



1975

## Book Review

James S. Hill

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### Recommended Citation

Hill, James S. (1975) "Book Review," *North Dakota Law Review*. Vol. 52 : No. 2 , Article 9.  
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## BOOK REVIEW

**DISSENT WITHOUT OPINION—THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES.** By Bernard Wolfman, Jonathan L. F. Silver and Marjorie A. Silver. Philadelphia: University of Pennsylvania Press, 1975. Pp. 204. \$9.50.

Originally printed in the University of Pennsylvania Law Review, *Dissent Without Opinion* is quite simply an examination of Justice William O. Douglas' voting and writing behavior in federal tax cases throughout his career on the Supreme Court. But there ends the simplicity. What follows is a scholarly analysis of Justice Douglas' votes in 278 tax cases from 1939 to 1973. The book is a statistical masterpiece.

Justice Douglas is known by lawyer and nonlawyer as a champion of individual liberties. Even his background in federal securities law has been the subject of a number of legal articles.<sup>1</sup> But in exploring Douglas' leadership in tax cases, Mr. Wolfman and his associates strike out in a new direction.

Crisp organization impresses the reader from the beginning. Part I develops in statistical detail the evolution of Justice Douglas' behavior in tax cases. These statistics form a convincing backdrop to some interesting conclusions by the authors.

Tax cases follow an interpretive pattern, and to gain a deeper understanding of Douglas' voting pattern in the tax field, the authors develop in Part II a comparison of Douglas' work in other areas of the law requiring statutory interpretation such as corporate law, welfare law, and labor law.

In Part III the authors leave the defenses of facts and figures to speculate upon Douglas' dramatic change in approach regarding the Internal Revenue Service.

The conclusion is described by author Wolfman as a reflection "on Justice Douglas' performance in federal tax cases as a Justice of the United States Supreme Court."<sup>2</sup> The difficulty in such a project is evident not only from the natural complexity of federal tax law, but the increasing influence of these same tax laws.

In examining Douglas' voting record, the authors found it possi-

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1. The authors include a selected bibliography regarding Justice Douglas.

2. B. WOLFMAN, J. SILVER & M. SILVER, *DISSENT WITHOUT OPINION—THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES* 4 (1975).

ble to break his tenure into four separate periods. The discussion of each period begins with an analysis of the statistical data relating to that particular period, which the authors have divided into three tables.

"The first of these tables (Table I) shows the number of tax cases won by the taxpayer in each period, and the number in which Justice Douglas voted for the taxpayer. Table II exposes those cases, period by period, in which Justice Douglas differed with the majority of the Court, and indicates the extent to which Douglas was the sole dissenter. Subtables divide the cases into two groups, one including those which the taxpayer won, and the other, those in which the Government won. Table III indicates the way in which Justice Douglas expressed his dissenting views. The cases are again divided by period, with notation of the number of cases in which Douglas wrote an opinion, joined an opinion and dissented without opinion. . . . These compilations lay bare the fleshless pattern which lead us to dig below the statistics in search of explanation."<sup>3</sup>

Following this analysis is an in-depth discussion and examination of selected cases from the particular period.

*Helvering v. Clifford*,<sup>4</sup> handed down in 1940, is the beginning, the first tax case in which Justice Douglas participated and wrote. The first period of analysis includes the years 1939, when Douglas was appointed Associate Justice, through 1943. These were the "government years"—characterized by strong support for the government's position, and exceptionally high number of majority opinions authored by Douglas, and a high degree of quality in his writing.

In addition to some already discussed, a number of the cases indicate that in this first period Justice Douglas devoted considerable time and thought to the writing of tax opinions. The point here is not that Douglas' conclusions were always "right." It is only to emphasize that he supported his judgments with reasoning and analysis which demanded attention and were at least arguably correct.<sup>5</sup>

The unbalanced statistics during this period lead the authors to some obvious conclusions. What might be surprising to Douglas admirers is that the Justice supported a broad view of the statutory scheme in his early years on the Court which clearly aided the Internal Revenue Service in enforcing tax laws. "His opinions reveal

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3. *Id.* at 7-8.

4. 309 U.S. 331 (1940).

5. B. WOLFFMAN, J. SILVER & M. SILVER, *DISSENT WITHOUT OPINION—THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES*, 19 (1975).

attention to legislative history and considerable concern for the practical necessities of administering the tax system.”<sup>6</sup>

A shift to the taxpayer began in 1943 and was distinctly traceable to 1959. The statistics show Douglas began to differ from the majority in a far greater number of cases. His vote in favor of the taxpayer increased from 18 percent to 47 percent in the second period. Many of his votes were recorded in dissents; in fact, the Justice dissented in 29 of 87 cases in this period. Even the fact that he dissented was in sharp contrast to his early period where he dissented but once. He found himself in the minority over four times as often as in the earlier period. Absent were the precise explanations which characterized his earlier writings on the Court. Fifteen of his dissents were without opinion.

Through their study of this period Wolfman and his co-authors find Justice Douglas articulating a new philosophy—one against the government. Their analysis of his opinions in which he expressed this feeling shows he avoided opportunities for rational distinctions within the legislative framework a distinctive feature of Period I. Their analysis also showed other changes. During Period II, Douglas reduced the time he spent on tax cases. Lacking was the thoroughness of his earlier cases. Since many cases decided by the Court in that period changed earlier opinions authored by Douglas, his failure to enunciate his dissents left bewildering results. Throughout this period, Douglas tended not to state reasons for his votes.

The next period encompasses the years 1959-1964, and evidences a dramatic acceleration of the second period's trend. It is a substantially shorter period, and is distinguishable in the authors' opinion by an extremeness in Douglas' voting pattern not seen in the earlier years. The statistics in the last period, 1964-1973, “indicate a blunting of the extreme tendencies which distinguish this third period.”<sup>7</sup>

The vote for the taxpayer was 73 percent in Period III, as compared to 47 percent in Period II, and 18 percent in Period I. Strikingly, the majority held for the taxpayer in only 17 percent of the cases in this period. Douglas differed with the majority in 54 percent of the cases in this period. In every one of his dissents, he voted for the taxpayer. (In the first period, his dissents favored the government).

The statistics show the frequency of opinionless, and extremely brief, dissents also grew significantly. In many instances, Douglas become a lone dissenter. The Justice wrote no opinions for the Court during this period and only two concurring opinions.

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6. *Id.* at 26.

7. *Id.* at 43.

The quality of his opinions also changed.

"The statistical data show that although Douglas was more frequently in dissent during this period, he chose less frequently to state the basis of his disagreement with the majority. Additionally, as the cases already discussed have indicated, when he did write, his positions were often unexplained or poorly explained."<sup>8</sup>

"This period was therefore an extreme one. Douglas was more alienated from the Court than in any other period, this by reference both to the percentage of cases in which he dissented and to those in which he dissented alone. And the positions he took were the least justified of any period."<sup>9</sup>

Period IV is aptly entitled the "tempered rebellion," by the authors and covers the years 1964-1973. It was a period of change for the Court, the period of the Nixon appointments. Douglas reverses and becomes less solitary and mute than he had been in the early part of the decade. But his approach to the Code continued to favor the taxpayer, and his hostility to the government heightened.

The authors conclude their statistical section of the book, which they call the "record," with some generalizations. Among other things, they declare their statistics irrefutably bear out that Douglas' "affinity for the taxpayer has its deepest roots in the areas of the gift exclusion, depreciation, business expense deductions and tax accounting. The taxpayers' positions in cases involving percentage depletion and capital gains have seemed less attractive to Douglas."<sup>10</sup>

In attempting to explain their earlier conclusions, the authors look to other areas of the law. They reason that a Justice's behavior in one area of the law is bound to affect his affiliation and performance in others. Part II contrasts the areas of labor law, welfare law and corporate insider regulation. These areas are examined because, like the field of taxation, they involve the interpretation of statutes. Therein lies more intense analytical comparison of cases and statistics. The comparisons become so precise and detailed that a thorough understanding of the substantive areas of law under discussion seems almost a necessity.

The book in its final chapter attempts to strike a "cord of accountability." The conclusion is somewhat condemning. Justice Douglas is known for reflecting his individual beliefs in his opinions. It is inevitable that he would contradict himself throughout a career spanning thirty six years. The authors have pointed out that some of the more startling contradictions have arisen in tax cases.

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8. *Id.* at 54.

9. *Id.* at 59.

10. *Id.* at 77.

“Although he is a person who appreciates the importance of reasoned opinions, as a Justice he has been repeatedly unwilling to write a reasoned basis for his judicial vote in tax cases. Such a Justice does not enforce the cohesion nor can he long attract the respect to the Court which he says he values so highly.”<sup>11</sup>

The ending is challenging.

“Taxation is too important, the Court’s role too fundamental, and Justice Douglas too capable for him to continue refusing to judge in tax cases. We trust that in his remaining years on the Court this Justice, whose tenure exceeds all others’ and whose version of a free America in a system of law has often provided hope and guidance, will judge tax cases as he has stated judges should judge, and that he will reason and will share his reasoning with us.”<sup>12</sup>

Although the statistics seem to beg an explanation, there will be none from Justice Douglas, at least through future opinions. With the Justice’s resignation the issue is left to speculation. One thing appears certain, intellectual legal history such as *Dissent Without Opinion* is sure to be welcomed by future Douglas biographers, but the effort of these authors will not often be repeated.

JAMES S. HILL\*

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11. *Id.* at 137.

12. *Id.* at 138.

\* J.D., 1974 University of North Dakota.

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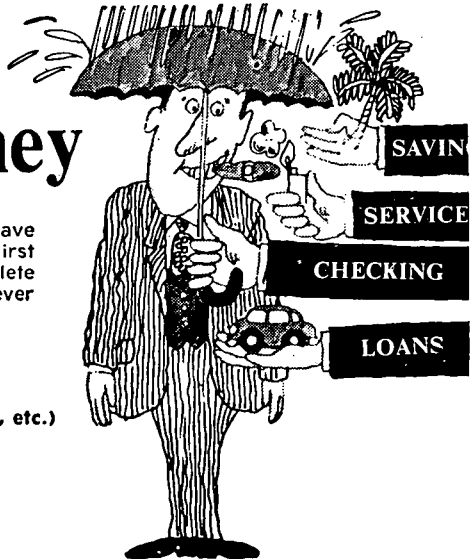
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VOLUME 52

SPRING 1976

NUMBER 3

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THE NORTH DAKOTA LAW REVIEW is published quarterly by the University of North Dakota School of Law in co-operation with the State Bar Association of North Dakota.

Communications concerning business matters and requests for reprints should be addressed to: Business Manager, North Dakota Law Review, University of North Dakota School of Law, Grand Forks, North Dakota 58202. Subscription \$10.00 per volume, \$3.50 per issue. Second class postage paid at Grand Forks, North Dakota.

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