majority of the House must determine that impeachment is merited before forwarding articles of impeachment to the Senate.<sup>76</sup> The Constitution requires two-thirds of the senators' votes to remove a federal judge from office.<sup>77</sup> The operative basis for impeachment is the commission of "high Crimes and Misdemeanors."<sup>78</sup> Although the process is called a trial, it is non-reviewable in the federal courts.<sup>79</sup> And, although the Judiciary Committee serves as a quasi-grand jury, few of the normal grand jury rules apply, including the sealing of evidence.<sup>80</sup>

At the time of Ford's April 15 speech calling for Justice Douglas's impeachment, Celler, the Judiciary Committee's chairman, had served in Congress for forty-seven years.<sup>81</sup> He had also served on the Judiciary Committee since 1924 and been its chairman for eleven congresses.<sup>82</sup> He would be the congressman responsible for overseeing an impeachment investigation of Douglas.<sup>83</sup>

Ford and his congressional allies might have found it disturbing that Celler was involved in an investigation into Justice Douglas for three reasons. First, Celler was an ardent champion of civil rights. He had

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73. See, e.g., III ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2400 (1907) (moving to refer an impeachment claim against President Andrew Johnson to the Judiciary Committee); *id.* at § 2469 (directing the Judiciary Committee to inquire and report on the alleged misconduct of Judge Charles Swayne, United States District Court Judge for the Northern District of Florida).

74. U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6.

75. See *id.* art. I, § 2, cl. 5; HINDS, *supra* note 73, at §§ 2342, 2400, 2469.

76. See U.S. CONST. art. I, § 5, cl. 1.

77. See *id.* art. I, § 3, cls. 6–7.

78. *Id.* art. II, § 4.

79. See, e.g., *Nixon v. United States*, 506 U.S. 224, 236–38 (1993).

80. See Jonathan Turley, *Congress As Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735, 771–77 (1999).

81. See MARGARET SANDS ORCHOWSKI, *THE LAW THAT CHANGED THE FACE OF AMERICA: THE IMMIGRATION AND NATIONALITY ACT OF 1965*, at 54 (2015) ("Emanuel (Manny) Celler was the Jewish congressman from Manhattan since 1923 and leader of the House Judiciary Committee for some 40 years.").

82. See *id.* at 55.

83. *Id.* at 54–55.



confronted southern congressmen over the treatment of African Americans.<sup>84</sup> He had also advocated for a more expansive immigration policy for refugees after witnessing the closure of the United States to Jews fleeing Europe in the late 1930s and 1940s.<sup>85</sup>

Second, Celler had not been receptive to the types of reforms that conservatives sought to impose on the judiciary. During his chairmanship, he received several legislative proposals to modify the Court's jurisdiction or alter the means by which the justices determined that a law was unconstitutional, which he refused to submit to the committee for debate. For instance, in 1966, Congressman Earle Cabell, a conservative Texas Democrat, introduced legislation that would have required two-thirds of the justices to overturn a state or federal law on the basis of the law's unconstitutionality.<sup>86</sup> Celler had also previously refused to consider calls to investigate Justice Douglas's activities. Prior to the 1970s, conservatives called for Justice Douglas's removal after he authored articles in *Playboy Magazine*<sup>87</sup> and questioned whether his marital history, which did not reflect appropriate family values, made him unfit to sit on the nation's highest court.<sup>88</sup> Under Celler's control of the committee, both efforts failed.<sup>89</sup> Additionally, in the days leading up to Ford's speech, Celler joined forty other congressmen condemning Ford for attacking the "integrity and independence of the United States Supreme Court."<sup>90</sup>

Finally, Ford might have been concerned with Celler because he and Justice Douglas were "New Deal" liberals and, more importantly, had been friends.<sup>91</sup> In 1967, when Justice Douglas was unable to attend a New York

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84. See MARVIN CAPLAN, *FARTHER ALONG* 202 (1999).

85. ORCHOWSKI, *supra* note 81, at 55.

86. H.R.J. Res. 1124, 89th Cong. (1966); Letter from Representative Earle Cabell to Representative Emanuel Celler, Chairman, House of Representatives Judiciary Comm. (Apr. 28, 1966), in EMANUEL CELLER PAPERS, 1924–1973 (Library of Cong. comp., 2012). Although Celler responded to Cabell that the proposed bill was "intriguing" and promised to give it his "personal study," letter from Representative Emanuel Celler, Chairman, House of Representatives Judiciary Comm., to Representative Earle Cabell (May 2, 1966), in EMANUEL CELLER PAPERS, 1924–1973 (Library of Cong. comp., 2012), the proposal was never sent to the House Judiciary Committee.

87. James J. Kilpatrick, *Justice Douglas and Playboy*, L.A. TIMES, June 18, 1969, at II-9.

88. See BRUCE ALLEN MURPHY, *WILD BILL 366–70* (2003); see also *Contempt of Court . . .*, VA. L. WKLY., Apr. 25, 1963.

89. Memorandum by Richard Sachs, *supra* note 21, at 20–21.

90. *Id.* at 12 (quoting Marjorie Hunter, *Ford Asks Douglas' Ouster*, N.Y. TIMES, Apr. 16, 1970).

91. Letter from Representative Emanuel Celler Chairman, Hour of Representatives Judiciary Comm., to Assoc. Justice William O. Douglas (Feb. 11, 1946), in WILLIAM O.

State Society dinner honoring Celler, Celler responded to Justice Douglas that “it is good enough to know I have your friendship and you have mine.”<sup>92</sup> In spite of their friendship, Celler did not publicly support Justice Douglas in all matters. When the *Los Angeles Times* discovered that Justice Douglas had written Albert Parvin, one of the focal points of Ford’s allegations, a letter condemning the Internal Revenue Service for investigating him, Celler publicly criticized Justice Douglas for undermining the public’s confidence in the judiciary.<sup>93</sup>

It should be clear to see why Ford was nervous about Celler’s participation in the Judiciary Committee’s investigation into Justice Douglas. As head of the investigating committee, Celler had great power to steer the investigation. Without his approval, the impeachment process would likely go nowhere. Ford also knew that Celler had often opposed the policy decisions of Southern Democrats—the same individuals who sought to impeach Justice Douglas—and was unlikely to align with them in their effort. Celler also had a history of deferring to the judiciary to regulate and police the ethics of its judges. He had opposed attempts to impose reforms on the judiciary, many of which formed the basis of the charges against Justice Douglas. Finally, and perhaps most significantly, Ford did not want Celler to head the committee because of his friendship and personal history with Justice Douglas. During his tenure as chair of the Judiciary Committee, Celler had been called on to investigate Douglas twice, and each time, he had ensured the investigations failed. Correspondence between the two men showed just how close their friendship was. Ford must have known it would

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DOUGLAS PAPERS, 1801–1980, Box 315 (Library of Cong. comp., 2014). In 1946, Celler invited Justice Douglas to attend a meeting in support of a “Jewish State” in Palestine. *Id.*

92. Letter from New York State Society to Representative Emanuel Celler, Chairman, House of Representatives Judiciary Comm. (Feb. 17, 1967), in WILLIAM O. DOUGLAS PAPERS, 1801–1980, Box 315 (Library of Cong. comp., 2014); Letter from Representative Emanuel Celler, Chairman, House of Representatives Judiciary Comm., to Assoc. Justice William O. Douglas (Mar. 31, 1967), in WILLIAM O. DOUGLAS PAPERS, 1801–1980, Box 315 (Library of Cong. comp., 2014). On April 18, 1973, Celler wrote to Douglas: “I congratulate you on the 34th anniversary of your appointment as a member of the United States Supreme Court. You have indeed been a credit to that bench and a tower of strength to the nation. You have sought out new judicial trails and have done your work wisely and courageously.” Letter from Representative Emanuel Celler, Chairman, House of Representatives Judiciary Comm., to Assoc. Justice William O. Douglas (Apr. 18, 1973) in WILLIAM O. DOUGLAS PAPERS, 1801–1980, Box 315 (Library of Cong. comp., 2014). Douglas replied that he “cherish[ed] such praise . . . .” Letter from Assoc. Justice William O. Douglas to Representative Emanuel Celler, Chairman, House of Representatives Judiciary Comm. (Apr. 24, 1973) in WILLIAM O. DOUGLAS PAPERS, 1801–1980, Box 315 (Library of Cong. comp., 2014).

93. George Lardner Jr., *Celler Raps Douglas on Letter to Parvin*, WASH. POST, May 28, 1969, at A4.

be a tall order to impeach Justice Douglas, especially with Celler in charge of the Judiciary Committee.

*D. Justice Douglas and the “Sordid State” of Judicial Ethics in 1970*

Perhaps, because Justice Douglas had been a “sponsor” to Justice Fortas, and because the lives of the two men had been intertwined, it should have been foreseeable that Justice Douglas’s opponents would “tar him” with allegations similar to those which forced Justice Fortas’s retirement.<sup>94</sup> Justice Douglas’s involvement with the Parvin Foundation provided just such an opportunity.

Named after its founder, Albert Parvin, a furniture magnate and casino owner, the Parvin Foundation was designed to bring foreign government officers and academics to the United States for educational programs in an effort to promote democracy.<sup>95</sup> Both Justices Douglas and Fortas received money from wealthy benefactors in exchange for chairing academic organizations, and in both instances the wealthy benefactors were suspected of criminal fraud. Justice Fortas’s sponsor, Louis Wolfson, was convicted.<sup>96</sup> To Justice Douglas’ consternation, Parvin’s company was investigated by the Securities and Exchange Commission for fraud in its stock market valuation,<sup>97</sup> and the Internal Revenue Service likewise targeted Parvin’s foundation.<sup>98</sup> In 1966, the *Los Angeles Times* reported that Justice Douglas

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94. See, e.g., MURPHY, *supra* note 15, at 3–33. Under oath, Justice Fortas had denied advising President Lyndon Johnson on matters such as the President’s Vietnam policies, but this was untrue. *Id.* Moreover, Justice Fortas’s previously unreported acceptance of monies from Louis Wolfson through American University were ultimately the reason that led to his resignation. *Id.*

95. MURPHY, *supra* note 88, at 366–67 (2003).

96. *United States v. Wolfson*, 282 F. Supp. 772 (S.D.N.Y. 1967), *aff’d* 405 F.2d 779 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969).

97. *SEC v. Parvin/Dohrmann Co.*, No. 69 Civ. 4543, 1969 U.S. Dist. LEXIS 12985 (S.D.N.Y. Oct. 30, 1969); see also *Firm’s Chairman Hits Investigation by SEC*, L.A. TIMES, May 27, 1969, at 6.

98. *Douglas Says Tax Inquiry Aims to Get Him off Court*, N.Y. TIMES, May 26, 1969; see also *Douglas Note Sharpens Controversy on Court*, L.A. TIMES, May 27, 1969, at 1. Justice Douglas had reason to fret over his relationship with Parvin, and his communications to Parvin evidenced that concern. In 1961, Justice Douglas warned Parvin that an individual named “Mr. Frimet,” who had inquired about the foundation’s financial status; Douglas seemed to be wary of him. Letter from Assoc. Justice William O. Douglas to Albert Parvin (May 1, 1961), in RECORDS OF THE JUDICIARY COMM. AND RELATED COMMS., 1813–1988, RECORDS OF THE H.R., 1789–1990, Record Group 233, Box 88, AP File (National Archives). Parvin’s answer to Justice Douglas displays political naivety on Parvin’s part and circumstantially could evidence the lack of an affiliation with organized crime in which he would have been suspicious of Frimet. Parvin wrote: “Your note of May 1st regarding Gilbert M. Frimet is before me and it has taught me to be more reticent in replying to such

served as a paid director of the Parvin Foundation.<sup>99</sup> On October 17 of that year, Senator John J. Williams, a Delaware Republican, called for the Senate to investigate Justice Douglas's relationship with the foundation, not on the grounds that the foundation had endangered national security, but because Justice Douglas's paid position on the foundation was unethical in light of his position as a justice.<sup>100</sup> Justice Douglas countered to Chief Justice Warren that, because Parvin had no appeals pending before the Court (and that if any appeals were to come before the Court he would recuse himself), Williams's criticisms were without merit.<sup>101</sup> Chief Justice Warren, in turn, provided Williams with materials that he believed answered the Senator's concerns.<sup>102</sup> Contemporaneously, Congressman Harold Royce Gross, an Iowa Republican known for his acerbic behavior, publicly criticized Justice Douglas for accepting an annual payment of \$12,000 from the foundation and demanded Justice Douglas's resignation.<sup>103</sup> On May 27, 1969, the *Los Angeles Times* reported that Justice Douglas had decided to resign from his position in the Parvin Foundation.<sup>104</sup> Justice Douglas's resignation from the foundation, which followed closely in the wake of Justice Fortas's

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promiscuous letters concerning the Foundation. While Mr. Frimet's letter did not state that he was writing me with your knowledge, the inference was that he did know you and was writing me at your request." Letter from Albert Parvin to Assoc. Justice William O. Douglas (May 4, 1961), in RECORDS OF THE JUDICIARY COMM. AND RELATED COMMS., 1813-1988, RECORDS OF THE H.R., 1789-1990, Record Group 233, Box 88, AP File (National Archives).

99. DOUGLAS FRANTZ & DAVID MCKEAN, FRIENDS IN HIGH PLACES 7 (1995).

100. *Senator Urges Court Inquiry on Role of Douglas*, N.Y. TIMES, Oct. 18, 1966; *Dirksen Hints New Douglas Data In Drive for Judicial Ethics Code*, N.Y. TIMES, Oct. 18, 1966. Williams argued:

Justice Douglas' acceptance of payments totaling around \$50,000 over the past 4 years from this Las Vegas operation raises a serious question as to its propriety as well as its legality. It also raises a serious question as to whether he should now be permitted to remain on the Court.

Membership on the Supreme Court is a lifetime appointment. The Associate Justices receive a lifetime annual salary of \$39,500 per year which continues even after they retire. The lifetime appointment with this liberal pension was provided in order to insulate members of the Supreme Court from the necessity of being dependent upon outside income either during or after their appointments.

112 CONG. REC. 27,215 (1966).

101. Letter from Assoc. Justice William O. Douglas to Chief Justice Earl Warren (Oct. 31, 1966), in EARL WARREN PAPERS, 1930-1974, Box 352 (Library of Cong. comp., 2000);

102. Letter from Chief Justice Earl Warren to Senator John J. Williams (Oct. 31, 1966), in EARL WARREN PAPERS, 1864-1974, Box 49 (Library of Cong. comp., 2000).

103. *He'll Offer Impeachment Resolution: Justice is Urged to Resign*, WASH. POST, June 9, 1969.

104. Ronald J. Ostrow & Robert L. Jackson, *Douglas Letter to Parvin Sharpens Court Controversy*, L.A. TIMES, May 27, 1969, at 2. The *Los Angeles Times* was not alone in its reporting. See Lardner, *supra* note 93.

resignation, led to allegations that Justice Douglas recognized he had engaged in illicit extrajudicial activities.<sup>105</sup>

By the end of 1968, there was a general perception in Congress that the ethical standards of the federal judiciary were far too malleable. Senator Ervin referred a draft bill to the Senate Judiciary Committee that would have prohibited federal judges from “engag[ing] or participat[ing]” in “the exercise of any power, or the discharge of any duty, which is conferred or imposed upon any officer or employee of the executive branch or the legislative branch of the Government.”<sup>106</sup> In essence, Ervin sought to prevent judges from advising the president on draft legislation or on domestic, foreign, and military policies.

At the same time, Senator Joseph Tydings, a Maryland Democrat, introduced a bill to create a “Commission on Judicial Disabilities and Tenure,” which would comprise five judges and be chaired by the chief justice.<sup>107</sup> This commission would have the power to inquire into the conduct of all federal judges.<sup>108</sup> If four of the judges agreed that a federal judge had violated judicial standards, the commission would recommend to the House Judiciary Committee that a judge be subject to impeachment.<sup>109</sup> Later that year, Tydings addressed the Catholic University Law School on the need for judicial reform.<sup>110</sup> He claimed that Congress had to legislate a standard of “good behavior” for the judiciary because the judiciary had failed to follow its own standards.<sup>111</sup> Tydings argued that mandatory reporting of income and gifts, as well as regulations on judicial activities, were not a threat to the judiciary’s independence but, rather, would bolster public confidence in the judiciary.<sup>112</sup> To that end, Tydings noted that the federal judiciary must “realize that not every attempt to monitor their conduct constitutes hazing.”<sup>113</sup>

Chief Justice Warren was also concerned with the justices’ extrajudicial activities and convened a judicial conference to convince the justices to adopt a more stringent ethics code, mirroring the code governing the lower

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105. See, e.g., *Justice Douglas Quits as Paid Head of the Parvin Foundation*, CHI. TRIB., May 24, 1969, at 7.

106. S. 1097, 91st Cong. (1969).

107. S. 1516, 91st Cong. § 377 (1969).

108. *Id.*

109. *Id.*

110. Tydings, Address to Catholic University, Nov. 6, 1969.

111. *Id.*

112. John P. Mackenzie, *Tydings Attacks Ruling on Judges’ Activities*, L.A. TIMES, Nov. 8, 1969, at 10.

113. *Id.* (internal quotations omitted).

federal judiciary.<sup>114</sup> On June 10, 1969, the Judicial Conference, an administrative agency overseen by the chief justice, issued guidelines to govern the conduct of judges.<sup>115</sup> The Judicial Conference was, in effect, responding to Tydings's bill and, indeed, matched its guidelines to the proposed legislation.<sup>116</sup> The guidelines included the creation of a judicial board to monitor the income and assets of other judges.<sup>117</sup> Justice Douglas wrote to his colleagues to share his reasons for opposing the Judicial Conference's new rules.<sup>118</sup> He reminded his colleagues that any new requirements imposed on judges must be enacted by Congress.<sup>119</sup> "Judges have no authority to tell other judges what to do," he said before asking whether the Supreme Court would also be monitored and overseen by judges in the lower judiciary.<sup>120</sup> One rule which particularly galled Justice Douglas was that judges would have to first seek the approval of the Conference before publishing an article, traveling, or accepting compensation for lecturing or writing.<sup>121</sup> He "deplored seeing judges withdraw into a cloistered life" and felt that a rule requiring judges to submit their literary work or speeches for review was merely a form of judicial censorship.<sup>122</sup> Justice Douglas's position placed him in a vulnerable political position in the sense that it provided his congressional critics with fodder that he disregarded judicial ethics and norms.

While Tydings's bill was pending and the chief justice's Judicial Commission was still formulating its recommendations, Congressman Robert Alphonso Taft, Jr., the grandson of Chief Justice and President William Howard Taft, introduced a bill that would have required federal judges to provide the Comptroller General with copies of their complete tax filings, including any spousal incomes and the names and addresses of professional corporations, businesses, foundations, or other enterprises in

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114. Fred P. Graham, *Justices Rebuff Warren On Code*, N.Y. TIMES, June 18, 1969, at 1.

115. See, e.g., Proposed Resolution from Judge Walter Ely (June 10, 1969), in WILLIAM O. DOUGLAS PAPERS, 1801–1980, Box 594 (Library of Cong. comp., 2014). On the Judicial Conference, see 28 U.S.C. § 331 (2012).

116. S. 1506, 91st Cong. (1969).

117. *Id.*

118. Memorandum from Assoc. Justice William O. Douglas to the Court (Oct., 1969), in WILLIAM O. DOUGLAS PAPERS, 1801–1980, Box 594 (Library of Cong. comp., 2014). The Memorandum was never published, presumably because the proposed rules were never adopted by the Court.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

which the judge served as a compensated officer or consultant.<sup>123</sup> The bill also required judges to list their real and personal property interests valued at more than \$10,000 and all trusts valued at more than \$10,000.<sup>124</sup> Finally, the bill required judges to list all financial liabilities, such as home loans and lines of credit valued at more than \$5,000.<sup>125</sup> Ostensibly, this bill was introduced as a means to build public confidence in the impartiality of federal judges following Justice Fortas's resignation.<sup>126</sup>

When the Judicial Conference rescinded the proposed prohibition against judges earning outside income, Representative Taft, along with Ford, formally requested that Representative Celler, as Chairman of the House Judiciary Committee, schedule a hearing on the bill.<sup>127</sup> Celler remained noncommittal,<sup>128</sup> and Taft grew frustrated at the inability to move the bill forward. He complained to a University of Cincinnati Law School professor that he “saw no reason why a thorough investigation of such conflicts of interest should not be carried out,” adding that Ford was in the process of

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123. H.R. 11109, 91st Cong. § 470(a) (1969); *see also* Letter from Representative Robert Taft, Jr. to Representative Emanuel Celler, Chairman, House of Representatives Judiciary Comm. (May 26, 1969), *in* ROBERT TAFT, JR. PAPERS, 1897–1993, Box 44 (Library of Cong. comp., 2009). Taft wrote:

As you know, on May 8, the Honorable Gerald Ford and I introduced H.R. 11109, to provide for financial disclosure by members of the Federal judiciary. In view of recent developments, I feel the Committee should consider whether it would be appropriate at this time to schedule hearings on this proposal. In making this request I recognize, of course, the recent call by the Chief Justice for action by the Judicial Conference, as well as the constitutional questions involved.

Letter from Representative Robert Taft, Jr., *supra*. Ford wrote separately to Celler on May 28, stating, “Honorable Robert Taft, Jr., and I have introduced H.R. 11109, to provide for financial disclosure by members of the Federal judiciary. This legislation has been referred to your committee and I would very much appreciate anything which you may do to schedule hearings on the proposal.” Letter from Representative Gerald Ford to Representative Emanuel Celler, Chairman, House of Representatives Judiciary Comm. (May 28, 1969), *in* ROBERT TAFT, JR. PAPERS, 1897–1993, Box 44 (Library of Cong. comp., 2009).

124. H.R. 11109 §§ 470(b)–(c).

125. *Id.* § 470(e).

126. Statement by Representative Robert Taft, Jr., On the Resignation of Supreme Court Justice Abe Fortas (May 15, 1969) *in* ROBERT TAFT, JR. PAPERS, 1897–1993, Vault 0202B, (Library of Cong. comp., 2014).

127. Letter from Representative Robert Taft, Jr. to Representative Emanuel Celler, Chairman, House of Representatives Judiciary Comm. (Nov. 4, 1969), *in* ROBERT TAFT, JR. PAPERS, 1897–1993, Vault 0202B, (Library of Cong. comp., 2014).

128. Letter from Representative Emanuel Celler, Chairman, House of Representatives Judiciary Comm., to Representative Robert Taft, Jr. (Nov. 7, 1969), *in* ROBERT TAFT, JR. PAPERS, 1897–1993, Vault 0202B, (Library of Cong. comp., 2014).

investigating “at least one member of the Court.”<sup>129</sup> Four days later, Ford publicly “hinted” that he was going to demand an investigation into Justice Douglas.<sup>130</sup> Three days after issuing his “hint,” Ford expanded on his statements and added that he had begun to study Justice Douglas’s financial relationships early in the year and that this information would form the basis for his eventual demand to have Justice Douglas investigated by the House.<sup>131</sup> Later in the month, Ford informed several congressmen that he would call for a special investigation into Justice Douglas by the end of 1970.<sup>132</sup>

The Warren Court’s opinions ending segregation, limiting school prayer, and extending the rights of the accused had drawn staunch criticism from southern conservatives. The failed confirmation of Justice Fortas for chief justice, investigation into his conflicts of interest, and subsequent resignation from the Court gave members of Congress and the press good cause to look at other justices with skepticism. And, when Senate Democrats failed to confirm Nixon’s first two appointments to replace Justice Fortas, political motivation to unseat another vulnerable Supreme Court justice grew; the political climate seemed ripe for a call for impeachment. Justice Douglas looked to be the ideal target. His personal life did not live up to expected standards of conservative family values. His judicial decisions gave Republicans an opening to criticize him for undermining the war effort. And, his extrajudicial writings and activities allowed them to paint him as a subversive who would continue to undermine national security.

## II. FORD’S CALL FOR THE IMPEACHMENT OF JUSTICE DOUGLAS

Throughout the 1960’s, congressional criticism of the justices had largely focused on ethical concerns regarding conflicts of interest and the justices’ finances. There were no specific allegations that Justice Douglas had undermined national security until April 9, 1970, when Vice President Spiro Agnew, in a CBS News interview, alleged that Justice Douglas had expressed beliefs that were incompatible with the nation’s security.<sup>133</sup> In the

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129. Letter from Representative Robert Taft, Jr. to C.M. Hulley, Professor, Univ. of Cincinnati Law School (Dec. 5, 1969), in ROBERT TAFT, JR. PAPERS, 1897–1993, Vault 0202B, (Library of Cong. comp., 2014).

130. Fred P. Graham, *Ford Hints Move to Oust Douglas*, N.Y. TIMES, Nov. 8, 1969, at 1.

131. *Contempt of Court*, N.Y. TIMES, Nov. 11, 1969.

132. See *Rep. Ford Says He Pushes Study of Justice Douglas*, N.Y. TIMES, Nov. 22 1969; Spencer Rich, *Ford Eyes Ousting Douglas*, WASH. POST, Nov. 8, 1969, at A1; Royce Brier, *Douglas Hostage For Haynsworth?*, S.F. CHRON., Nov. 19, 1969.

133. Letter from Herbert L. Thompson to White House Staff (Apr. 10, 1970), in SPIRO AGNEW PAPERS, 1953–1977, Box 18 (Univ. Md. comp., 2008). A transcript of the interview



interview, Agnew asserted that Justice Douglas's extrajudicial writings advocated rebellion against the United States government and alluded to "the fact that two fine judges [had] been denied seats on the bench for statements . . . much less reprehensible . . ." <sup>134</sup> Agnew's interview appeared to prime the public for the information that Ford provided when he laid out his claims against Justice Douglas and called for his impeachment just a few days later. This Part analyzes both the generalized and specific claims made by Ford, as well as the congressional response to those claims.

When Ford detailed his allegations to the House of Representatives on April 15, 1970, he claimed that he had received hundreds of complaints about Justice Douglas, which led him to "quietly [undertake] a study of both the law of impeachment and the facts about the behavior of Mr. Justice Douglas."<sup>135</sup> Ford articulated several complaints before specifying his charges against Douglas: that Congressman Taft's bill had remained "dormant" in the Judiciary Committee; that the Judicial Conference's newly promulgated ethics rules did not apply to the Supreme Court; and that the thirty-six-year-old canons of judicial ethics were merely advisory for the federal judiciary.<sup>136</sup> Ford also tried to reassure the House that he had not moved against Justice Douglas on the basis of the justice's jurisprudential philosophy or any personal animus against him.<sup>137</sup> And, unlike the prior Southern Democrat-led efforts, Ford noted that he did not incorporate Justice Douglas's three divorces into his reasons for seeking an investigation.<sup>138</sup>

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was attached to Thompson's letter, which was forwarded to H.R. Haldeman, C. Stanley Blair, Herbert G Klein, and Ronald Zeigler. In the interview, Mr. Agnew was asked what position the administration would take if Ford did begin impeachment proceedings against Justice Douglas. *Id.* The Vice-President answered:

I must say in complete candor that having read the latest publication of Justice Douglas' I'm a little bit concerned about his qualifications. I think that if we are talking about qualifications of Supreme Court Justices, it may be appropriate to look at some of his beliefs, among which, as I recall is a statement that rebellion is justified, in cases where the establishment has acted in the way it's acting at the present time. It seems rather unusual for a man on the bench to advocate rebellion and revolution. And possibly, we should take a better look at what the justice is saying and what he thinks, particularly in view of the fact two fine judges have been denied seats on the bench for statements that are much less reprehensible than those made by, in my opinion, by Justice Douglas."

*Id.*

134. *Id.*

135. Ford Speech, *supra* note 1.

136. *Id.*

137. *Id.*

138. *Id.* Congressman Matson Emmitt O'Neal introduced the previous resolution calling for an investigation in 1966; the formal title read: "To conduct a full and complete investigation and study of the moral character of Justice William O Douglas, in view of the

Ford reminded the House that federal judges did not constitutionally serve in their offices for life, but rather remained on the bench only during periods of “good behavior.”<sup>139</sup> He conceded that the term “good behavior” found in Article III was no different than the language accompanying the terms of office for federal legislators found in Article I.<sup>140</sup> He failed to articulate a clear standard for what constituted an impeachable offense; instead of a finite standard, he claimed that “an impeachable offense [was] whatever a majority of the House of Representatives consider[ed] it to be at a moment in history . . . .”<sup>141</sup> In his view, an impeachable offense was whatever “two-thirds of the [Senate] consider[ed] to be sufficiently serious to require removal of the accused from office.”<sup>142</sup> He also insisted that federal judges had to be held to a higher standard than elected officials because, unlike congressmen or presidents, voters could not remove them through the electoral process.<sup>143</sup> Whether intended or not, Ford’s loose standard was tailor-made to an allegation that Justice Douglas had undermined national security. During times of crisis, opposition speech is often deemed to “aid the enemy” in an effort to silence it.<sup>144</sup> The loose standard of “good behavior” advanced by Ford could allow Congress to find an impeachable offense in a justice’s opposition speech simply because it went against the grain of current political opinion.

*A. Justice Douglas’s Failure to Recuse*

After giving his opinions on the nature of judicial tenure, Ford went on to provide his reasons why Justice Douglas should face an impeachment hearing. The minority leader’s first accusation was that Justice Douglas’s

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fact that he has been divorced by three wives on grounds of alleged cruelty, including in the case of one wife, alleged personal indignities.” See H.R. Res. 928, 89th Cong. (1966) (calling for the Committee on the Judiciary to investigate Douglas). Of course, by mentioning the prior efforts of Southern congressmen to impeach Justice Douglas, Ford may have intended to remind Congress that Justice Douglas’s “immorality” would still form a basis to judge his competency to remain on the Court.

139. Ford Speech, *supra* note 1.

140. *Id.* In his efforts to define “good behavior” and “impeachable offenses,” he took pains to separate the constitutional impeachment provisions from British practice. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* Ford noted that in its history, the House had impeached nine federal judges, of which the Senate convicted four. *Id.* Ford further harkened to the impeachment of Judge Halsted Ritter in 1936. In that impeachment—which Ford characterized as political—the House found Ritter forced litigants to channel their monies to his former law partner and practiced law while serving as a judge. However, the Senate acquitted him on the specific charges and convicted him on an omnibus charge. See GERHARDT, *supra* note 69, at 54.

144. See, e.g., GEOFFREY R. STONE, PERILOUS TIMES 1–14 (2004).

association with Ralph Ginzburg created a two-fold conflict.<sup>145</sup> Justice Douglas had written an article that was printed in one of Ginzburg's publications and was paid \$350 for it.<sup>146</sup> Ginzburg was later found guilty of violating a federal obscenity statute by sending a magazine titled "Eros" through the mail.<sup>147</sup> The Court upheld the conviction, but Justice Douglas, along with Justices Black, Stewart, and Harlan, dissented,<sup>148</sup> prompting several senators to voice opposition to the Court's overturning of obscenity statutes during the Senate's investigation into Justice Fortas.<sup>149</sup> Another Ginzburg magazine had attacked Senator Barry Goldwater, the Republican presidential candidate, and Goldwater had successfully sued Ginzberg for libel.<sup>150</sup> When the Court issued its decision not to grant *certiorari*, thereby upholding the libel award, Justice Douglas dissented.<sup>151</sup> Ford claimed that Justice Douglas should have recused himself from each decision, even if the article was only a praise of folk music, for which he received only nominal compensation<sup>152</sup> It was improper, irrespective of the payment, that the Justice's image appeared in a full-page photo with the "byline clear across the page reading 'By William O. Douglas, Associate Justice, U.S. Supreme Court,'" in a publication which, at the time, had two appeals pending before

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145. Ford Speech, *supra* note 1, at 11,915.

146. *Id.*

147. *See, e.g.*, Ginzburg v. United States, 383 U.S. 463 (1966).

148. *See id.* at 476 (Black, J., dissenting). Although Justice Douglas joined in Justice Black's dissent, he also separately dissented. *Id.* at 482 (Douglas, J., dissenting) (arguing that the federal obscenity statute under which Ginzburg had been prosecuted could not apply to the very instances which Ginzburg's magazines displayed). Justice Douglas, joined by Justice Black in his dissent, pointed out that the trial court found that an article on interracial sex was obscene, as well as an article detailing sexual intercourse and orgasms from a woman's point of view. *Id.* at 488. Moreover, an article on homosexuality served as a basis for a conviction. *Id.* at 490. Justice Douglas concluded his dissent with the admonition:

[U]nder our charter all regulation or control of expression is barred. Government does not sit to reveal where the "truth" is. People are left to pick and choose between competing offerings. There is no compulsion to take and read what is repulsive any more than there is to spend one's time poring over government bulletins, political tracts, or theological treatises. . . . I think this is the ideal of the Free Society written into our Constitution. We have no business acting as censors or endowing any group with censorship powers.

*Id.* at 492.

149. MURPHY, *supra* note 15, at 441–62.

150. Goldwater v. Ginzburg, 414 F.2d 324, 342 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

151. *Goldwater*, 396 U.S. at 1049 (Douglas, J., dissenting); *see, e.g.*, Robert H. Phelps, *Court Allows Goldwater Judgment to Stand*, N.Y. TIMES, Jan. 27, 1970.

152. Ford Speech, *supra* note 1, at 11,915. Ford recognized that Justice Douglas's article was also not pornographic, but he characterized it as "prais[ing] the lusty, lurid, and risqué along with the social protest of leftwing folk singers." *Id.*

the Court.<sup>153</sup> He reminded the House that federal law required a judge to recuse himself in

any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.<sup>154</sup>

In this instance, Ford arguably overreached because Justice Douglas did not have a financial stake in the outcome of Ginzburg's appeals. But, linking Justice Douglas to a purveyor of material that conservatives considered obscene added to their argument that Justice Douglas contributed to the destabilization of society.

*B. Justice Douglas's Writings Allegedly Advocating Rebellion*

Ford next turned to the first of several allegations that Justice Douglas undermined national security. Justice Douglas had recently published *Points of Rebellion*, in which he posited that the nation's freedom was at risk because of an overarching military industrial complex and governmental surveillance of both individuals protesting the Vietnam Conflict and civil rights organizations.<sup>155</sup> Ford relied on the article as evidence that Justice Douglas was advocating rebellion. He said the article had championed the idea that, just as there had been a right to rebel against the British crown during the War for Independence, there was now a right to rebel against the United States government if it did not curtail its expanding interference into the lives of Americans.<sup>156</sup> Ford said that Justice Douglas had condoned violence against the government and would have to recuse himself from cases arising from challenges to the government's military and national security policies.<sup>157</sup>

Ford also used *Points of Rebellion* to again tie Justice Douglas to Ginzburg's controversial publications. Justice Douglas had allowed excerpts from *Points of Rebellion* to be reprinted in *Evergreen*—another Ginzburg-owned magazine that Ford claimed contained a “hybrid of hippie-yippie” diatribes against the government and pornography. Ford argued that by

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153. *Id.* Ford said: “Writing signed articles for notorious publications of a convicted pornographer is bad enough. Taking money from them is worse. Declining to disqualify one's self in [the] case is inexcusable.” *Id.*

154. *Id.* (citing 28 U.S.C. § 455 (2012)). Ford claimed that it was “inexcusable” for Justice Douglas not to have recused himself in light of this law. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

allowing the excerpts to be reprinted, Justice Douglas condoned the magazine's other articles that encouraged violence.<sup>158</sup>

*C. Justice Douglas's Involvement with the Parvin Foundation*

Toward the end of his speech, Ford accused Justice Douglas of nefariously "consorting" with "Albert Parvin and [his] mysterious entity known as the Parvin Foundation."<sup>159</sup> Ford implied that Justice Douglas's involvement in the foundation had undermined national security in at least two ways. First, Ford implied that Parvin was a member of the criminal underworld.<sup>160</sup> Second, he claimed that, through his involvement with the foundation, Douglas had undermined the war effort against Northern Vietnam and the South Vietnamese communists.<sup>161</sup>

*1. Parvin, Justice Douglas, and the Criminal Underworld*

Ford asserted that Parvin was associated with suspected mafiosi Sanford Adler, Gus Greenbaum, and William Siegel.<sup>162</sup> He claimed that Parvin had paid one well-known mafioso, Meyer Lansky, a \$200,000 finder's fee when Parvin sold a Las Vegas casino known as the Flamingo.<sup>163</sup> The difficulty with Ford's accusation against Parvin was that it was not uncommon for such "fees" to be paid to the mafia in Las Vegas; billionaire Howard Hughes had also paid "fees" to gangsters for the purchase of his Las Vegas casinos.<sup>164</sup> In the late 1960s, alleged mafiosi who "controlled" Nevada's casinos had been looking for a means to divest their ownership out

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158. *Id.* Ford exhorted Congress, "[Y]ou cannot tell me that an Associate Justice of the United States is compelled to give his permission to reprint his name and his title and his writings in a pornographic magazine with a portfolio of obscene photographs on one side of it and a literary admonition to get a gun and start shooting at the first white face you see on the other." *Id.*

159. *Id.* at 11,916.

160. *Id.* Ford alluded to Albert Parvin's questionable past dealings with spurious business partners. *Id.* Parvin became the part owner of the Hotel Flamingo, a hotel and casino in Las Vegas. *Id.* The hotel's original partner, Bugsy Siegel, was murdered soon afterward. *Id.* Sanford Adler then took over running the establishment, and when he later fled to Mexico to avoid income tax charges, the hotel passed to Gus Greenbaum. *Id.* Greenbaum fled to Cuba only a day later, where he was later murdered. *Id.* After Siegel, Adler, and Greenbaum "left" the establishment, Parvin teamed up with William Israel Alderman to run the Flamingo. *Id.* However, this relationship was short-lived, as well, because Alderman soon after left for the Riviera. *Id.* Parvin was then left running the Flamingo by himself. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. CRIME, ADDICTION, AND THE REGULATIONS OF GAMBLING 35–37 (Toine Spapens et al. eds., 2008).

of a fear that the Justice Department had learned of tax-skimming schemes.<sup>165</sup>

Ford also tied Justice Douglas to two men with felony records: Robert “Bobby” Baker and Edward Levinson.<sup>166</sup> Baker, a protégé of Lyndon Johnson, was under investigation for fraud and for having ties to organized crime.<sup>167</sup> From 1954 until 1963, Baker was also a de facto secretary to Johnson and Mike Mansfield when they were senate majority leaders.<sup>168</sup> Ford reminded Congress that Justice Fortas had represented Baker’s vending machine company prior to his Supreme Court appointment.<sup>169</sup> Levinson also had ties to organized crime through his ownership of the Sands Casino and as director of the Flamingo Casino in Las Vegas.<sup>170</sup> Because Parvin had financial dealings with both Levinson and Baker, Ford used him to tie Justice Douglas to the two.<sup>171</sup>

## 2. *Parvin, Justice Douglas, and Communism*

Ford then used the tie to Baker and Levinson to assert that Justice Douglas had supported communist forces in Central America. Ford alleged that Baker and Justice Douglas stayed at Levinson’s hotel together and Baker later met with Juan Bosch, the deposed leader of the Dominican Republic, to convey Justice Douglas’s support for his return to power.<sup>172</sup> Although Ford did not directly accuse either Baker or Justice Douglas of trying to open the Dominican Republic to organized crime, he implied that the purpose of Baker’s meeting with Bosch was to obtain a license to open a casino and that Douglas had helped him do so.<sup>173</sup> At any rate, Ford could only speculate as to what Bosch might have conceded to the gambling industry. If Justice

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165. Sergio Lalli, *Howard Hughes in Vegas*, in *THE PLAYERS: THE MEN WHO MADE LAS VEGAS* 133, 133–57 (Jack Sheehan ed., 1997).

166. Ford Speech, *supra* note 1, at 11,916.

167. See ROBERT DALLEK, *LONE STAR RISING* 477–78 (1991).

168. NEIL MACNEIL & RICHARD A. BAKER, *THE AMERICAN SENATE* 36–37 (2013); ROBERT CARO, *THE PASSAGE OF POWER* 164 (2012).

169. Ford Speech, *supra* note 1, at 11,917.

170. See ALEXANDER CHARNS, *CLOAK AND GAVEL* 67 (1992).

171. Ford Speech, *supra* note 1, at 11,917. Ford also reminded Congress that between 1966 and 1969, Parvin took over the Aladdin Hotel, Fremont Hotel, and Stardust Hotel before the Securities and Exchange Commission audited him. *Id.*

172. *Id.*

173. *Id.* It is true that organized crime leaders dominated the casino industry in Cuba in the 1950s and, after the communist takeover of that nation, explored the possibility of other Caribbean locations. But, any attempt to link organized crime to Bosch was problematic since, like Fidel Castro, Bosch intended to nationalize much of the Dominican Republic’s economy, including its hotels and casinos. Ford either was unaware or ignored this aspect of Bosch’s platform.

Douglas had met with Baker and Bosch, as Ford suspected, one could infer that Ford thought Justice Douglas likely interfered with the foreign policy of the United States, as well, particularly since neither the Kennedy nor Johnson administrations backed Bosch's presidency in 1962 or his attempt to return to power in 1965.<sup>174</sup> However, there was no evidence that Baker and Justice Douglas were in Las Vegas for a shared purpose—the investigation later uncovered that Justice Douglas and Baker were not even in Las Vegas at the same time—and there was no evidence of any correspondence between the two men regarding the Dominican Republic.<sup>175</sup>

Ford also claimed that Justice Douglas's involvement in the Parvin Foundation had undermined national security by supporting communist regimes because, although "[t]he ostensible purpose of the Parvin Foundation was declared to be educating the developing leadership in Latin America," the true reason for the foundation was to protect mafia casino interests in Cuba during the communist revolution.<sup>176</sup> In 1961, Justice Douglas was named to the foundation's board and received a stipend—Ford called it "pay"—which lasted until 1969, when Justice Douglas voluntarily relinquished all payments following Justice Fortas's resignation.<sup>177</sup> Ford claimed Baker, Parvin, and Justice Douglas welcomed Bosch when he returned from exile to become the Dominican Republic's president.<sup>178</sup> But, Ford had to concede that Senator Hubert Humphrey and First Lady Johnson also attended in a formal capacity.<sup>179</sup> Ford emphasized that Justice Douglas's resignation from the Parvin Foundation following Justice Fortas's departure from the Court constituted direct evidence that Justice Douglas knew his association with the foundation violated judicial ethics.<sup>180</sup>

Douglas had a relationship with another center focusing on international relations—the Center for the Study of Democratic Institutions ("CSDI").<sup>181</sup> This center, overseen by Dr. Robert Hutchins, the former dean of the Yale University Law School, also obtained funding from Parvin.<sup>182</sup> Ford tried to portray the center as an adjunct to the Parvin Foundation and a

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174. *Id.* On the Kennedy and Johnson view of Bosch, see Russell D. Buhite, *From Kennedy to Nixon: The End of Consensus*, in *AMERICAN FOREIGN RELATIONS RECONSIDERED: 1890–1993*, at 131 (Gordon Martel ed., 1994).

175. CHARNS, *supra* note 170, at 115.

176. See Ford Speech, *supra* note 1, at 11,916.

177. *Id.*

178. *Id.* at 11,917.

179. *Id.*

180. *Id.*

181. *Id.* at 11,918.

182. *Id.*

link to Meyer Lansky.<sup>183</sup> He also informed the House that, in 1967, CSDI had held a “conference of militant student leaders [where] plans were laid for violent campus disruptions . . . and the students were exhorted . . . to sabotage American society, block defense work by universities, immobilize computerized record systems and discredit the ROTC.”<sup>184</sup> Ford claimed that CSDI, through its participation in an international conference, encouraged left-wing rebellions in Latin America and Asia.<sup>185</sup> In this latter category, Ford’s allies would later hint at a relationship between Ho Chi Minh and Douglas.<sup>186</sup>

Toward the end of his speech, Ford reiterated that Douglas had aligned with a combination of organized criminals, left-wing campus radicals, and other persons whose interests ran contrary to the United States.<sup>187</sup> Finally, Ford attempted to create an aura of guilt by association between Justices Fortas and Douglas because Justice Fortas had been one of Justice Douglas’s prized pupils at Yale.<sup>188</sup> In comparing the two Justices, Ford concluded by charging Justice Douglas with violations of judicial ethics rules far beyond Justice Fortas’s transgressions.<sup>189</sup> Although this Article is focused on Ford’s (and ostensibly Nixon’s) efforts to portray Justice Douglas as a danger to national security, it cannot be ignored that the diversity of allegations against Douglas would have appeared illogical if considered as interrelated—unless, of course, Ford intended to present Justice Douglas as an unstable Manchurian candidate.

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183. *Id.* Ford included in his remarks an assertion that Lansky had been paid \$25,000 per year during the same time that the center was making payments to Justice Douglas. *Id.*

184. *Id.*

185. *Id.* Ford said that CSDI had “sponsored and financed the National Conference for New Politics which was, in effect, the birth of the New Left as a political movement.” *Id.*

186. *See* CONG. REC. 11,920 (1970) (statement of Rep. Louis C. Wyman). Perhaps because the first *Pacem in Terris* conference occurred in New York in 1965 in full public view, it seems not to have caused concern to Johnson’s administration.

187. Ford Speech, *supra* note 1, at 11,919.

188. *Id.*

189. *Id.* Ford acknowledged there was no evidence that Wolfson had ties to the criminal underworld, but he also said that the situation with Justice Fortas was different because

Mr. Justice Fortas had enough respect for the so-called establishment and the personal decency to resign when his behavior brought reproach upon the U.S. Supreme Court. Whatever he may have done privately, Mr. Justice Fortas did not consistently take public positions that damaged and endangered the fabric of law and government.

*Id.*



*D. Congressional Reaction: Ford's Allies*

Congressman Joseph D. Waggoner, a conservative pro-segregationist Louisiana Democrat, took the podium after Ford and reminded the House of Representatives that, in 1966, he had introduced a resolution seeking an investigation into Justice Douglas.<sup>190</sup> In his short statement, Waggoner seconded Ford's allegations and, in particular, emphasized an alleged link between Justice Douglas and the "pornographic" publications of Ginzburg.<sup>191</sup> He also mentioned a link between Justice Douglas, Lansky, and the "radical Hutchins."<sup>192</sup> Waggoner's speech was brief, but his main point was a meritless interpretation of the judicial system. Waggoner argued that Justice Douglas's "least whim, his most causal aberration can suddenly, for all intents, become the law of the land."<sup>193</sup> This claim lacked any efficacy for the most obvious of reasons: Justice Douglas was only one of nine justices, and the idea that the Court's most liberal and iconoclastic justice could sway Justices Burger, Harlan, Stewart, White, or the newly arrived Blackmun stretched credulity.<sup>194</sup>

While Waggoner's statements may not have undermined Ford, a misjudgment on the part of Congressman Louis C. Wyman, one of Ford's staunchest allies and a longtime critic of Justice Douglas, shifted the momentum in the House away from creating a special ad hoc investigation in the Rules Committee to an investigation headed by the Judiciary Committee. Wyman, a conservative New Hampshire Republican, was a states-rights congressman, and he had a personal reason for taking part in the impeachment efforts.<sup>195</sup> While serving as New Hampshire's attorney general in 1951, he convinced the legislature to pass a statute banning subversive persons from holding state government positions.<sup>196</sup> The law gave him, as

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190. 116 CONG. REC. 11,919 (1970) (statement of Rep. Joe D. Waggoner). First elected to Congress in 1960, Waggoner opposed civil rights and supported the United States' involvement in Vietnam. In 1974, he fought against Nixon's impeachment. Indeed, after Nixon resigned, Waggoner continued to profess the former president's innocence. See DAVID WAYNE CHILDS, CONGRESSMAN JOE D. WAGGONER: A STUDY IN POLITICAL INFLUENCE 119–30 (1979). In 1976, Waggoner was arrested for soliciting a prostitute. RONALD KESSLER, INSIDE CONGRESS 21 (1997).

191. 116 CONG. REC. 11,919 (1970) (statement of Rep. Joe D. Waggoner).

192. *Id.* Ford associated Hutchins with "intellectual incubators for the New Left and the [Students for a Democratic Society]." *Id.*

193. *Id.* at 11,920.

194. See, e.g., NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 425–33 (2010).

195. See generally FREEDOM WRITER: VIRGINIA FOSTER DURR, LETTERS FROM THE CIVIL RIGHTS YEARS 157 (Patricia Sullivan ed., 2003).

196. Act Relative to Subversive Activities, 1951 N.H. Laws 410.

attorney general, the power to investigate persons suspected of ties to the Communist Party of the United States.<sup>197</sup> In 1957, the Supreme Court reversed a state conviction of a professor whom Wyman investigated.<sup>198</sup> The professor, citing the First Amendment, refused to answer Wyman's interrogations, and a state judge imprisoned the professor for contempt.<sup>199</sup> The Court overturned the contempt conviction.<sup>200</sup>

But, Wyman did not always lose in the Court. Two years later, the Court upheld a civil contempt order against Willard Uphaus, a person Wyman suspected of communist ties, after Uphaus refused to provide Wyman the names of people who attended a summer camp sponsored by the World Fellowship.<sup>201</sup> While Justice Douglas was in the majority that reversed the contempt conviction against the professor, he joined the dissent against Wyman in the second case.<sup>202</sup> In 1957, Wyman addressed the Georgia state legislature and claimed that Justice Douglas showed partiality to subversive organizations through the two decisions.<sup>203</sup>

Wyman planned to make a statement and propose a House resolution that called for an investigation into Justice Douglas.<sup>204</sup> But, after Speaker McCormack recognized Wyman to deliver his statement, Congressman Andrew Jacobs, an Indiana Democrat, asked Wyman to yield for "a three-sentence statement."<sup>205</sup> Wyman, perhaps assuming that Jacobs only sought a point of order, yielded the floor to Jacobs.<sup>206</sup> That misjudgment allowed

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197. *See* *Sweezy v. New Hampshire*, 354 U.S. 234, 236 (1957); ARTHUR J. SABIN, IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY 156 (1999).

198. *Sweezy*, 354 U.S. at 248. The Court specifically criticized Wyman:

The nature of the investigation which the Attorney General was authorized to conduct is revealed by this case. He delved minutely into the past conduct of petitioner, thereby making his private life a matter of public record. The questioning indicates that the investigators had thoroughly prepared for the interview and were not acquiring new information as much as corroborating data already in their possession. On the great majority of questions, the witness was cooperative, even though he made clear his opinion that the interrogation was unjustified and unconstitutional. Two subjects arose upon which petitioner refused to answer: his lectures at the University of New Hampshire, and his knowledge of the Progressive Party and its adherents."

*Id.*

199. *Id.* at 239-45.

200. *Id.* at 255.

201. *Uphaus v. Wyman*, 360 U.S. 72, 81 (1959).

202. *Id.* at 82-108 (Brennan, J., dissenting).

203. M. J. HEALE, MCCARTHY'S AMERICANS 264 (1998).

204. *See* H.R. Res. 922, 91st Cong. (1970).

205. 116 CONG. REC. 11,920 (1970).

206. *Id.*

Jacobs in three sentences to beat Wyman to the punch and introduce the first House resolution calling for an investigation of Douglas by the Judiciary Committee.<sup>207</sup>

There was a fundamental difference between the two proposals: Jacobs's proposal—listed as H.R. Res. 920—would place the investigation in the hands of the Judiciary Committee; Wyman's proposal that Jacobs preempted—listed as H.R. Res. 922—sought to place the investigation in the House of Representatives Rules Committee.<sup>208</sup> Wyman's misstep meant that instead of having the charges against Justice Douglas investigated by the Rules Committee—where Ford and his coalition could exert more control over the investigation—the charges would be investigated by the Judiciary Committee and controlled by Celler, who could appoint any Democrat he wanted.<sup>209</sup>

*E. Attempts to Create a Special Investigation Bypassing the Judiciary Committee*

Within four days of Ford's call to investigate Justice Douglas, fifty-three Democrats joined fifty-one Republicans to sign on to Jacobs's resolution that authorized an investigation by the Judiciary Committee.<sup>210</sup> Ford and his allies were determined not to allow the investigation to proceed in the hands of the Judiciary Committee, though. A special investigative committee headed by the Rules Committee was more likely to result in articles of impeachment being drafted and passed to the full House for a vote; the Rules Committee could have simply adopted the ad hoc investigation's findings and then voted on articles of impeachment without further debate.<sup>211</sup> This course of action would have constituted a significant departure from more than a century of precedent in which the Judiciary Committee had been responsible for such investigations, but Ford and his allies were determined to try.<sup>212</sup>

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207. *Id.* Jacobs claimed Ford had refused to file a resolution of impeachment requiring a formal investigation, and that he would, therefore, immediately introduce the resolution “in order that a proper and dignified inquiry” into the matter be held. *Id.*

208. *See id.*

209. *See supra* Section I.C.

210. H.R. Res. 920, 91st Cong. (1970). A total of ten resolutions that called for an investigation into Douglas were filed. *See* SPECIAL SUBCOMM. ON H. RES. 920, 91ST CONG., ASSOCIATE JUSTICE WILLIAM O. DOUGLAS: FIRST REPORT 4 (Comm. Print 1970) [hereinafter INTERIM REPORT].

211. *See infra* Part IV.

212. *See, e.g.*, JAMES L. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS 374 (1981); NELSON W. POLSBY, HOW CONGRESS EVOLVES 35 (2004).

Wyman introduced a resolution that asked the Speaker of the House to appoint a special subcommittee comprised of six congressmen, with both parties evenly represented, to investigate the charges.<sup>213</sup> A co-sponsor of the resolution, Maston Emmitt O’Neal, claimed that Justice Douglas was a threat to national security, writing: “In my opinion, Justice Douglas is an evil man and one of the most dangerous in America. His behavior has been far from ‘good’ as required by the Constitution, and I think he should go to trial for it.”<sup>214</sup>

William Colmer, a conservative Southern Democrat, chaired the Rules Committee.<sup>215</sup> Although Ford had once claimed his intent to distance conservative Republicans from Southern Democrats, he knew he would need to convince Colmer on the merits of having the Rules Committee lead the investigation if he was going to succeed in orchestrating the investigation he desired.<sup>216</sup> Colmer was a World War I veteran and a supporter of the United States’ involvement in Vietnam. He had been in Congress since 1933, and, like Hebert, he signed the “Southern Manifesto,” disparaged the Warren Court after *Brown*, and articulated that the southern states constituted “the real America.”<sup>217</sup> In this vein, Colmer had also equated anti-war demonstrators with communism.<sup>218</sup> Ford saw a clear path to convincing Colmer of the importance of impeaching Justice Douglas and of having his own committee control the investigation—by appealing to his concerns about national security.

In the year preceding Ford’s speech, Colmer appointed a “study group” to examine potential changes in the House and Senate committees.<sup>219</sup> The group was charged with exploring (1) alterations to the relationships between committees and House leadership; (2) increasing the number of joint committees with the Senate; and (3) granting the Rules Committee the power

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213. H.R. Res. 924, 91st Cong. (1970). Rep. Maston Emmitt O’Neal, who co-sponsored the resolution, told a constituent that he intended to bypass Celler’s committee to keep New York Democrats from controlling the investigation. See Letter from Representative Maston O’Neal to Mrs. Eugene C. Black (Apr. 17, 1970), in MASTON O’NEAL PAPERS, 1962–1972, Collection 850, Box 43 (Richard B. Russell Library, Univ. Georgia comp., 2008).

214. Letter from Representative Maston O’Neal to Mrs. Eugene C. Black, *supra* note 213.

215. DONALD R. WOLFENBERGER, CONGRESS AND THE PEOPLE 94 (2000).

216. See, e.g., John F. Manley, *The Conservative Coalition in Congress*, in NEW PERSPECTIVES ON THE HOUSE OF REPRESENTATIVES 97, 98–114 (Robert L. Peabody & Nelson W. Polsby eds., 3d ed. 1977). Manley noted that, in 1967, Ford publicly proclaimed that conservative Republicans would no longer openly ally with Southern Democrats. *Id.* at 105.

217. RANDOLPH HOHLE, RACE AND THE ORIGINS OF AMERICAN NEOLIBERALISM 198 (2015).

218. *Id.*; ARI BERMAN, GIVE US THE BALLOT 83 (2015); JASON MORGAN WARD, DEFENDING WHITE DEMOCRACY 25 (2011).

219. WOLFENBERGER, *supra* note 215.

to conduct extra-congressional investigations.<sup>220</sup> Following the study, he introduced a bill that would have given the Rules Committee that power.<sup>221</sup> For over a year, a McCormack-led coalition of northern and western Democrats and liberal Republicans blocked Colmer's efforts to expand his committee's authority.<sup>222</sup> While Colmer's purpose appears to have had little directly to do with the Supreme Court, the timing of his effort and possible impact on any investigation into Douglas should not be ignored.

Ultimately, Colmer announced that he would not pursue an investigation against Douglas through the Rules Committee.<sup>223</sup> He claimed that Wyman's resolution authorized "only a study and recommendation" by the Rules Committee, such that the Judiciary Committee was the more appropriate body to conduct the investigation.<sup>224</sup> In other words, Colmer—who would likely have voted to impeach Douglas—claimed that his committee could not be used as a means to draft impeachment articles.

### III. THE COMMITTEE INVESTIGATION

Having gained Colmer's promise to postpone Ford's efforts to use the Rules Committee, Celler formed the investigating subcommittee by selecting Jack Brooks, a Texas Democrat, and Byron Rogers, a Colorado Democrat.<sup>225</sup> Celler promised the public that the investigation would be "neither a whitewash [of Justice Douglas] nor a witchhunt."<sup>226</sup>

Brooks was a liberal who had supported President Johnson's domestic policies.<sup>227</sup> Byron Rogers served in the Army in World War I and, after the

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220. *See id.*

221. *Id.* On June 17, 1970, Colmer brought H.R. 17654, The Legislative Reorganization Act of 1970, to the floor of the House for a vote. *Id.*

222. *See id.* at 93.

223. *See Douglas Resolution Deferred*, ST. LOUIS POST-DISPATCH, April 24, 1970, at 2A. Representative Thomas "Tip" O'Neill, Jr., played an important role in swaying Colmer from inserting the Rules Committee into the investigation of Douglas. Letter from Representative Thomas O'Neill, Jr., to John E. Thayer (June 17, 1970), in THOMAS P. O'NEILL, JR. CONGRESSIONAL PAPERS, 1936–1994 (John J. Burns Library, Boston Coll. comp., 1988) (describing Celler as "an extremely fair man who is greatly concerned with civil liberties" and suggesting that an investigation conducted by the Rules Committee would have been biased against Douglas); *see also* Martin F. Nolan, *The Man Who Could Push Richard Nixon Over the Edge*, N.Y. MAG., Dec. 24, 1973, at 39.

224. *Douglas Resolution Deferred*, *supra* note 223.

225. Marjorie Hunter, *Celler Will Head Panel on Douglas*, N.Y. TIMES, Apr. 22, 1970, at 1.

226. *Id.*

227. *See* SEAN P. CUNNINGHAM, AMERICAN POLITICS IN THE POSTWAR SUNBELT 95 (2014) (noting that Brooks voted for the Civil Rights Act of 1964).

war, began a career in state politics, including a stint as Colorado's attorney general.<sup>228</sup> In 1950, Denver's voters elected him to Congress, where he served ten consecutive terms.<sup>229</sup> Rogers, like Celler and Brooks, supported civil rights, and, in response to a firebomb attack on the NAACP headquarters in Mississippi in 1967, pushed for legislation to federalize law enforcement throughout that state.<sup>230</sup> Although Rogers had never been a public supporter of the escalation of force in Vietnam, he also had not opposed it.<sup>231</sup>

William M. McCulloch, the ranking Republican on the Judiciary Committee, and Edward Hutchinson, a Michigan Republican, were also appointed to the subcommittee.<sup>232</sup> Although Ford lobbied McCulloch to persuade Celler to appoint Hutchinson, there is nothing in either Ford's or McCulloch's papers that indicates Ford's lobbying was persuasive.<sup>233</sup> Ford may have believed that McCulloch would push for the House to draft articles of impeachment because McCulloch had proved himself to be a stalwart conservative and a "hawk" on national security matters. But, McCulloch could also be wholly independent of his party.<sup>234</sup> If Nixon and Ford were able to garner McCulloch's vote in favor of impeachment, it would send a powerful signal to the nation that Justice Douglas's support for civil rights had not been a basis for impeachment.

#### A. *Formulating the Charges Against Justice Douglas*

Most of the charges in H.R. Res. 920 accused Justice Douglas of abandoning his duty of impartiality and accepting monies in violation of established law.<sup>235</sup> However, one charge accused Justice Douglas of undermining confidence in the federal government by publishing *Points of*

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228. See Rogers, *Byron Giles, (1900–1983)*, BIOGRAPHICAL DIRECTORY U.S. CONG., <https://perma.cc/7XQT-23YZ>.

229. *Id.*

230. See MICHAL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER 221 (1987).

231. See ALAN WARE, THE LOGIC OF PARTY DEMOCRACY 94 (1979); JOAN A. LOWY, PAT SCHROEDER: A WOMAN OF THE HOUSE 30 (2003).

232. SPECIAL SUBCOMM. ON H. RES. 920, 91ST CONG., ASSOCIATE JUSTICE WILLIAM O. DOUGLAS: FINAL REPORT iii (Comm. Print 1970) [hereinafter REPORT II].

233. See Press Release, Office of Congressman Edward Hutchinson (Apr. 21, 1970), in EDWARD HUTCHINSON PAPERS, 1959–1976, Box 14 (Gerald R. Ford Library, William McNitt comp., 1989); Letter from Howard W. Fogt, Jr., Minority Counsel to Representative Edward Hutchinson (May 19, 1970), in EDWARD HUTCHINSON PAPERS, 1959–1976, Box 14 (Gerald R. Ford Library, William McNitt comp., 1989).

234. See CARL ALBERT WITH DANNEY GOBLE, LITTLE GIANT: THE LIFE AND TIMES OF SPEAKER CARL ALBERT 278 (1990).

235. REPORT II, *supra* note 232, at 31–69.

*Rebellion*.<sup>236</sup> A further charge involved an article Douglas authored titled “Redress and Revolution” in *Evergreen Magazine*, which likewise was allegedly designed to erode confidence in the government.<sup>237</sup> Another charge was that Justice Douglas was responsible for student unrest because he served as the chairman of the Executive Committee of the CSDI and that organization had sought relations with the Soviet Union and stoked campus unrest.<sup>238</sup> A separate charge involving Justice Douglas and the CSDI claimed that he had tried to communicate with Ho Chi Minh without presidential sanction during a 1967 international conference in Geneva titled *Pacem in Terris II*.<sup>239</sup> Justice Douglas was also accused of undermining national security by openly advocating for the “recognition of Red China” and by publicly criticizing the government’s foreign policy while on a trip to Brazil.<sup>240</sup> In regard to Justice Douglas’s position in the Parvin Foundation, H.R. Res. 922 contained charges that he had consorted with “gangsters” and had tried to reestablish “the leftist” Juan Bosch as president of the Dominican Republic.<sup>241</sup>

In addition to Ford’s speech and the charges contained in H.R. Res. 922, Celler permitted other congressmen to add allegations against Justice Douglas. Among other new allegations, and perhaps providing circumstantial evidence as to why Ford lobbied for Hutchinson’s appointment to the investigating committee, Hutchinson alleged that on at least three occasions Justice Douglas violated the Logan Act.<sup>242</sup> This Act, first enacted in 1799, prohibits United States citizens from negotiating with foreign governments without the express permission of the Executive Branch.<sup>243</sup> The Logan Act is not only designed to give the President a virtual

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236. *Id.* at 157.

237. *Id.* at 166.

238. *Id.* at 328–31.

239. *Id.* at 331. The specific language of this charge was that CSDI had sponsored and financed a “Pacem in Terris II Convocation” . . . to discuss foreign affairs and U.S. foreign policy . . . , to which Ho Chi Minh was publicly invited, and all while the United States was in the midst of war in which Communists directed by the same Ho Chi Minh were killing American boys fighting to give South Vietnam the independence and freedom from aggression we had promised that nation . . . .

INTERIM REPORT, *supra* note 210, at 46–47.

240. INTERIM REPORT, *supra* note 210, at 47.

241. *Id.* at 48.

242. Report II, *supra* note 232, at 351–52. Hutchinson raised these concerns in his dissenting opinion within the Final Report. *See id.* It is unknown whether Hutchinson formally asserted these allegations during the investigation or merely suggested that Justice Douglas’s actions be scrutinized under the lens of the Logan Act after the fact.

243. The Logan Act, 18 U.S.C. § 953 (2012). The Act as rewritten in 1948, reads in part:

monopoly over foreign policy, it is also tied to national security.<sup>244</sup> The Act is designed to ensure that the United States does not become obligated to a foreign government or a cause without the express command of the Executive Branch.<sup>245</sup> On the other hand, not once in the Act's existence has there ever been a successful prosecution of a violation.<sup>246</sup>

In one sense, Celler satisfied Ford, Wyman, and Waggoner's demands: the committee determined to investigate each of the charges contained in H.R. Res. 922 and opened the investigation to other charges. What H.R. Res. 920 did not permit was a bypassing of the Judiciary Committee to better Ford's chances of having articles of impeachment drafted for the full House to consider. Yet, Ford and his allies professed their dissatisfaction with H.R. Res. 920.<sup>247</sup> On July 29, 1970, Ford complained to Celler that H.R. Res. 920 failed to include all of his charges against Justice Douglas and also failed to present the legal standard he espoused—that is, holding the federal judiciary to a higher standard than that of elected officials.<sup>248</sup> However, by this time, H.R. Res. 920 and its commensurate investigation were well under way.

On August 5, 1970, Celler issued the investigative report to Congress and informed the legislature that there was no evidence of Justice Douglas's wrongdoing, either in regard to his judicial or nonjudicial activities.<sup>249</sup> "Intensive investigation of the Special Subcommittee has not disclosed credible evidence that would warrant preparation of charges on any acceptable concept of an impeachable offense," the investigation

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Any citizen . . . who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined under this title or imprisoned not more than three years, or both.

*Id.*

244. *See id.*

245. *See, e.g.,* United States v. Peace Info. Ctr., 97 F. Supp. 255, 260 (D.D.C. 1951); S. PRT. NO. 103-83, pt. 4, at 95 (1994); Timothy Zick, *The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941, 960 (2011).

246. Detlev F. Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?*, 60 AM. J. INT'L L. 268, 271 (1966).

247. Letter from Representative Gerald Ford to Representative Emanuel Celler, Chairman, House of Representatives Judiciary Comm. (July 29, 1970), in RECORDS OF THE JUDICIARY COMM. AND RELATED COMMS., 1813–1988, RECORDS OF THE H.R., 1789–1990, Record Group 233, Box 88, AP File (National Archives comp.).

248. *Id.*

249. REPORT II, *supra* note 232, at 1.



concluded.<sup>250</sup> This conclusion largely broke on partisan lines, with Brooks and Rogers in agreement.<sup>251</sup> While McCulloch did not believe that impeachment was merited, he noted that his opinion was based on a lack of evidence.<sup>252</sup> Hutchinson dissented from the conclusion, but he, too, did not call for impeachment articles to be drafted. Rather, he complained that the investigation was inherently incomplete because it did not subject witnesses to cross-examination, so it should only be considered as merely a second interim report.<sup>253</sup>

A brief timeline of the investigation—in terms of assessing whether the Nixon administration or Ford had any actual evidence of Justice Douglas’s attempts to undermine national security—is helpful to understand why the investigation failed, beyond the spurious nature of the allegation that Justice Douglas had undermined national security.

On April 27, 1970, Justice Douglas notified Celler that he had retained Simon Rifkind to represent him before the subcommittee.<sup>254</sup> Rifkind, a former federal judge who resigned from the bench in 1950, and Justice Douglas had been friends for more than two decades before the impeachment hearings.<sup>255</sup> Shortly after, Douglas added former Attorney General Ramsay Clark and former Secretary of Defense and presidential advisor Clark Clifford to his defense team.<sup>256</sup> Rifkind countered Ford’s claims with a lengthy brief to the Judiciary Committee; Ford, in turn, hired a Detroit-based law firm to try to rebut Rifkind.<sup>257</sup>

The subcommittee began its formal work on April 28, 1970, when it sent a request to each member of the House to furnish any evidence they

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250. *Id.* at 349.

251. *Id.*

252. See Richard L. Lyons, *No Grounds to Impeach Justice Douglas Found*, WASH. POST, Dec. 4, 1970.

253. REPORT II, *supra* note 232, at 351–52.

254. Letter from Assoc. Justice William O. Douglas to Representative Emanuel Celler, Chairman, House of Representatives Judiciary Comm. (Apr. 27, 1970), in WILLIAM O. DOUGLAS PAPERS, 1801–1980, Box 588 (Library of Cong. comp., 2014).

255. See, e.g., Letter from Assoc. Justice William O. Douglas to Simon Rifkind (Apr. 5, 1950), in WILLIAM O. DOUGLAS PAPERS, 1801–1980, Box 366 (Library of Cong. comp., 2014) (lamenting Rifkind’s resignation).

256. See, e.g., Letter from Assoc. Justice William O. Douglas to Ramsay Clark (May 7, 1970), in WILLIAM O. DOUGLAS PAPERS, 1801–1980, Box 588 (Library of Cong. Comp., 2014).

257. Letter from Representative Gerald Ford to Rep. Emanuel Celler, Chairman, House of Representatives Judiciary Comm. (Aug. 19, 1970), in GERALD R. FORD CONGRESSIONAL PAPERS, 1949–1973, Box R12 (Gerald R. Ford Presidential Library, Robert T. Hartmann comp.); Letter from Representative Gerald Ford to Representative Emanuel Celler, *supra* note 247.

believed to be relevant to the investigation.<sup>258</sup> Initially, the investigation was scheduled to conclude in late June, based on Nixon's assurances that the federal agencies would cooperate with the investigation; but, Celler made little headway, in large part because the agencies' responses were not conducted within the timelines allotted for the investigation.<sup>259</sup> For instance, Celler sought a response from the Internal Revenue Service as to whether Justice Douglas had violated the federal tax code or had foreign sources of income.<sup>260</sup> The commissioner did not respond until July 15.<sup>261</sup> A similar pattern occurred with Attorney General Mitchell, J. Edgar Hoover, and Richard Helms. These delays prompted Celler to seek an extension of the investigation for a further 60 days beyond June 20.<sup>262</sup> Although the investigation required detailed examination into Justice Douglas's tax filings and potential relationships with litigants and other interested parties, the investigation into matters of national security could have been closed with quicker agency cooperation.<sup>263</sup>

### B. *General Allegations*

Before examining the specific allegations against Justice Douglas in terms of national security, it should be noted that, early in the investigation, Celler requested the State Department to provide any evidence that would link Justice Douglas, the Parvin Foundation, or the CSDI to governments or personnel whom had been deemed a threat to the United States.<sup>264</sup> Celler

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258. Letter from Representative Emanuel Celler, Chairman, House of Representatives Judiciary Comm., to Representative Gerald Ford, (Apr. 29, 1970), in GERALD R. FORD CONGRESSIONAL PAPERS, 1949–1973, Box R12 (Gerald R. Ford Presidential Library, Robert T. Hartmann comp.).

259. Letter from President Richard Nixon to Representative Emanuel Celler, Chairman, House of Representatives Judiciary Comm. (May 13, 1970), in RECORDS OF THE JUDICIARY COMM. AND RELATED COMMS., 1813–1988, RECORDS OF THE H.R., 1789–1990, Record Group 233, Box 88, AP File (National Archives comp.). Nixon assured Celler, “Therefore, in accordance with the subcommittee’s request, I shall authorize and direct appropriate officials of the Executive Branch to furnish information within the jurisdiction of their departments and agencies relevant to the charges against Justice Douglas and otherwise to cooperate with the House of Representatives in this matter.” *Id.*

260. Letter from President Richard Nixon to Representative Emanuel Celler, Chairman, House of Representatives Judiciary Comm. (June 2, 1970), in RECORDS OF THE JUDICIARY COMM. AND RELATED COMMS., 1813–1988, RECORDS OF THE H.R., 1789–1990, Record Group 233, Box 88, AP File (National Archives comp.).

261. REPORT II, *supra* note 232, at 19.

262. *Id.* at 1.

263. *See id.* at 13.

264. *See id.* at 17–18 (asking Rogers for any evidence of Justice Douglas’s trips to the Dominican Republic between 1962 and 1966, information on the Parvin Foundation, the State

made it clear that the investigating subcommittee wanted to obtain any evidence that Justice Douglas had violated the Logan Act.<sup>265</sup> Secretary of State William Rogers did not respond to Celler until two months later.<sup>266</sup> Despite the length of time between the request and response, Rogers claimed that the State Department had some information relevant to the investigation, but he advised Celler that violations of federal law, including any laws which violated foreign restrictions, were a matter for the Justice Department.<sup>267</sup>

The Justice Department proved unhelpful to the investigation, as well. After a June 9, 1970 meeting between Celler, McCulloch, and Attorney General Mitchell, the Special Subcommittee was critical of the Justice Department for being nonresponsive to their request for information.<sup>268</sup> It was not until twenty days passed that Mitchell responded that the Justice Department had no evidence pertinent to the investigation and that, in fact, Justice Douglas had never been investigated for any criminal wrongdoing.<sup>269</sup> Mitchell, however, noted that “[o]ver the years, Justice Douglas has been the subject of various allegations and complaints about his personal life and about his purported friendships and associations.”<sup>270</sup>

Perhaps most distressing to Ford and the anti-Douglas faction was the behavior of Richard Helms, the director of the Central Intelligence Agency. Nixon assured the committee on May 13 that the CIA would investigate their files for damaging material on Justice Douglas, but it was not until July 15—more than two months later—that Helms informed Celler that the agency only possessed information relating to financial support given by Parvin to CSDI through Justice Douglas, who served on the board of the foundation at the time.<sup>271</sup> On the one hand, the lack of pertinent evidence was a logical conclusion since the CIA was not supposed to spy on citizens in the first place.<sup>272</sup> “This is to be expected, as it is our policy not to concern ourselves with United States citizens, either at home or abroad, unless they are

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Department’s participation in the *Pacem in Terris* Conferences, and trips by CSDI personnel to North Vietnam between 1967 and 1968).

265. *Id.* at 18.

266. *Id.*

267. *Id.*

268. *Id.* at 21.

269. *Id.* at 21–22.

270. *Id.* at 22 (noting that information in the possession of the Internal Revenue Service and the Securities and Exchange Commission had already been brought to the investigation by those agencies).

271. Letter from Richard Helms, Dir., CIA, to Representative Emanuel Celler, Chairman, House of Representatives Judiciary Comm. (July 15, 1970), in GERALD R. FORD CONGRESSIONAL PAPERS, 1949–1973, Box R14 (Gerald R. Ford Presidential Library, Robert T. Hartmann comp.).

272. *Id.*

specifically involved in some activity directly related to the foreign intelligence field,” Helms responded to Celler.<sup>273</sup> However, on the other hand, Justice Douglas had travelled to China and Soviet Russia, as well as other overseas locations, which might have interested the CIA.<sup>274</sup>

Celler understood that Helms had given the subcommittee, at best, a partial answer, and he instructed the CIA director to conduct the investigation with greater specificity. On July 24, at a meeting between the Special Subcommittee and the CIA, Helms informed Celler that the CIA general counsel had searched through the agency’s investigative files and found nothing pertinent to share with the investigation, other than what had already been disclosed regarding the CSDI financial support.<sup>275</sup> This should have been expected, especially since the subcommittee itself had mentioned it would not want the CIA to release any information that would prejudice future activities of the CIA or complicate Helms’s administration of the agency.<sup>276</sup> On August 10, Helms provided a final answer to Celler’s inquisitions; however, this answer merely reiterated the July 15 letter and the July 24 meeting.<sup>277</sup> While Helms would not fully exonerate Justice Douglas of all accusations, he answered that the CIA had no evidence to support any of Ford’s charges against the Justice.<sup>278</sup> Waggoner’s reaction to Helms’s answer is telling of the degree to which conservatives believed Justice Douglas had undermined national security. Waggoner refuted the CIA’s position and insisted that there was evidence Justice Douglas had intended to weaken the military through foreign associations.<sup>279</sup>

Before turning to specific Logan Act allegations, the investigation determined that Ford’s allies’ use of *Points of Rebellion* to show that Justice Douglas had the intent to undermine national security was undercut by their own actions in highlighting singular passages from the article.<sup>280</sup> In reality,

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273. *Id.*

274. See Jules Lobel, *Justice Douglas the Internationalist: The Connection Between Domestic Liberty and Foreign Policy*, in “HE SHALL NOT PASS THIS WAY AGAIN” 279, 284–87 (Stephen L. Wasby ed., 1990).

275. REPORT II, *supra* note 232, at 19–20.

276. *Id.* at 20–21.

277. *Id.*

278. *Id.* at 21. Helms wrote:

Accordingly I wish to inform you that, as Mr. Maury explained to Mr. Harkins, a further review of our records has revealed nothing bearing on H. Res. 920 or the points covered by Representative Gerald R. Ford in his statement on the floor of the House on 15 April 1970. Therefore my letter to you of 15 July 1970 should stand as written.

*Id.*

279. *Id.* at 9–10.

280. *Id.* at 157–66.

Justice Douglas had simply warned of future public retribution for the government's failure to police itself.<sup>281</sup> Although the article had alluded to a right of public rebellion against the government, the investigation concluded that Justice Douglas's comments on the lack of trust in government were taken out of context.<sup>282</sup> The investigation countered claims that Justice Douglas would have to recuse himself from appeals arising out of challenges to the government by noting that justices such as Oliver Wendell Holmes, Jr., Benjamin Cardozo, and Felix Frankfurter had been prolific writers on issues of speech and the law.<sup>283</sup> More importantly, the investigation admonished Ford that, at the same time Justice Douglas published the treatise, he also issued a concurrence in *Illinois v. Allen* in which he urged, "The social compact has room for tolerance, patience, and restraint, but not for sabotage and violence."<sup>284</sup> Perhaps as a matter of political shrewdness, the investigation pointed out that Nixon's Secretary of the Interior, Walter Hickel, had publicly warned Nixon against treating dissenters as an external enemy on May 6, 1970.<sup>285</sup>

### C. *Logan Act Violations: Vietnam and Cambodia*

Ford's allies accused CSDI of violating the Logan Act by inviting Ho Chi Minh to *Pacem in Terris II*, a foreign policy conference in Switzerland in which the United States' role in Vietnam was debated.<sup>286</sup> CSDI had paid Justice Douglas fees of up to \$500 per day for providing seminars and articles.<sup>287</sup> What Ford did not know was that some of the senior-most officers in President Johnson's administration had given the CSDI permission to speak with Ho Chi Minh, as long as it was clear that it did not obligate the United States to any terms or concessions.<sup>288</sup> More importantly, these same officials had approved of Justice Douglas's role in CSDI's efforts to develop

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281. *Id.*

282. *Id.* at 164–65.

283. *Id.* at 395–96.

284. *Illinois v. Allen*, 397 U.S. 337, 356 (1970) (Douglas, J., concurring).

285. REPORT II, *supra* note 232, at 392. The report also noted that Kissinger had issued a similar warning. *Id.* at 389–90.

286. *Id.* at 143–44 (quoting H.R. Res. 920, which asserted that inviting Ho Chi Minh to the conference while "the United States was in the midst of war in which Communists directed by the same Ho Chi Minh were killing American boys fighting to give South Vietnam the independence and freedom from aggression we had promised that Nation" was a violation of the Act).

287. *Id.* at 143.

288. *Id.* at 144. The men that CSDI Director Hutchins gained permission from included McGeorge Bundy, Nicholas Katzenbach, and Johnson himself. *Id.*

a dialogue with North Vietnam.<sup>289</sup> Given Johnson's approval of CSDI's attempts to open communications with Ho Chi Minh in hopes of resolving the conflict with North Vietnam and the South Vietnamese communists, there was no basis for sustaining the charge under the Logan Act.<sup>290</sup> And, while one could debate the wisdom of a justice taking a role in foreign affairs at the indirect behest of a president (and certainly the tacit permission, if not encouragement, for Justice Douglas to take a role in this effort is open to criticism), there are historic examples of justices being tasked to make the very type of effort that Justice Douglas had undertaken.<sup>291</sup>

When the Associated Press quoted Hutchins accusing Johnson of "scuttling" peace talks on the war, perhaps it was understandable that pro-war politicians would think of accusing the CSDI of acting without the sanction of the government and, therefore, infer Justice Douglas's violation of the Logan Act.<sup>292</sup> But, these same politicians, and in particular Ford, would have had access to the State Department and members in Johnson's administration, who knew that Johnson had sanctioned the Vietnam missions.

#### *D. Justice Douglas, Albert Parvin, and the Dominican Republic*

Justice Douglas became associated with the Parvin Foundation from its inception in 1960 at Princeton University.<sup>293</sup> Parvin had read Justice Douglas's published lectures and invited him to participate in a new foundation whose mission was to combat communism in the Middle East, Asia, South America, and Africa by bringing "[m]en between the ages of 25

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289. *See id.*

290. *Id.* By 1968, CSDI's activities were made public in a book by the group's directors, Harry Ashmore and William Baggs. HARRY S. ASHMORE & WILLIAM C. BAGGS, CTR. FOR THE STUDY OF DEMOCRATIC INSTS., MISSION TO HANOI: A CHRONICLE OF DOUBLE-DEALING IN HIGH PLACES 9–12 (1968). It was true that Harry Ashmore travelled to Hanoi between January 6 and January 14, 1967. REPORT II, *supra* note 232, at 145. However, as the investigation discovered, Johnson sanctioned these direct meetings with Ho Chi Minh. *Id.* Moreover, in 1966, Justice Douglas personally obtained Johnson's support for entering into informal discussions with Ho Chi Minh and the communist Chinese government in the hopes of ending the conflict. *Id.* On June 9, 1966, Johnson conveyed to Justice Douglas that he had no objection with CSDI meeting Ho Chi Minh and the Peking regime. *Id.* at 145–46.

291. In 1949, President Harry Truman convinced Chief Justice Fred Vinson to undertake a diplomatic mission to Premier Joseph Stalin, but the trip never occurred because the Chief Justice and Secretary of State advised strongly against it. *See* JAMES E. ST. CLAIR & LINDA C. GUGIN, CHIEF JUSTICE FRED M. VINSON OF KENTUCKY 193 (2002).

292. *Cf.* ASHMORE & BAGGS, *supra* note 290, at 11 (describing Ashmore and Baggs's suspicions that their Hanoi exchanges had been canceled by internal operations within the Johnson administration).

293. REPORT II, *supra* note 232, at 284; MURPHY, *supra* note 88, at 366.

and 35” for a year of study at Princeton University’s Woodrow Wilson School.<sup>294</sup>

The foundation set up a similar program at the University of California, Los Angeles.<sup>295</sup> Although Justice Douglas and William Campbell, a judge on the District Court for the District of Northern Illinois, were actively associated with the foundation, they were not the only judges to participate. In 1961, Justice William Brennan spoke to the foundation on the importance of promoting independent judges in South and Central America as a guarantor against dictatorship.<sup>296</sup> Justice Douglas’s association with the Parvin Foundation was somewhat different than his activities in regard to Vietnam, in that the foundation focused on a region closer to the United States than Southeast Asia.

In addition to the increased role of the United States military in Vietnam from 1964 through 1970, the nation’s military forces were used in other parts of the world believed to be endangered by the spread of communism, particularly in Latin and South America. After Fidel Castro’s takeover in Cuba in 1959, the United States aggressively tried to stem the further spread of communism throughout Latin America, and in particular the Caribbean.<sup>297</sup> One of the problem areas arose as a result of Rafael Trujillo’s dictatorial rule over the Dominican Republic.<sup>298</sup>

Trujillo’s rule has been described as one of the worst dictatorships in Latin America,<sup>299</sup> both brutal and corrupt, which warped the political and economic framework of the country.<sup>300</sup> However, he assured the United States that he was the Western Hemisphere’s most vigorous anti-communist.<sup>301</sup> In 1959, Dominican forces loyal to Trujillo were able to defeat insurgents who had trained in Cuba alongside Castro’s forces.<sup>302</sup> While Trujillo was an anathema to both Eisenhower and Kennedy, he was

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294. REPORT II, *supra* note 232, at 193.

295. *Id.*

296. Letter from Assoc. Justice William O. Douglas to Assoc. Justice William J Brennan (Nov. 28, 1961), in WILLIAM J. BRENNAN PAPERS, 1945–1998, Box II:109 (Library of Cong. comp., 2010).

297. See, e.g., JONATHAN COLMAN, THE FOREIGN POLICY OF LYNDON B. JOHNSON 173–75 (2010).

298. Joseph S. Tulchin, *The Promise of Progress: U.S. Relations with Latin America During the Administration of Lyndon B. Johnson*, in LYNDON JOHNSON CONFRONTS THE WORLD 211, 233–36 (Warren I. Cohen & Nancy Bernkopf Tucker eds., 1994).

299. *Id.* at 234.

300. COLMAN, *supra* note 297, at 174.

301. STEPHEN G. RABE, EISENHOWER AND LATIN AMERICA 15 (1988).

302. Stephen G. Rabe, *The Caribbean Triangle: Betancourt, Castro, and Trujillo and U.S. Foreign Policy, 1958–1963*, in EMPIRE AND REVOLUTION 48, 52 (Peter L. Hahn & Mary Ann Heiss eds., 2001).

also a potential ally in the containment of communism and had been praised by Nixon for his quest to defeat communism in Latin America.<sup>303</sup>

Trujillo was assassinated in 1961, and Juan Bosch was elected President the following year.<sup>304</sup> The Kennedy administration initially signaled its support for Bosch, sending Vice-President Johnson to attend his inauguration.<sup>305</sup> However, within a short time, Bosch was suspected of being pro-communist.<sup>306</sup> In fact, the United States ambassador to the Dominican Republic informed Kennedy that Bosch was “a deep-cover Communist.”<sup>307</sup> In 1963, the Dominican Republic’s military leaders deposed him.<sup>308</sup>

After Bosch’s ouster, Johnson supported Donald Reid Cabral, a pro-Western dictator<sup>309</sup> who was also ousted in a military coup just two years later. Bosch used the resulting civil war to attempt to return to power.<sup>310</sup> In response, Johnson ordered United States military forces into the Dominican Republic.<sup>311</sup> Johnson still believed Bosch to be pro-communism and wanted to thwart his return to power.<sup>312</sup> Johnson did not have the express approval of either Congress or the Organization of American States to send military forces to the Dominican Republic, and there was swift public outcry against his actions.<sup>313</sup> Nevertheless, Johnson received bipartisan support from senior congressional leaders such as Everett Dirksen, the Senate minority leader, and Speaker of the House McCormack.<sup>314</sup> Bosch lost reelection in 1966 and relocated to another country.<sup>315</sup>

Given Justice Douglas’s determination to promote democracy, it is not difficult to understand why he may have favored Bosch. But, neither the CIA nor the State Department provided any evidence that Justice Douglas had pushed for Bosch’s return—despite Ford’s forceful accusations to the contrary. Nor was there any action on Justice Douglas’s part that ran

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303. *But see id.* at 87. On Kennedy and Trujillo, *see* ELIZABETH N. SAUNDERS, *LEADERS AT WAR* 113 (2011); RANDALL BENNETT WOODS, *FULBRIGHT* 306–07 (1995).

304. H.W. BRANDS, *THE WAGES OF GLOBALISM* 50 (1995); Stephen G. Rabe, *Controlling Revolutions: Latin America, the Alliance for Progress, and Cold War Anti-Communism*, in *KENNEDY’S QUEST FOR VICTORY* 105, 113–14 (Thomas G. Paterson ed., 1989).

305. SAUNDERS, *supra* note 303, at 157.

306. *See id.*

307. BRANDS, *supra* note 304 (internal quotations omitted).

308. MARK ERIC WILLIAMS, *UNDERSTANDING U.S.–LATIN AMERICAN RELATIONS* 163 (2012).

309. ROBERT DALLEK, *FLAWED GIANT* 262 (1998).

310. *Id.* at 263.

311. *Id.* at 263–65.

312. *Id.* at 262–65.

313. *Id.* at 265.

314. *Id.* at 263–64.

315. *Id.* at 267.



contrary to Johnson's foreign policy in regard to the Dominican Republic. All the CIA could confirm was that the Parvin Foundation had given financial assistance to the Inter-American Center for Economic and Social Studies and that an individual named Sacha Volman had worked as an intermediary between Parvin and the center.<sup>316</sup> Volman had communicated with Justice Douglas about obtaining World Bank support for the Dominican Republic while Bosch was president, but nowhere in their correspondence is there evidence that Justice Douglas assisted in this effort.<sup>317</sup>

In 1969, Senators Strom Thurmond and Barry Goldwater, in the midst of the confirmation hearings on Chief Justice Warren Burger, claimed that Justice Douglas's association with the Inter-American Center for Economic and Social Studies reached beyond the acceptable parameters of extrajudicial activities and aided the United States' enemies.<sup>318</sup> On June 20, 1969, Thurmond, in a speech in Tucson, accused Justice Douglas of having undermined the Dominican Republic's stability by encouraging left-wing revolts, making it necessary for Johnson to order the invasion.<sup>319</sup>

The 1960s were a time of intense nationalism, as the United States embarked on a growing war against communism around the globe. Justice Douglas's attempts to facilitate peaceful change in these countries through educational initiatives gave his critics the fodder they needed to accuse him of undermining national security simply by associating with individuals who were even tangentially tied to these regimes.

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316. Letter from Richard Helms, Dir., CIA, to Representative Emanuel Celler, Chairman, House of Representatives Judiciary Comm., *supra* note 271.

317. REPORT II, *supra* note 232, at 137–38 (incorporating correspondence from Volman to Justice Douglas on April 16, 1963 in which Volman requested support for the Dominican Republic). Neither Justice Douglas nor Parvin, or, for that matter, their accusers, likely knew that, while Volman may have appeared to be a “shadowy figure” who conversed with anti-American elements throughout Latin America, he was, in reality, a CIA operative. On Volman, see JEROME R. ADAMS, LIBERATORS, PATRIOTS AND LEADERS OF LATIN AMERICA 171 (2nd ed. 2010), and KAREN M. PAGET, PATRIOTIC BETRAYAL 272 (2015). According to Professor Paget, Volman was born in Romania, fought against the Nazis and also later against the communist regime, and then fled to South America in the late 1940s. PAGET, *supra*. In 1959, Volman set up an educational initiative called the Institute of Political Education in Costa Rica to train anti-communist, pro-democracy forces, including several Dominican students. *Id.*

318. See 115 CONG. REC. 15,203–07 (1969) (statement of Sen. Thurmond); see also Kennedy, *Thurmond Tangle over Douglas*, ARIZ. REPUBLIC, June 10, 1969, at 5.

319. Transcript of Senator Strom Thurmond's Remarks at the Trunk 'N Tusk Club Dinner (Jun. 20, 1969), in THE STROM THURMOND PAPERS (Clemson Univ. Library).

*E. Iraq and the Kurdish Emigre*

Justice Douglas was also accused of violating the Logan Act by lobbying the Immigration Service director on behalf of a Kurdish professor who sought to remain in the United States.<sup>320</sup> But, Representative Hutchinson, who levied the accusation, misread the Act's purpose entirely. The Logan Act is intended to prevent United States citizens outside of the Executive Branch from lobbying foreign governments or interfering with United States foreign policy.<sup>321</sup> But, Justice Douglas did not lobby the Iraqi government. Arguably, had Justice Douglas championed the cause of Kurdish independence without the Nixon administration's permission, he might have run afoul of the Logan Act; but, in this instance, he simply used established legal channels to assist a professor with his immigration process.<sup>322</sup> In a letter to the Immigration and Naturalization Service, Justice Douglas noted that the professor's life was in danger and that he did not seek to alter the relations between the United States and Iraq.<sup>323</sup> To this end, the investigation concluded that Justice Douglas was innocent of trying to use his office to influence foreign policy and that his advice to the immigration director—based on his extensive travels to the Middle and Near East—proved helpful to an important agency determination.<sup>324</sup>

In his dissent from the report, Hutchinson accused Justice Douglas of acting at the behest of an unknown citizen and using his official position to pressure the Commissioner of Immigration.<sup>325</sup> To Hutchinson, this was a

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320. REPORT II, *supra* note 232, at 66–67 (incorporating correspondence from Justice Douglas to Raymond Ferrell on February 6, 1970, wherein Justice Douglas expressed his personal knowledge of the Kurdish situation but emphasized that he did not know the professor personally).

321. The Logan Act, 18 U.S.C. §953 (2012).

322. REPORT II, *supra* note 232, at 66–67. Douglas added, “These are all causes in the Jeffersonian tradition, which the military regime which has governed Iraq since 1958 does not honor.” *Id.* On February 6, 1970, Justice Douglas wrote to the Immigration and Naturalization Service commissioner that, although he did not personally know Dr. Mustafa Salih Abdulrahman, he travelled in the Kurdistan area of Northern Iraq and became acquainted with the leaders of a Kurdish rights movement. *Id.* According to Justice Douglas, this movement was in “the struggle in Iraq for the right to teach the Kurdish language, the right to distribute Kurdish literature, and the right of Kurds to hold public office.” *Id.*

323. *Id.* (“So I know that if Dr. Abdulrahman returns to Iraq he will be subject to severe persecution.”).

324. *Id.* at 68–69.

325. *Id.* at 351–52. Hutchinson argued that

[s]omeone must have asked Justice Douglas to intercede for Dr. Abdulrahman, who according to the Justice was unknown to him. And the Justice did intercede. Who was so uninformed to believe it proper for a Justice of the Supreme Court to lend

clear case of a Logan Act violation. Hutchinson apparently believed that, because there were Kurdish men serving in the Iraqi legislature, Justice Douglas altered the relationship between the United States and Iraq by claiming that the professor was in danger.<sup>326</sup>

In addition to Hutchinson's failure to articulate the Logan Act's limits, he also seemed to ignore the fact that other justices had intervened on behalf of persons awaiting deportation, such that Justice Douglas's actions were neither unusual nor unknown to Congress. For instance, in 1950, when the Court upheld a deportation order for Ms. Ellen Knauff, the Czechoslovakian-born wife of a U.S. soldier, in *Knauff v. Shaughnessy*,<sup>327</sup> Justice Robert Jackson issued a stay against the deportation and ordered the government to permit Knauff to remain in the United States while she petitioned Congress.<sup>328</sup> The House of Representatives held a hearing to assess a petition to permit Ms. Knauff to remain permanently in the United States and passed a specific bill allowing her to remain in the country.<sup>329</sup> Although in this instance Justice Jackson acted in expectation of congressional action, the fact that a stay was issued against the Executive Branch indicates that a single justice can act on behalf of a foreigner facing deportation. While it is true that past practices alone do not provide full exoneration for breaches of judicial ethics, Hutchinson should have understood that Justice Douglas's use of lawful means of redress was hardly a usurpation of legislative or executive power, to which Justice Jackson's actions arguably arose. The investigation did not rely on *Knauff* to reach its conclusions, but Justice Jackson's conduct, as it had been accepted by Congress, evidences the spurious nature of Hutchinson's particular allegation.

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his name and influence in a matter which could reach his Court; and why did the Justice accede to such a request or pressure?

*Id.* at 352. Hutchinson would have had a better argument if Dr. Abdulrahman had challenged a deportation order through the courts and his appeal against an adverse decision had risen to the Court, such as in *United States ex. rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), or *Ludecke v. Watkins*, 335 U.S. 160 (1948). In *Knauff*, Justice Jackson noted in his dissent that he would have ordered the INS not to deport Ms. Knauff, even after the Court's majority determined she had no right to challenge her deportation. *Knauff*, 338 U.S. at 551–52 (Jackson, J., dissenting). Jackson's would-be order enabled a special petition to advance through Congress, which provided Ms. Knauff the means to remain in the United States. See *Exclusion of Ellen Knauff: Hearings on H.R. 7614, A Bill for the Relief of Mrs. Ellen Knauff Before Subcomm. No. 1, H. Comm. on the Judiciary*, 81st Cong. 5–17 (1950) (statement of Rep. Walter, Member, H. Comm. on the Judiciary).

326. REPORT II, *supra* note 232, at 351–52.

327. *Knauff*, 338 U.S. at 547.

328. H.R. 7614, 81st Cong. (1950) (enacted).

329. *Id.*

All of the allegations against Justice Douglas that were based on national security fell far short of proving that he had either violated the law or undermined the foreign policies of the country. There were no ties between organized crime and Justice Douglas or, for that matter, the Parvin Foundation. The Parvin Foundation did not seek to restore Bosch to power against a president's express statements against Bosch. Justice Douglas did not, without the permission of the Executive Branch, try to establish relations with the North Vietnamese government. And, Justice Douglas's efforts on behalf of an immigrant did not arise to a violation of the Logan Act.

#### IV. FORDS'S FAILURE

Aside from the obvious reasons for Ford's failure to show that Justice Douglas had undermined national security, there were two other aspects to Ford's failure. First, a number of Republicans and conservative Democrats in the House recognized the dangers that Ford's allegations posed to an independent judiciary. Second, by the beginning of May 1970, Congress began to debate limits on Nixon's authority to order military forces into Cambodia and Laos; whether Justice Douglas had violated financial ethics norms—perhaps a sounder allegation—became a secondary question that was overcome by world events.

The media coverage of Ford's allegations also played a significant role in the failure of the impeachment campaign. The news media's coverage was critical of Ford's allegations in the immediate aftermath of his April 15 speech. Without positive reporting on the allegations, Ford and his allies appeared to imperil an independent judiciary through callous accusations.

##### *A. Congressional Reaction to the Final Report and to Cambodia*

If Ford, or for that matter Nixon, believed that an alliance between Republicans and Southern Democrats would pressure the investigation to conclude that Justice Douglas had committed "high crimes or misdemeanors," they wrongly placed confidence in the numbers of Republican and conservative Democratic congressmen likely to join the effort. For instance, Congressman Paul McCloskey, a California Republican, denounced Ford's advocacy for an ambiguous impeachment standard.<sup>330</sup> McCloskey went on to urge that, although he would not defend Justice Douglas's conduct, all of the matters raised by Ford were too remote to justify impeachment.<sup>331</sup> On June 24, 1970, McCloskey informed Chief Justice Warren that he wanted to discuss the best way to proceed on ending

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330. 116 CONG. REC. 12,569–76 (1970) (statement of Rep. McCloskey).

331. *Id.*

the investigation.<sup>332</sup> In August, McCloskey argued to Celler that Justice Douglas had not committed any offense, even if his extrajudicial conduct brought him personally into disrepute.<sup>333</sup>

On the Democratic Party side of the House, while Ford gained support from many of the South's Democrats, he did not convince all Southern Democrats to join him. For instance, Richard Walker Bolling from Missouri publicly defended Justice Douglas as a guardian of individual rights in explaining his support of Justice Douglas to his constituents.<sup>334</sup> Likewise, Claude Pepper, a Florida Democrat, opposed Ford and informed Celler that he backed the investigation's conclusions.<sup>335</sup> Congressmen from northern Democratic strongholds like Daniel Rostenkowski were confronted by constituents who sought Justice Douglas's impeachment, but Rostenkowski merely responded that he knew of no movement to impeach Justice Douglas.<sup>336</sup>

### *B. Cambodian Invasion Strengthens the Anti-War Movement*

In addition to Ford's failure to gain more congressmen to push for Justice Douglas's impeachment, the invasion into Cambodia proved to be politically disastrous in Congress. On April 30, Senator William Fulbright, the chairman of the Senate Foreign Relations Committee and a long-serving Democrat from Arkansas, demanded that the Nixon administration inform Congress what legal basis it had to invade Cambodia.<sup>337</sup> By the beginning of May, more than half of the senators expressed their opposition to the invasion, including Henry Jackson, a well-known and respected hawk who supported most other acts of escalation.<sup>338</sup> A similar proportion of congressmen opposed the invasion in the House.<sup>339</sup> On May 11, Senator John Sherman Cooper, a Kentucky Republican, and Senator Frank Church,

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332. Letter from Representative Paul N. McCloskey to Chief Justice Earl Warren (June 24, 1970), in EARL WARREN PAPERS, 1864–1974 (Manuscript Div., Library of Congress comp., 2000).

333. See REPORT II, *supra* note 232, at 15–16.

334. See, e.g., Letter from Representative Richard Bolling to William J. Thebo (Aug. 31, 1970), in THE RICHARD W. BOLLING COLLECTION (LaBudde Special Collections Dep't, UMKC Library).

335. Letter from Representative Claude Pepper to Representative Emanuel Celler, Chairman, House of Representatives Judiciary Comm. (Aug. 17, 1970), in EMANUEL CELLAR PAPERS (Library of Congress comp.).

336. See letter from Representative Dan Rostenkowski to Mr. Martin Gorski (Sept. 3, 1969), in DAN ROSTENKOWSKI PAPERS, Box 127 (Loyola Univ. Chi.).

337. KENTON CLYMER, THE UNITED STATES AND CAMBODIA, 1969–2000, at 31 (2004).

338. *Id.*

339. *Id.*

an Idaho Democrat, introduced a bill to limit the president's ability to direct United States forces into operations outside of Vietnam.<sup>340</sup> Their efforts had only nominally succeeded by the time Justice Douglas's investigation concluded, but when coupled with massive protests following the Cambodian invasion, it became increasingly unlikely that Ford could succeed in impeaching an anti-war justice in the midst of growing anti-war sentiment—not only in the public, but in Congress, as well.

*C. Media Coverage Disfavored Ford's Efforts*

If Nixon or Ford hoped to distract the country from the ground invasion in Cambodia by forcing an impeachment against Justice Douglas, their efforts failed for reasons beyond their control. To be sure, newspaper reporting on Ford's allegations against Justice Douglas occurred during a period when the nation's attention could divert from the constitutional importance of an impeachment proceeding. The ongoing conflict in Vietnam, as well as violence in Cambodia and protests against the war, dominated the headlines of the nation's newspapers. The day before Ford's speech, the *Philadelphia Inquirer* reported that Nixon entered into nuclear arms reduction discussions with the Soviet Government.<sup>341</sup> And, the day after the speech, the *New York Times* reported that hundreds of ethnic Vietnamese had been murdered in Cambodia.<sup>342</sup> The country's attention was focused on the ongoing war and the dangers that might bring at home. It was difficult to turn the public's attention to a judicial scandal, despite Ford's attempts to tie the two together.

Other current events continued to dominate the news cycle, blotting out or dulling coverage of the impeachment effort. During the week after Ford's speech, three United States astronauts aboard lunar mission Apollo 13 were in a struggle to return to Earth after malfunctions with their spacecraft.<sup>343</sup> A Palestinian attack on the United States embassy in Amman, Jordan occurred on the same day as Ford's speech,<sup>344</sup> and King Hussein of Jordan demanded that the American ambassador be recalled to the United States.<sup>345</sup> By the end

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340. JOHNS, *supra* note 2, at 284–85.

341. 'Freeze' in Doubt As U.S., Soviets Open Arms Talks, PHILA. INQUIRER, Apr. 14, 1970, at 2.

342. Neak Leung, *Hundreds of Bodies of Vietnamese Seen in Cambodian River*, N.Y. TIMES, Apr. 16, 1970, at 1.

343. See, e.g., *Hopes rise for safe landing by Apollo in Pacific Today*, TIMES (London), Apr. 17, 1970, at 1; John Barbour, *Apollo Rocket Burn Sets Home Course*, ATLANTA CONST., Apr. 16, 1970, at 1A.

344. *Jordanian Mob Burns U.S. Embassy Library*, ATLANTA CONST., Apr. 16, 1970, at 2A.

345. NIGEL ASHTON, KING HUSSEIN OF JORDAN 143 (2008).

of the month, major news coverage turned to the Senate Foreign Relations Committee's opposition to sending military aid to Lon Nol's Cambodian government<sup>346</sup> and demonstrations on college campuses against the invasion into Cambodia.<sup>347</sup>

When the nation's newspapers did cover the investigation, they did not side with Ford, and the reporting ranged from neutral analysis to skepticism of his intentions. The *Cincinnati Enquirer's* editors suggested that neither Ford nor Nixon intended for an impeachment to succeed, but rather sought to embarrass senators who had voted against the confirmations of Haynsworth and Carswell.<sup>348</sup> James Reston, in his syndicated column, sarcastically questioned whether Justice Douglas's book could be considered "a misdemeanor if not a high crime" because of the decline of literary standards.<sup>349</sup> The *Atlanta Constitution* headlined that Ford had sought a bill for Justice Douglas's impeachment,<sup>350</sup> and the *Detroit Free Press* informed its readers that Ford's allegations against Justice Douglas were based on innuendo.<sup>351</sup> The *Free Press* editors wrote that they "could take Mr. Ford's attack [on Justice Douglas] more seriously if [they] had greater faith in his objectivity" and added that Ford's actions only served to undermine the "confidence of the nation in the government's ability to govern."<sup>352</sup> When the investigation concluded that Justice Douglas had committed no wrongdoing, the *New York Times'* editorial staff wrote that Justice Douglas's "free-swinging" lifestyle was reproachful but challenged Ford and Nixon to "call a halt to [the] squalid campaign, which threaten[ed] the integrity and the independence of the Supreme Court."<sup>353</sup>

The *Philadelphia Inquirer* serves as one example to contextualize Ford's inability to use his allegations against Justice Douglas as a means for capturing the nation's attention. On April 12, 1970, its banner headline read: "Apollo 13 Heads Toward the Moon."<sup>354</sup> On the bottom of the first page sat

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346. *Key Senate Unit Opposes Sending Cambodia Arms*, N.Y. TIMES, Apr. 28, 1970, at 1.

347. *See, e.g., Jerry M. Flint, New Clash Erupts at Ohio State U.*, N.Y. TIMES, May 1, 1970, at 1.

348. *See The Campaign to 'Get' Justice Douglas*, CINCINNATI ENQUIRER, Apr. 16, 1970, at 6.

349. James Reston, Editorial, *Douglas, the Court, and Politics*, ATLANTA CONST., Apr. 16, 1970.

350. *Douglas Impeachment Move Introduced*, ATLANTA CONST., Apr. 16, 1970, at 13-A.

351. *Resolution to Impeach Douglas Filed*, DETROIT FREE PRESS, Apr. 16, 1970, at 7-B.

352. Editorial, *Ford's Attack Won't Get Douglas off Supreme Court*, DETROIT FREE PRESS, Apr. 17, 1970, at 6-A.

353. Editorial, *The Campaign Against Douglas*, N.Y. TIMES, Dec. 16, 1970.

354. *Apollo 13 Heads Toward the Moon*, PHILA. INQUIRER, Apr. 12, 1970, at 1.

the headline, “Agnew Attacks Douglas, Asks ‘Examination.’”<sup>355</sup> Under this headline, the *Inquirer* informed its readers that “Douglas, often involved in controversy, drew publicity this week after publication of his 20th book, ‘Points of Rebellion.’”<sup>356</sup> However, the newspaper also reported that Senator Richard S. Schweiker, a Pennsylvania Republican, claimed that Nixon pressured him to vote for Carswell’s confirmation.<sup>357</sup> Two days later, the *Inquirer* reported that the Apollo mission had to abort its lunar goal as a result of a power failure.<sup>358</sup> Underneath this headline, the newspaper reported that a Soviet nuclear submarine had sunk off the coast of Spain, the Israeli Air Force attacked targets near Cairo, and that four “Vietcong” rockets missed the United States embassy in Saigon.<sup>359</sup> Interestingly, and perhaps related to Ford’s effort to shore up Nixon’s popularity, the *Inquirer* reported the president’s popularity had fallen as a result over the administration’s military policy regarding Laos.<sup>360</sup> Coverage of the Justice Douglas investigation appeared on page three, with the newspaper informing its readers that Ford planned to move the House of Representatives to investigate Justice Douglas and that he denied any link between the failed Haynsworth and Carswell nominations and the allegations against Justice Douglas.<sup>361</sup>

When the newspaper reported Ford’s speech in Congress on April 16, it placed the story on its fifth page because its first four pages were filled with coverage of the returning Apollo mission, deaths in Vietnam, a congressional investigation into the My Lai massacre, and plans to keep peace talks with Russia.<sup>362</sup> The *Inquirer* even placed an article about Justice Blackmun’s net worth and judicial rulings ahead of coverage about the

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355. *Agnew Attacks Douglas, Asks ‘Examination’*, PHILA. INQUIRER, Apr. 12, 1970, at 1.

356. *Id.*

357. Thomas J. Madden, ‘*I Was Pressured to Vote for Carswell*’—Schweiker, PHILA. INQUIRER, Apr. 12, 1970, at 1.

358. *Power Failure Cancels Landing, Apollo Fires into Return Course*, PHILA. INQUIRER, Apr. 14, 1970, at 1.

359. *Russian A-Sub Reported Sunk off Spain’s Coast*, PHILA. INQUIRER, Apr. 14, 1970, at 1; *4 Vietcong Rockets Miss U.S. Embassy*, PHILA. INQUIRER, Apr. 14, 1970, at 2; *Israeli Planes Raid 20 Miles from Cairo*, PHILA. INQUIRER, Apr. 14, 1970, at 2.

360. Louis Harris, *Nixon’s Popularity Drops over Fears on Laos*, PHILA. INQUIRER, Apr. 14, 1970, at 3.

361. *Rep. Ford Leads Move to Investigate Justice Douglas’ Off-Bench Activities*, PHILA. INQUIRER, Apr. 14, 1970, at 3.

362. *Douglas Impeachment Move Grows*, PHILA. INQUIRER, Apr. 16, 1970, at 5; *Apollo Back on Path to Earth After Rocket Corrects Course*, PHILA. INQUIRER, Apr. 16, 1970, at 1; *Enemy Slays 25 Americans in Viet Action*, PHILA. INQUIRER, Apr. 16, 1970, at 1; *House Unit Quizzes 6 Army Men on My Lai*, PHILA. INQUIRER, Apr. 16, 1970, at 2; *U.S. to Propose Curb on Missiles*, PHILA. INQUIRER, Apr. 16, 1970, at 4.



investigation into Justice Douglas.<sup>363</sup> Although the hearings into Justice Douglas continued, by the beginning of May, the story seldom appeared in the *Inquirer*.

International newspapers also reported on Ford's attack on Justice Douglas by criticizing Ford. The *Times of London*, Britain's largest circulating newspaper, wrote that Ford had engaged in "a conservative-liberal vendetta" and said that there was "some suspicion that he ha[d] the tacit support of the White House."<sup>364</sup> The *Sydney Morning Herald* reported that Ford's "virulent attack launched efforts by a group of conservative Republicans and Democrats to have the Judge, noted for his liberal views, removed from the Bench."<sup>365</sup> Five days later, the *Times of London* lauded Celler for his promise not to "indulge in any witch-hunt."<sup>366</sup> That the three major newspapers of the United States' closest allies doubted the veracity of Ford's claims should have given Ford and Nixon pause; the readers of these newspapers could have concluded that Ford's allegations were made for a reason other than impeachment and, in turn, undermined allied trust in Nixon's government.

#### CONCLUSION

On April 16, 1970, according to John Ehrlichman, Nixon informed his staff that Ford's efforts were likely to fail because Speaker of the House McCormack would block any investigation into Justice Douglas.<sup>367</sup> Ford's efforts failed, in large measure because he relied on baseless allegations that Justice Douglas undermined national security. Perhaps, at the time, Ford did not have all of the requisite facts required to consider whether Douglas had violated the Logan Act or consorted with Ho Chi Minh or Juan Bosch. But, the Republican minority counsel to the investigation ultimately advised McCulloch that neither Douglas nor CSDI violated the Logan Act.<sup>368</sup> And, yet, at no time did Ford retract his allegations that Justice Douglas violated the Logan Act or undermined the national security of the United States.

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363. Spencer Rich, *Blackmun's Worth, Rulings Described to Sen. Eastland*, PHILA. INQUIRER, Apr. 16, 1970, at 4.

364. Louis Heren, *US Battle to Impeach Judge*, TIMES (London), Apr. 17, 1970, at 9.

365. *Judge Accused of Links with Gamblers*, SYDNEY MORNING HERALD, Apr. 17, 1970, at 3.

366. *Fair Hearing Promise for Douglas*, TIMES (London), Apr. 22, 1970, at 7.

367. Douglas Impeachment Conference Notes (Apr. 16, 1970), in JOHN EHRLICHMAN PAPERS, 1963–1982, Box 1 (Hoover Institution Archives).

368. Memorandum from Howard W. Fogt, Jr., Assoc. Counsel, H. Comm. on the Judiciary, to Representative William McCulloch (June 9, 1970), in GERALD R. FORD CONGR. PAPERS, 1949–1973, Box 14 (Gerald R. Ford Library, Paul Conway comp., 1980).

There may have been valid questions about Justice Douglas's extrajudicial activities and his financial relationship with a casino owner who had done business with an organized crime leader. In addition to the "Fortas Fiasco," had Justice Douglas actually violated ethics norms of a financial nature, this could have resulted in meaningful judicial reform. But, Ford never provided a plausible explanation for his vigorous allegations that Justice Douglas intentionally weakened the United States in the midst of the Vietnam Conflict. Perhaps he was unwittingly goaded by Nixon into doing so. Ultimately, none of the supposed proof was forthcoming. Ford's former aide, Benton Becker, later alleged that Nixon had duped Ford into making spurious allegations against Justice Douglas to deflect the public's attention from other matters.<sup>369</sup> And, though he did not directly implicate the Cambodian invasion, the timing of Ford's speech and the Cambodian invasion were likely more than coincidental.

There are other troubling aspects to Ford's, and by inference Nixon's, actions, as well as those of the congressmen who allied with Ford. Nixon certainly knew that large-scale protests were likely in response to the Cambodian invasion, especially because Secretary of Defense Melvin Laird warned of this eventuality. Had Congress not vigorously opposed the extension of the Vietnam Conflict into Cambodia and Laos, Justice Douglas's opponents may have succeeded in using *Points of Rebellion* and other aspects of his judicial record as a source of blame for the public's unrest. This would have been the equivalent of accusing Justice Douglas of stabbing the United States government in the back, and it could have created a visible litmus test for insuring judicial deference to national security over individual rights in future nominations.

Another troubling aspect to this episode is that, while it quickly faded from the public's view and much of the nation's legal and historical scholarship, none of the principal actors were held accountable for their actions. Nixon was reelected in 1972 by a large margin over George McGovern. Ford became Vice President after Spiro Agnew's resignation with little opposition. In contrast, by the time the House of Representatives issued the final report on Justice Douglas, both Celler and Rogers had lost in their respective primary races. Justice Douglas remained on the bench, albeit without further payments from organizations like the Parvin Foundation; and, in the words of John Dean, he remained with an "intractable resolve."<sup>370</sup> Although Ford may rightfully be remembered as a president who steadily guided the nation, either an admission of wrongdoing on his part or an

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369. See Sam Roberts, *Benton Becker, 77, Ford Aide; Negotiated Nixon Pardon*, N.Y. TIMES, Aug. 9, 2015, at A21.

370. DEAN, *supra* note 21, at 25–26.

admonishment from the House could have created a basis for protecting judicial independence. An admission or admonishment would have helped ensure that future nominees' adherence to the Executive Branch's claimed national security needs would not overtake the duties of independent constitutional and statutory interpretation. Given the recent conduct of the Executive Branch toward federal judges who have issued restraining orders against entry policies into the United States, a barometer for accountability within the Executive and Legislative Branches would well have been useful. Perhaps it is now necessary for the model canons of judicial ethics to assure the nation that judicial independence and adherence to constitutional principles remains paramount over the Executive Branch's assertions of national security needs.