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The Supreme Court Justice and "Boring" Cases

Neil M. Richards
Washington University in St. Louis School of Law, nrichards@wustl.edu

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As the Supreme Court approached its first summer recess since George Bush's inauguration, a common parlor game for lawyers, bureaucrats, journalists, and other people with nothing better to do with their time was idle speculation about who would replace the more senior members of the Supreme Court. Although none of the Justices obliged the rumor-mongers by actually retiring, this did not stop the Sunday Morning Show set from putting together an impressive array of candidates for the Bush "short list."[1] Possible candidates to fill any vacancy on the Court include notable jurists such as Judges J. Harvie Wilkinson, Paul V. Niemeyer, and J. Michael Luttig from the United States Court of Appeals for the Fourth Circuit,[2] Edith Jones and Emilio Garza from the Fifth Circuit,[3] and White House Counsel (and former Texas Supreme Court Justice) Alberto Gonzalez.[4] *Parade Magazine*, that famous arbiter of taste and refinement which greets most Americans each Sunday morning, has also entered a guess, selecting Senator Orrin Hatch (R-Utah) as its pick for the next Chief Justice.[5] When it comes to predictions on

Neil Richards practices law at Wilmer, Cutler & Pickering in Washington, DC. He is a former law clerk to Chief Justice William H. Rehnquist. *He thanks Chris Bowers, John Elwood, Wendy Richards, and Colin Rushing for their suggestions on earlier drafts.*

1 *See, e.g.*, "At High Court, a Retirement Watch; Rehnquist, O'Connor Top List of Possibilities as Speculation on Replacement Grows," Wash. Post, June 17, 2001.

2 *See, e.g.*, "Politics, Race Cloud Naming of Judges to U.S. Fourth Circuit," Baltimore Sun, Jan. 8, 2001; "Appeals Judges Hear N.C. Case Against School Busing," Baltimore Sun, Feb. 28, 2001.

3 *See, e.g.*, "Retirement Watch," *supra* note 1.

4 *See, e.g.*, "Bush's Judge-Picker Could Be Picked," Christian Science Monitor, July 10, 2001.

5 "Walter Scott's Personality Parade," Parade Magazine, April 29, 2001, at 2. By some (no doubt unintentional) oversight on the part of West Publishing, Inc., *Parade Magazine* appears to be unavailable on Westlaw. However, the *Salt Lake Tribune* picked up the story. *See* "Hatch Stays Upbeat Despite Senate's Shake-Up," Salt Lake Trib., June 3, 2001; *see also* "Hatch on Court? Unlikely

matters of public policy, "Personality Parade" should never be counted out.

The current speculation about which of these potential nominees would make a "good" Justice often revolves around their ideology, and how they would rule in the "big" cases – the successors to *Brown v. Board of Education*, *Roe v. Wade*, or *Bush v. Gore*. Certainly, analysis or speculation regarding potential nominees' views on abortion or the death penalty makes good copy and sells more newspapers than their views on the Equal Footing Doctrine[6] or the on-sale bar.[7] Indeed, few things would be more likely to prompt channel surfing than the following words: "coming up next on C-Span 2 – an overview of the tax cases written by Justice David Souter over the past ten years."[8] Yet even a cursory perusal of *United States Reports* reveals that the Supreme Court decides many more of the latter case than of the former. Or, put more bluntly, the Supreme Court decides an awful lot of boring cases.[9]

The problem of boring cases has been publicly recognized by the Justices themselves. In a 1980 speech, Justice Powell noted that the Court was "a place where Justices,

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at 67," Deseret News, May 9, 2001.

6 The "Equal Footing Doctrine" is the doctrine that all states are admitted to the Union on an equal footing to the thirteen original states that ratified the Constitution. This merely means that they have the same attributes of sovereignty as those original thirteen. *See Coyle v. Smith*, 221 U.S. 559 (1911).

7 The "on-sale bar" is the statutory requirement of patent law that "no person is entitled to patent an 'invention' that has been 'on sale' more than one year before the filing of their patent application." *See Pfaff v. Wells Electronics, Inc.*, 525 U.S. 55 (1998).

8 Apologies to Justice Souter, whose tax cases, I assume, are no less interesting than tax cases written by other members of the Court.

9 For a representative (but by no means exhaustive, lest it get too boring) sampling from recent Terms of the Court, *see, e.g.*, *Egelhoff v. Egelhoff ex rel. Breiner*, 121 S. Ct. 1322 (2001) (holding Washington statute providing for automatic revocation, upon divorce, of any designation of spouse as beneficiary of non-probate asset was preempted, as it applied to ERISA benefit plans, as state law "related to" ERISA plans, which directly conflicted with ERISA requirement that plans be administered, and benefits be paid, in accordance with plan documents); *Shalala v. Illinois Council on Long-Term Care, Inc.*, 529 U.S. 1 (2000) (in 53 pages of opinions, Court held 5-4 that a provision of the Medicare Act barring federal question jurisdiction for "action[s] … to recover on any claim arising under" the Medicare laws barred respondents' suit challenging the validity of various Medicare regulations); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (explaining the conditions for certifying a mandatory class action settlement class on a limited fund theory under Fed. R. Civ. Proc. 23(b)(1)(B)); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999) (determining whether a court could determine personal jurisdiction before subject matter jurisdiction); *Bank of America Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. Partnership*, 526 U.S. 434 (1999) (assessing the "new value" exception under the bankruptcy code); *Unum Life Ins. v. Ward*, 526 U.S. 358 (1999) (unanimous ERISA preemption decision); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998) (whether when a union adopts an arbitration process for challenges to the calculation of agency shop fees, objectors are required to exhaust the arbitral remedy before bringing claims in a federal court). For upcoming cases certain to raise boring issues, *see United Dominion Industries v. United States* (00-157) (whether the availability of the "product loss" carryback under 26 U.S.C. § 172(b)(1) for affiliated entities that file a consolidated return is to be determined (i) by aggregating the income and expense of the consolidated industries or (ii) separately calculating the income and expense of each entity); *Wisconsin Dept. of Health & Family Servs. v. Blumer* (00-952) (how state agencies should determine whether an institutionalized spouse is eligible for medical assistance under the Medicare Catastrophic Coverage Act of 1988); *Pollard v. E.I. duPont deNemours & Co.*, No. 00-763 (whether front pay is an element of compensatory damages under 42 U.S.C. §1981a and thus subject to the damages cap imposed by §1981a(b)(3)).

and their small staffs, work extremely long hours [and] where the work is sometimes tedious, though always intellectually demanding."[10] In an interview a decade later, Justice Scalia echoed the sentiment, reserving special scorn for tax cases: "The constitutional work can be dull, too, but it's not like the tax code. Philosopher-kings do not read the Internal Revenue Code, believe me."[11] Even more blunt was Justice Brennan, who was reported to have privately "seethed" at having to write the opinion in *Antoine v. Washington*,[12] a case involving the right of Indians to hunt and fish out of season in Washington state, which he deemed to be a "chicken-shit" case.[13] Thus, "boring" cases – cases requiring technical legal analysis such as statutory interpretation and doctrinal analysis, without much impact on constitutional rights or other "interesting" areas of law – are a major feature of the work of the Supreme Court.

An early indication that the workload could be wearing can be gleaned from a letter written by then-Justice Edward D. White to Justice William R. Day in May of 1903. Justice Day had been appointed to the Court on January 29 and sworn in on March 2, 1903. A man of poor health who suffered from several serious illnesses,[14] Day had fallen ill soon thereafter, and had spent some time away from the Court recuperating. On April 24, 1903, Day had written to his colleague White to let him know that he was getting slowly better and to inquire about the work. White's response on May 4 was interesting, revealing in candid terms the way in which a Supreme Court Justice looked at his job:

> My Dear Judge:
>
> I was very glad to get your letter of April the 24th and to infer from it that although it may be slowly, you are nevertheless surely going forward to complete recuperation.
>
> Nothing since you left here in the business of the Court has occurred to give you worry over the situation. The cases which have been heard, while some of them, difficult in the sense that they involved a good deal of time to examine, none of them have been of a very serious character. The cases which were in the hands of the Court while you were here have all been disposed of except the two about which the Chief Justice informed us that he had written you. I would not worry over either of these two cases if you do not feel just in the humor for doing work. One of them, the Canal-boat case, may be somewhat important in its consequences; and the other, the Oregon case, which has been twice argued, has a very important moral side to it, involving as it does the rights of certain Indians. They can both well wait if you do not feel like working now, and be considered next fall when we are all together and can discuss them in conference. We had our last session for hearing cases on Friday, met this morning, announced a few cases, and adjourned over until the 18th. We shall meet on that day, announce some opinions, then adjourn until the 1st of June, when the term will come to an end. I do hope you are going to have a real pleasant summer and gather plenty of strength so that next autumn we may begin for a long pull, a strong pull and a pull altogether. The Island case – you know the one to which I refer – went our way and is in the hands of brother B. for an opinion. It will doubtless be announced before the end of the term.
>
> My wife joins me in every kind message to yourself and we both unite in messages to Mrs. Day. Recall me, please, to your son.

10 Lewis F. Powell, Jr., "What Really Goes on at the Supreme Court," at 83, in David M. O'Brien, ed., *Judges on Judging: Views from the Bench* (1997).

11 "A Look at the Hidden World of U.S. Associate Justice Antonin Scalia," National Post, June 12, 1992.

12 420 U.S. 194 (1975).

13 Bob Woodward & Scott Armstrong, *The Brethren*, 359 (1979).

14 Kathleen Shurtleff, "William R. Day," at 292-94, in Clare Cushman, ed., *The Supreme Court Justices* (1993).

Your friend, very faithfully,

E.D. White[15]

White was undoubtedly correct in his assessment that the recent cases, "while some of them, difficult in the sense that they involved a good deal of time to examine, none of them have been of a very serious character." Two of the cases from the previous Friday – May 1, 1903 – are good examples. In *Johanson v. Washington*,[16] the court reviewed a decision from the Washington Supreme Court upholding a state trial court ruling in an ejectment case. The issue in *Johansen* was whether an individual could homestead on surveyed Western land reserved by a state for school purposes. The Washington courts determined that when a state agent selected plots of Western land for school purposes, this selection withdrew the lands from private entry under the Homestead Act, and therefore homesteading on such lands was not permitted. The Supreme Court agreed in an opinion written by "brother B." (Justice David J. Brewer). The other case, *Patterson v. Bark Eudora*,[17] presented the tedious question of whether a federal statute prohibiting the payment of advance wages to seamen was applicable (and if so valid) to seamen working on a foreign vessel in a port of the United States. The Court held that it was,[18] meaning that the American seamen who signed up on a British merchantman got to keep their advance as well as the full wages they would have earned had the advance not been paid. Neither of these cases was of earth-shaking importance, and both have been largely forgotten, though citations to *Patterson* do still pop up occasionally.[19] Neither was, then, in White's words, "of a very serious character" – hence his admonition to Day not to bother with them if he did not feel much like working.

Another "get well soon" letter from one Justice to another was written by William O. Douglas to Hugo Black. Like the White letter, it dealt with the subject of work, and reveals the way in which a Justice viewed the typical cases before him. Black had caught the flu in the first week of 1941, and had missed work due to his illness. Douglas, a close friend whose affection toward Black was almost brotherly,[20] wrote Black the following warm and funny note from the bench on January 7:

My Dear Hugo:

I was sorry to hear that you had the flu. But I am glad that you are taking care of yourself. Take good care, lie low, and forget about these dull tax cases – which are now droning on and on …

We miss you.

Hope to have you back, soon.

Ever yours,

Bill

15 Edward D. White to William R. Day, May 4, 1903, Papers of William R. Day, Box No. 19, Manuscript Division, Library of Congress, Washington, D.C.

16 190 U.S. 179 (1903).

17 190 U.S. 169 (1903).

18 *Id.* at 179.

19 *Patterson* has been cited in 139 other cases, mostly from the earliest twentieth century. Its most significant citation was in *West Coast Hotel v. Parrish*, 300 U.S. 379, 393 (1937), which upheld Washington state's minimum wage law for women, and was an important part of the transition towards a relaxed post-*Lochner* standard of review for economic regulation. *See* Barry Cushman, *Rethinking the New Deal Court*, 84-92 (1998). *Parrish* cited *Patterson* as one of several examples in which the Court had found exceptions to the core *Lochner* doctrine of liberty of contract.

20 *See* Roger K. Newman, *Hugo Black: A Biography*, 320 (1994) ("Douglas [and] Black had a truly brotherly relationship (if one hiccuped, the other would practically say 'excuse me')").

> P.S. Let me know if there is anything I can do.[21]

Douglas' distaste for oral argument has been well documented, and in later years he became so bored that he would work on his books while on the bench.[22] The image conjured up by this letter – the young Douglas, bored out of his mind by a dull tax case, essentially passing notes in class to his friend Hugo – paints a much more positive (or at least humorous) picture of Douglas than the cranky old recluse working on his non-legal books while he should have been doing his job.

In any event, Douglas' boredom is excusable in this case. On January 7, 1941, the Court heard four tax cases – the second day of argument in *Guggenheim v. Rasquin*,[23] as well as argument in *United States v. Pelzer*,[24] *Powers v. Commissioner*,[25] and *United States v. Ryerson*.[26] *Guggenheim, Ryerson*, and *Powers* all raised the issue of whether the value, for federal gift-tax purposes, of a single-premium life insurance policy is the cost to the donor or the cash-surrender value of the policy, while *Pelzer* required the Court to determine whether certain gifts of property in trust were future interests for gift tax deduction purposes. These cases were by no means the only tax cases the Court heard that month. The following day argument continued in the *Ryerson* companion case of *Ryerson v. United States*,[27] another in the seemingly endless series of tax cases through which Douglas was suffering. January 1941 seems to have been a very busy time for tax law – of the 27 cases in *United States Reports* that were argued in that month, ten were tax cases, a significant portion of the docket.[28]

The reason for the surge in tax cases was the recent major overhaul of tax law with the Internal Revenue Code of 1939.[29] The number of dreadfully boring (yet nonetheless extremely important) legal issues raised by this particular statute was best expressed by Learned Hand, who wrote humorously in 1947 that:

> In my own case the words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception – couched in abstract terms that offer no handle to seize hold of – leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time. I know that these monsters are the result of fabulous industry and ingenuity, plugging up this hole and casting out that net, against all possible evasion; yet at times I cannot help recalling a saying of William James about certain passages of Hegel: that they were no doubt written with a passion of rationality; but that one cannot help wondering whether to the reader they have any significance save that

21 William O. Douglas to Hugo L. Black, Jan. 7, 1941, Papers of Hugo Lafayette Black, Box No. 59, Manuscript Division, Library of Congress, Washington, D.C. *See also* the facsimile at p. 407.

22 *See* William O. Douglas, *The Court Years*, 41 (1980); G. Edward White, *The American Judicial Tradition*, 385-86 (expanded ed. 1988).

23 312 U.S. 254 (1941).

24 312 U.S. 399 (1941).

25 312 U.S. 259 (1941).

26 312 U.S. 260 (1941).

27 312 U.S. 405 (1941).

28 In addition to *Guggenheim, Pelzer, Powers*, and both *Ryerson* cases, *see Higgins v. Commissioner*, 312 U.S. 212 (1941); *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941); *Helvering v. Hutchings*, 312 U.S. 393 (1941); *Helvering v. Le Gierse*, 312 U.S. 531 (1941); *Keller v. Commissioner*, 312 U.S. 543 (1941).

29 Pub. L. No. 76-1 (1939).

> the words are strung together with syntactical correctness.[30]

Listening to such cases at oral argument, Douglas, (who was no fan of tax cases either) was no doubt bored to the point of exasperation. And if he were stuck on the bench with no visible means of escape, it may have seemed that the least he could do was to warn his friend Hugo to stay away for as long as possible, lest he, too, be forced to work on them. As it turned out, although Black was not listed as a non-participant in any of these cases, Douglas' torture was far from over. Of the four cases argued on the seventh of January, he was assigned to write three of them – *Guggenheim, Ryerson,* and *Powers*. Fate (or perhaps Chief Justice Stone) had a wicked sense of humor.

The grumblings of bored Supreme Court Justices to their ailing colleagues from the beginning and middle of the last century may seem far removed from the modern Court. Yet the tedium of cases past points up an important fact about the Court that is as true today as it was in years past. Being assigned an opinion in a case of lasting importance might happen but several times in a Justice's tenure. On the other hand, "boring" cases are assigned to them all the time. Both Justice Scalia and Justice Douglas have written tax cases, even if they would rather have been writing landmark constitutional rulings. For example, the "Roosevelt Court" during the Second World War (from which era the Douglas note arose) is best known for the cases it decided sketching the rough outlines of our modern rights jurisprudence – equal protection cases such as the infamous Japanese Internment case of *Korematsu v. United States*[31] and First Amendment cases such as *Murdock v. Pennsylvania*[32] and the "Flag Salute Cases" of *Minersville Bd. Of Ed. v. Gobitis*,[33] and *West Va. Bd. Of Ed. v. Barnette*.[34] Surely such constitutional cases are of greater interest to most Americans than the narrow questions raised in the *Ryerson* cases. But tax cases, like many other "boring" cases, are in reality among the Court's most important work. Such cases ensure the efficient functioning of the American legal system by resolving splits in authority, reining in lower courts that have significantly departed from the demands of the law, and interpreting important (if nonetheless boring) provisions in obscure federal statutes.[35]

The relevance of this point to modern ruminations about the possible Bush nominees to any vacancy on the Court is brought out by two articles that appeared in a recent issue of the *Legal Times*. The first article was an opinion piece by a law professor about the question of ideology in judicial confirmation proceedings.[36] Assuming the

30 Learned Hand, "Thomas Walter Swann," 57 Yale L.J. 167, 169 (1947). If Hand thought the 1939 Code was bad, he would be particularly boggled today, since the 1939 Code is, in the words of one commentator "almost childlike in its simplicity when compared to the 'modern' version of our statute." James S. Eustice, "Tax Complexity and the Tax Practitioner," 45 Tax Law Rev. 7 (1989).

31 323 U.S. 214 (1944).

32 319 U.S. 105 (1943). In *Murdock*, Douglas declared for the Court that "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position," an important milestone in the development of increased protection for First Amendment rights. *See* Melvin I. Urofsky, *Division and Discord: The Supreme Court under Stone and Vinson, 1941-1953*, at 110 (1997).

33 310 U.S. 586 (1940).

34 319 U.S. 624 (1943); *see* Neil M. Richards, "'The Good War,' The Jehovah's Witnesses, and The First Amendment," 87 Va. L. Rev. 781 (2001).

35 For example, the Bankruptcy Code might be boring, but it's a good thing to have.

36 *See* Vikram Amar, "How Do You Think? Ideology and the Judicial Nominee," Legal Times, July 9, 2001, at 50.

central question (whether "ideology should count"), it proceeded to lay out a roadmap of the issues raised by inquiring into a Justice's ideological views. The second article dealt with Chief Justice Rehnquist's address to the Fourth Circuit Judicial Conference. As is his tradition at this annual end-of-term event for federal judges from Maryland, Virginia, West Virginia, and the Carolinas, the Chief Justice left the analysis of "big cases" like *Bush v. Gore* to panels of distinguished law professors. Instead, he chose to focus on a few cases from the past Term which, while not receiving much media attention, are still significant, in his view, for their impact on the development of federal law.[37] Thus, whereas law professors are free to hypothesize about only how the "interesting" cases should be decided, at least one member of the Supreme Court is focused on the range of cases he faces in his job – even the boring ones, which can nonetheless be quite important.

These two articles highlight a significant divergence in views about the role of a Justice on the Supreme Court, as well as a major lesson for the judicial selection debate. On the one hand, there is the media and public academic focus on big cases and newsworthy rulings. On the other, there is that of the person actually doing the job, of deciding and drafting the cases, whether *Bush v. Gore* or *Ryerson v. United States*. Ideology rather than merit, regrettably, will continue to be a major factor in judicial selection for the foreseeable future. But as we look to identify individuals who will be good choices for federal judgeships, whether at the Supreme or lower courts, we should also look to temperament, maturity, and demeanor. It is not enough to have someone who can craft a brilliant opinion in a major constitutional ruling; we need someone who can stay awake and who pays equal attention when the tax cases, in Justice Douglas' cogent formulation, are "droning on and on." GB

37 *See* Jennifer Myers, "No Talk of Retirement at Circuit Meeting," Legal Times, July 9, 2001, at 8.