



# EX ANTE

## ERRATA

We just can't seem to get Tobias Dorsey's nickname right. In his article in the Spring 2007 issue we referred to him as "Toby." Then in the Summer 2007 issue we corrected ourselves, referring to him as "Tobey." Then we heard from Mr. Dorsey that we'd been correct the first time. From now on, perhaps we should just play it safe and call him Tobias, at least in print. But see the cover of this issue, and page 15.

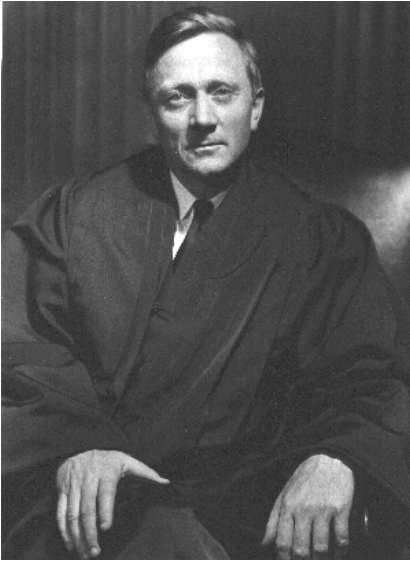
- 10 GREEN BAG 2D 283 (2007); 10 GREEN BAG 2D 413 (2007).

## WHAT DID WILLIAM O. DOUGLAS SAY?

Or United States Attorney Dean Smith? Or Burt Neuborne of the American Civil Liberties Union? Or any of the other participants in the unusual hearing Justice Douglas held at the county courthouse in Yakima, Washington, on August 3, 1973?

The topic was U.S. military involvement in Southeast Asia. In July 1973, Elizabeth Holtzman (a Member of the U.S. House of Representatives) and several Air Force officers filed suit in New York federal district court seeking to permanently enjoin U.S. air operations in Cambodia. The district court gave them their remedy, but postponed it for a few days to give the government time to seek review (or at least a stay of the injunction pending review) in the U.S. Court of Appeals for the Second Circuit. The Second Circuit granted the government's request for a stay, and set the case for

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prompt argument. Holtzman et al. applied to Justice Thurgood Marshall in his capacity as Circuit Justice for the Second Circuit, seeking an order vacating the appellate court's stay and thus triggering the district court's injunction. On August 1, Marshall denied the application. Two days later, Douglas – to whom Holtzman's attorneys had applied after being denied by Marshall – held a public hearing on the application at the Yakima County Courthouse (which

was conveniently located near Douglas's summer retreat in Goose Prairie, Washington). Douglas then vacated the Second Circuit's stay and restored the district court's injunction. But as Douglas knew perfectly well, his colleagues on the Court had resolutely avoided deep entanglement in issues related to the Vietnam War. On August 4, Douglas issued an opinion to accompany his August 3 order, even as the Solicitor General was presenting Marshall with an application to stay the order of the district court that Douglas had just restored. Marshall granted the stay, thus frustrating Douglas's effort to halt what was left of the war.

The *Green Bag* has uncovered what we believe to be a stenotype transcript of the August 3 hearing in Yakima. But we cannot find anyone who is willing and able to transcribe it into plain English for us. Please take a look at the three excerpts on the facing page and let us know if you – or someone you know – can help. We will express our gratitude in the customary way.

● *Holtzman v. Schlesinger*, 414 U.S. 1304 (1973) (Marshall, J., in chambers); *Holtzman v. Schlesinger*, 414 U.S. 1316 (1973) (Douglas, J., in chambers); *Schlesinger v. Holtzman*, 414 U.S. 1321 (1973) (Marshall, J., in chambers); BRUCE ALLEN MURPHY, *WILD BILL* ch. 36 (2003); JOHN HART ELY, *WAR AND RESPONSIBILITY* 34-35, 40-43 (1993).

Ex Ante

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