This Spring issue of *Victorian Bar News* heralds the time when a young man’s fancy is caught by the vivid contrast of crisp white flannels against the rich green of the village oval and the pleasurable thwack of willow against leather.

The thrust of this article is the relationship, perhaps *prima facie* preposterous, between sporting prowess and appointment to high judicial office. There does exist such a linkage. It is widely known that in Great Britain the appointment of judges is solely within the province of the Lord Chancellor. What is not so well known is that the Lord Chancellor also is responsible for the appointment of clergy in the Anglican Church. The spouse of a Lord Chancellor once asked to see the list of candidates for such appointments and was surprised to find their credentials carefully noted against each name: “good left-hand bowler” or “right-hand bat”.¹

At this early stage in the development of my thesis it is respectfully submitted that those contributors to *Bar News* who have cast snide remarks on the ability of fellow members of the Bar on the cricket green would be well advised to curtail such commentary lest they find themselves appearing before their target, newly appointed to the Bench. It is no coincidence that “bench” is used widely in both sporting and legal parlance.

Our American brothers-in-law apparently pulled up stumps when they jettisoned the British tea into Boston Harbour. Cricket does not play a large part in contemporary American life. What did they keep? That question will be answered shortly. But it is noteworthy that his status as an All-American gridiron player played a large part in the appointment of Byron White to the US Supreme Court by President Kennedy in 1962. This would appear to augur well for those ex-VFL (now AFL) ruckmen, particularly those with a possible genetic disposition for judicial office.

One disappointing aspect of Byron White’s recently announced resignation and President Clinton’s nomination of Judge Ruth Bader Ginsburg to fill the vacancy was
the failure of the representatives of the Murdoch and Black press empires. At the time Judge Ginsburg’s nomination was announced, her daughter, Professor Jane Ginsburg of Columbia University, was in Australia as a visiting lecturer in copyright law and the Australian journos swarmed around her en masse.

However, they frittered away their opportunity. Instead of asking Professor Ginsburg what handicap her mum played off or her preferred position in the batting order and whether her mum was a clay or grass court player, these representatives of the fourth estate wasted time, effort, and column inches on such trivial issues as her mother’s record as an advocate and as a judge.\(^2\) Obviously, these highly paid pros from Spencer and Flinders Streets have much to learn from us underpaid hacks here at Bar News.

What was it that our American cousins retained after 1776? The answer is, of course, the English common law tradition and — dare I say it — tennis.

Notwithstanding that the “highest court in the land” is a basketball court on the top floor of the US Supreme Court building in Washington, DC,\(^3\) the US Supreme Court justices are nuts about tennis. In fact, it is conjectured that the northern summer recess of the US Supreme Court is scheduled to permit the justices to stay glued to the TV coverage of the All England championships or, indeed, to travel and attend personally at Wimbledon. Indeed, who of our sharp-eyed readers identified the spectator behind and just to the left of Barbra Streisand at this year’s Wimbledon tournament.

It is cause for astonishment among members of the English legal profession that their American counterparts mistakenly believe the publishers of the All England Law Reports (Butterworths) to be the commercial sponsor of the Wimbledon tennis tournament (conducted by the All England Lawn Tennis and Croquet Club).

It was widely known at the time that Justice Hugo Black (who served on the Court from 1937-71) played a keen and vigorous game of tennis almost right up to the end of his life at the age of 85 years.

Indeed, in his middle age, Justice Black complained “my doctor advised me that a man in his 40s shouldn’t play tennis. I heeded his advice carefully and could hardly wait until I reached 50 to start again.” This anecdote is possibly apocryphal or perhaps jesting on his part because his biographer relates that he continued to play at the insistence of his cardiologist until 1969 when he suffered a stroke (at age 83). Although he returned to the game after his recovery, he no longer vigorously chased every shot:

Consider the one-time US Solicitor-General and (unsuccessful) nominee to the Supreme Court (in 1987), Robert Bork. As a faculty member of the Yale Law School it was widely known that Bork had ambitions to be appointed to the Supreme Court. Christmas 1974 saw the Yale Law students produce a skit roasting judicial conservatives and Bork’s tennis-playing was used to mock his ambition. The parody was to the effect that Bork so wanted to play tennis he would run down his mother, trample little old ladies, get up at 5 am, all just to play tennis because “Bob Bork would do anything to get on the court”.4

Justice John Paul Stevens plays tennis — most weekends, even during term, will see him at his weekender Fort Lauderdale condominium where he works on opinions and plays with other 70-plus-year-olds, most of whom have no idea that their court opponent is a sitting Supreme Court justice.5

Justice Sandra Day O’Connor apparently plays tennis (and golf) with the unremitting commitment with which she approaches all aspects of her life.6

When Associate Justice Rehnquist was elevated to Chief Justice (replacing the retiring CJ Warren Burger), Antonin Scalia, one-time professor at the Chicago Law School, was appointed to fill the Rehnquist vacancy. In 1986 when he was subjected to Senate scrutiny to approve President Reagan’s nomination of him, Scalia displayed the confident superiority of one who had scaled the legal heights. During the Senate Judicial Committee hearings he lit up his pipe and puffed away serenely. When Senator Howard Metzenbaum (Democrat, Ohio) began his questioning by noting that Scalia had recently beaten him on the tennis court, the nominee jauntily responded that “it was a case of my integrity overcoming my judgment, Senator”.7

Once sworn in, Scalia didn’t let up his relentless competitiveness. Having quit jogging and gained weight around his waist, he did not look like a tennis player. Nonetheless he was ferocious. Law clerks who took him on came away surprised. One clerk who fancied himself a first-rate tennis player had set up a singles match with the Justice. He returned from the court to the Court stunned: “I can’t believe I got beat by a 55-year-old fat Italian,” he told his fellow law clerks.8

Last, there is the present Chief Justice. Every Thursday morning William Rehnquist and his three law clerks play on the courts in Potomac Park (including winter, and remember, Washington DC snows in winter). All the justices are entitled to engage
four law clerks, but Rehnquist CJ picks only three every year — just enough to make up a doubles match. The clerks joke among themselves that to be hired by Rehnquist the desirable (but not necessary) qualifications are a first-rate academic record from a first-rate law school and a conservative political outlook. The only essential quality is to be a competitive tennis player.⁹

While the Press Officer of the US Supreme Court admits to the existence of a basketball court (“the highest court in the land”) in the gymnasium above the hearing chamber in the building, it is emphasised that games are forbidden while the Court is in session because the distracting noise of the dribbling can be heard in the courtroom directly below.¹⁰ This writer suspects that the truth lies in the justices, particularly Rehnquist CJ and White J, not being able to countenance the thought of the clerks playing while they are stuck in court listening to scintillating legal argument.

Given the foregoing I maintain that I have established a solid relationship between appointment to high judicial office and sporting prowess (and in the case of the US Supreme Court, prowess at tennis). I readily concede that my conclusion is not yet widely accepted and note that the Harvard Law Review’s motoring editor, Christopher de Franga, has formulated a rival theory (“auto-selection”) linking a judicial appointee with their choice of motor vehicle. Without pre-empting de Franga’s argument, it can be stated briefly that the driving of a Volkswagen is essential to ensure successful appointment as a Supreme Court justice.¹¹ Almost alone among academic legal writers, de Franga postulates that the failure of Robert Bork to secure Senate confirmation of his appointment had very little to do with the perception that Bork was a rigid conservative ideologue out of touch with the mainstream of contemporary American values.¹² Instead, de Franga attributes the failed nomination entirely to Bork’s reluctance to trade down his BMW¹³ to a VW. While there exists a certain attractiveness about the auto-selection theory, it suffered a setback just prior to its scheduled publication in early 1992 when it was hurriedly retracted to permit much-needed modification which de Franga is still working on: Justice Clarence Thomas, sworn in on 1 November 1991, drives a Corvette.¹⁴

EW Grace
ENDNOTES:

2 The Melbourne *Age* and the *Australian*, 16 June 1993.
6 *Id* 226.
7 *Id* 22.
8 *Id* 306-7.
9 *Id* 306.
10 *The Oxford Companion to the Supreme Court of the United States*, loc cit, note 3 above.
11 Savage, *op cit* 209 (Rehnquist) and 353 (Souter).
13 Gitenstein, *op cit* 76.
14 Phelps and Winternitz, *op cit*.
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