



WHY DID THE CAMBODIA BOMBING CONTINUE?

Eugene R. Fidell

NEARLY THREE YEARS AGO, the *Green Bag* published an *Ex Ante* item about the discovery of what might be a stenotype transcript of a hearing held in 1973 by Justice William O. Douglas at the federal courthouse in Yakima, Washington, in the famous case of *Holtzman v. Schlesinger*.¹ If the editors of this journal ever manage to translate the stenotype into readable text (they tell me they are working on it), we might learn something new about relations between Congress, the presidency, and the judiciary in time of war – in this case, the Vietnam War. In the meantime, I have my own small contribution to make on that subject, based on a brief correspondence with the Department of Defense during the *Holtzman* litigation.

BACKGROUND

The *Holtzman* case was an action brought in the summer of 1973 in the United States District Court for the Eastern District of New York to halt one of the last gasps of the Vietnam War – the United States' bombing of Cambodia. The plaintiffs – Representa-

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¹ *What Did William O. Douglas Say?*, 11 GREEN BAG 2D 1 (2007); *Douglas to Rule By Monday On Bombing Halt Order*, WASH. POST, Aug. 4, 1973, at A17.

tive Elizabeth Holtzman (D-NY) and several United States Air Force officers – were represented by lawyers from the American Civil Liberties Union. The defendants – Secretary of Defense James Schlesinger and several other executive branch officials – were represented by the Department of Justice.

The proceedings were complex and fast-moving. They approached a crescendo of a sort in late July and early August when, in rapid succession, (a) the District Court entered an injunction ordering a halt to the Cambodia bombing,² (b) the U.S. Court of Appeals for the Second Circuit stayed the injunction pending oral argument on the merits on an accelerated schedule, (c) Justice Thurgood Marshall refused to lift the Second Circuit's stay,³ and (d) Douglas held his August 3 hearing in Yakima to consider lifting the stay that Marshall had left in place. Douglas moved quickly. Shortly after the hearing he did indeed vacate the Second Circuit's stay, restoring the District Court's injunction against the Cambodia bombing.⁴ But counsel for Schlesinger et al. were moving quickly too. Douglas vacated the Second Circuit's stay sometime on August 3 or the morning of August 4 (more on that in a moment), but later on August 4 Marshall re-stayed the District Court's injunction in response to a motion by the government. This time around, Marshall polled the other members of the Court, all of whom supported Marshall's decision, thus frustrating Holtzman's claim and the decisions of Douglas and the District Court.⁵

DID THE BOMBING EVER STOP?

The ACLU has declared a moral, symbolic victory in the *Holtzman* case, claiming that as a result of Douglas's short-lived reinstatement of the District Court's injunction, "the bombing was halted for a few hours"⁶ – in other words, that the case resulted in a

² *Holtzman v. Schlesinger*, 361 F. Supp. 553 (1973).

³ *Holtzman v. Schlesinger*, 414 U.S. 1304 (1973) (Marshall, J., in chambers).

⁴ *Holtzman v. Schlesinger*, 414 U.S. 1316 (1973) (Douglas, J., in chambers).

⁵ *Schlesinger v. Holtzman*, 414 U.S. 1321, 1322 (1973) (Marshall, J., in chambers).

⁶ ACLU, *The Successes of the American Civil Liberties Union*, www.aclu.org/successes

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genuine, if brief, halt to the Vietnam War. A 1976 article in the *Air University Review* got more specific about the duration of the injunction (albeit without mentioning a bombing halt), reporting that “Justice’s Douglas’s injunction [really, the District Court’s] lasted just six hours and ten minutes.”⁷ The reported August 4 opinions of Douglas and Marshall, however, indicate that Douglas vacated the Second Circuit’s stay on August 3, thus leaving the District Court’s injunction in effect for roughly one day.⁸ But whether Douglas’s order was in effect for a “few hours” or “six hours and ten minutes” or a whole day, the question remains: Did the bombing ever actually stop?

Despite the ACLU’s claim, the answer is No. Why? Because the government claimed it had not been served. Its story, however, changed over time. In an August 5 article, the *New York Times* reported,

During the intervening period, between 9:30 a.m. and 3:30 p.m. [on August 4], the Pentagon refused to comply with the Douglas decision, saying that the Government was attempting to win a reversal in the Supreme Court. A Defense Department spokesman reported afterward that ‘bombing operations were in effect’ during the six hours.⁹

The *Times* added,

[T]he Assistant Secretary of Defense for Public Affairs . . . said that the Department did not intend to take any legal ac-

american-civil-liberties-union (vis. Apr. 2, 2010).

⁷ Stephen M. Millett, *The Air Force, the Courts, and the Controversial Bombing of Cambodia*, AIR U. REV., July-Aug. 1976, www.airpower.maxwell.af.mil/airchronicles/aureview/1976/jul-aug/millett.html (vis. May 16, 2010).

⁸ *Holtzman v. Schlesinger*, 414 U.S. 1316 (1973) (Douglas, in chambers); 414 U.S. at 1321 (Marshall, J., in chambers); id. at 1322 (Douglas, J., dissenting in chambers). There is some reason to think that Douglas did not issue an order until August 4, but that mystery is beyond the scope of this little article. See generally Papers of Harry A. Blackmun, Library of Congress, Manuscript Division, box 172, folder 4 (filings and correspondence in *Holtzman*).

⁹ Warren Weaver, Jr., *Douglas Upholds Halt in Bombing But is Overruled*, N.Y. TIMES, Aug. 5, 1973, at 1 col. 8.

tion because the Government was trying to get the Douglas decision reversed. . . . Minutes after the Douglas decision was announced this morning, Government attorneys asked Chief Justice Warren E. Burger to reconvene the full court in special term, recalling the justices from their summer recess, to review the issue and overturn the Douglas ruling.¹⁰

THE LETTER

I must have been skeptical of the government's explanation, because the day after the *Times* story appeared, I wrote to Secretary Schlesinger. By the time I received a reply on August 22, the Defense Department's story had shifted. Assistant Secretary of Defense for International Security Affairs Dennis J. Doolin wrote that the bombing operations "were not suspended." "[E]vents were occurring in rapid succession and . . . the effect of Mr. Justice Douglas' action was promptly taken under advisement by Mr. Justice Marshall. Accordingly, the precise nature of the status quo was *pendente lite*." Mr. Doolin stressed that Secretary Schlesinger "was not served, either by a judicial officer or by the plaintiffs' attorney, with a copy of Mr. Justice Douglas' order between the time his order was issued and the issuance of Mr. Justice Marshall's order," adding that if the Secretary had been served, "rapid dissemination of [Justice Douglas's] order would have occurred with dispatch of prepositioned instructions from the Pentagon."

In other words, even though the Defense Department had taken steps so that it would be ready to issue the instructions needed to stop the bombing, and even though the government's attorneys had actual knowledge of Douglas's order sufficient to cause them within minutes to seek relief from the full Court, it nonetheless did not comply with his order. Douglas considered the government to have acted lawlessly in ignoring his order.¹¹

¹⁰ *Id.* at 3, col. 1.

¹¹ James L. Moses, *William O. Douglas and the Vietnam War: Civil Liberties, Presidential Authority, and the Political Question*, 26 *PRES. STUD. Q.* 1019, 1029 (1996). The case ended with a whimper on August 8, when the Second Circuit ordered it dismissed on grounds of nonjusticiability. *Holtzman v. Schlesinger*, 484 F.2d 1307

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INTERNATIONAL
SECURITY AFFAIRS

ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

In reply refer to
1-9701/73

22 AUG 1973

Mr. Eugene R. Fidell
1845 47th Place NW
Washington, D.C. 20007

Dear Mr. Fidell:

Secretary Schlesinger has asked that I respond to your letter of August 6, 1973 concerning the suspension of air operations in Cambodia on August 4, 1973.

The facts of the case are as follows:

The District Court for the Eastern District of New York entered an order on July 25, 1973, holding that the bombing of Cambodia by American armed forces is unlawful. The District Court postponed the effective date of the order until 4:00pm EDT, July 27, 1973, to permit the defendants to apply to the Court of Appeals for a stay pending appeal.

An appeal was promptly taken by the defendants on July 25. On July 27, 1973, the Court of Appeals for the Second Circuit issued an order staying the order of the District Court, pending appeal.

On August 1, 1973, Mr. Justice Marshall, the Circuit Justice for the Second Circuit, denied the plaintiffs' application for an order vacating the stay entered by the Court of Appeals.

The plaintiffs then applied to Mr. Justice Douglas for an order vacating the stay entered by the Court of Appeals on July 27, 1973. On August 4, at approximately 9:30am, Mr. Justice Douglas granted that application.

Upon being advised of Mr. Justice Douglas' order, the Solicitor General of the United States presented an application to Mr. Justice Marshall for an order staying the order of the District Court. At approximately 4:00pm the same day, Mr. Justice Marshall granted that application, and issued an order staying the order of the District Court pending further order by the Supreme Court.

On August 8, 1973, the Court of Appeals for the Second Circuit reversed the order of the District Court and held that the bombing in Cambodia is lawful.

During the approximately six and one-half hours which existed from Mr. Justice Douglas' order to Mr. Justice Marshall's order, air

(2d Cir. 1973).

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operations in Cambodia were not suspended. It should be pointed out that, as indicated above, events were occurring in rapid succession and that the effect on the status quo of Mr. Justice Douglas' action was promptly taken under advisement by Mr. Justice Marshall. Accordingly, the precise nature of the status quo was pendente lite. Moreover, and of particular relevance to your concern is the fact that the Secretary of Defense was not served, either by a judicial officer or by the plaintiffs' attorney, with a copy of Mr. Justice Douglas' order between the time his order was issued and the issuance of Mr. Justice Marshall's order. In fact, presumably because of the rapid sequence of events, the Secretary of Defense has never been served with a copy of Mr. Justice Douglas' order.

In the event that the Department of Defense had been served with Mr. Justice Douglas' order on August 4, 1973, rapid dissemination of the order would have occurred with dispatch of prepositioned instructions from the Pentagon.

I trust you will find this reply responsive to your question.

Sincerely,



Dennis J. Doolin
Deputy Assistant Secretary

