Chapter Twelve

How Judicial Appointments Reform Threatens our Democracy

Alan Anderson

Let me begin by acknowledging the traditional owners of the land: King George III and his heirs and assigns.

Judicial appointment mechanisms are a topic of intense interest to lawyers, for all the wrong reasons. To the practising lawyer, judicial appointment is a prize, a status symbol, public recognition of professional merit and an entitlement to a generous pension in retirement.

It is therefore understandable that the obsession of lawyers is with the "fairness" and "transparency" of the process: what must one do to earn a place on the Bench? Similarly, judges are concerned to maintain the lustre and status of their position by ensuring that suitably eminent practitioners are elevated to sit beside them.

Yet this perspective pays scant regard to the role of the judiciary in our system of government, as opposed to its role in the hierarchy of the profession.

Current arrangements

Our current constitutional arrangements stipulate the appointment of federal judges by the Governor-General in Council, which has traditionally meant in practice that Cabinet considers nominees advanced by the Attorney-General and makes a recommendation to the Governor-General, whose ratification of its selection is a formality.

When Daryl Williams established the Federal Magistrates Court in 2000, he established an alternative appointments process involving advertisements for applicants, followed by interviews with a panel consisting of the Chief Federal Magistrate, a senior public servant, and a representative of the Attorney, who in Williams' years was sometimes a departmental liaison officer from his office, which is to say another public servant. The panel then made recommendations to the Attorney.

When Philip Ruddock became Attorney-General, he made sure to send an adviser, my predecessor, Julian Leeser, to the interview panel as his representative. And when I commenced service with Ruddock, I participated in one such round of interviews, then unofficially returned to the system employed for the higher courts: discreet consultation by the Attorney's office with relevant parties such as legal professional bodies, current and former judicial officers and others, followed by a request from the Attorney to the chosen candidate.

Recently there has been much clamouring from legal professional bodies, and even from some sitting judges, for the establishment of a Judicial Appointments Commission, populated by serving or retired judges, legal academics and heads of legal professional bodies. Most recently, the idea was floated by Chief Justice French.[1]

These proposals are advanced under the rubric of enhancing transparency and eliminating "political appointments". Presumably the legal bodies agitating for a Commission envisage the sort of transparency and lack of political controversy that is evident in, for instance, the process of appointing silks in Victoria.

The proposals found partial expression in the changes implemented by the Rudd Government earlier this year. Under the new system, a clone of Daryl Williams' system for Federal Magistrates'

appointments, applicants are invited to apply for judicial positions on the Federal, Family and Federal Magistrates Courts.

They are assessed by a panel consisting of the Chief Justice of the relevant court, a senior public servant and a retired judge, which draws up a shortlist for submission to the Attorney. However, this panel has no legislative basis and in practice the process of appointments remains shrouded in secrecy.

While this change falls short of the establishment of an independent Commission, as advocated by the legal bodies, and while the Attorney reserves the right to depart from the short-list, it is none the less a radical departure from established practice.

The role of judges

It is important to consider judicial appointments not from the perspective of an ambitious legal practitioner or élitist judge, but in the context of the role of the judiciary in our system of government. While the legislature enacts laws, and the Executive administers them, the judiciary is the final arbiter of what those laws actually mean.

Traditionally, this role has been seen as one of constrained power, circumscribed by the language of statute and the supremacy of Parliament.

In *The Federalist Papers*, Alexander Hamilton noted that:

> "The judiciary … has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society.....".

and concluded that:

> "The judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution".[2]

Since Hamilton wrote those words, events have transpired which call into question his sanguine appraisal of the risk posed by the judicial branch. New schools of judicial interpretation have evolved, some of them demonstrating little respect for the text of laws promulgated by the legislature.

Surely the most unconsciously amusing example of this is the US Supreme Court's judgment of *Griswold v. Connecticut*,[3] in which judges found a constitutional right for unmarried couples to buy prophylactics, hidden in "penumbras, formed by emanations" of explicit constitutional guarantees.

Anyone who favours this approach to textual interpretation need not listen to the rest of this address; you can just come up here and divine its content from the shadow it casts.

Yet with the enactment of a Charter of Rights in Victoria, and the push by legal professional bodies for a national Bill of Rights, there is little doubt that Australia is following the rest of the Anglosphere into a world in which the personal policy preferences of judges, masquerading as judicial interpretation of the law, will increasingly affect the operation of government.

At their most expansive, human rights instruments confer extensive and ambiguous positive rights – to adequate housing, to healthcare and education, even to intangibles such as "dignity at work" – which the courts oblige the government to honour.

Hence in post-apartheid South Africa, home to a Constitution drafted by a cohort of human rights *illuminati*, courts have been happy to find an obligation upon the government to reprioritise the allocation of government health and housing resources to favour the needy litigants before them.

Even as the legal lobby calls for the depoliticisation of judicial appointments, it favours the increasing politicisation of the judicial role, through the expansion of such ambiguous "rights" and adjudication on whether the legislature's laws are consistent with these rights.

The Law Council of Australia has been the most enthusiastic supporter of the Charter of Rights. Its tendency to meddle in politics led me to provide a quick analysis to the Attorney in 2006, showing that over two-thirds of its media releases that year related to David Hicks, Guantanamo Bay, or alleged abuses of the "human rights" of illegal immigrants.

This is a body which holds itself out as an apolitical participant in any prospective judicial appointments panel or Commission.

It is in this context that we must view, with a healthy dose of scepticism, legal professional bodies lamenting "political appointments".

The Oxford English Dictionary advances as its first definition of the word "political":

> "Of, belonging to, or concerned with the form, organization, and administration of a state, and with the regulation of its relations with other states".

Understood in this way, the judicial role is entirely political. It is fundamental to the proper operation of our system of government. Accordingly, the appointment of judges is, by definition, political.

The manner in which judicial officers carry out their duties is thus a legitimate subject of political debate. Should judges interpret the law through painstaking fidelity to text coupled with deference towards the clear intent of the legislators and constitutional draftsmen? Or should they seek to mould the law to enhance its consistency with the growing suite of amorphous "human rights" championed by much of the legal fraternity?

Regardless of your view on these questions, I would argue that a government which did *not* take an interest in them was fundamentally failing in its responsibilities to the Australian people. The role of the Executive in making judicial appointments is the principal lever which the Constitution has provided for the people to influence a central aspect of the way that they are governed.

Many of you will recall from 1998, in the wake of the High Court's contentious *Wik* decision on the survival of native title over pastoral leases, judges and lawyers complaining that Attorney-General Daryl Williams was failing in his duty to defend the judiciary against political attack.

Indeed, any criticism of a judicial decision by a politician is greeted with howls of protest from legal bodies, who claim that it is an attack on judicial independence.

Yet methods of judicial interpretation, and the decisions to which they give rise, are not merely a topic for academic discussion, as the *Wik Case* demonstrated. So when we hear condemnation of political appointments to the Bench, we need to clarify what is meant by that term.

It is certainly not acceptable for a government to assess the party-political affiliations of a prospective judicial officer as relevant to appointment. But I would submit that it is entirely legitimate for a government to have regard for a candidate's judicial philosophy.

Publicly, governments have maintained that there is only one criterion for judicial appointment: merit.

It is questionable whether this was ever a clear-cut concept. With the politicisation of the judicial role in the English-speaking world, which has flowed from the growth of human rights instruments and jurisprudence, the concept of an objective metric of "merit" is a fiction.

If you subscribe to what is commonly referred to as a "judicial activist" outlook, you cannot truly believe that a crusty, old, black-letter lawyer is "meritorious". And vice versa. Evaluating the "merit" of candidates for the judicial role is entirely meaningless if we ignore the great schism that has opened between competing judicial philosophies, which profoundly affects the way that the judicial role is conducted. It has meaning only if we accept the legal professional bodies' view of the world, in which we should merely assess the eminence of a practitioner to ensure that the prize of judicial office is awarded to the most deserving candidate – not the one who would do the best job in the context of our system of government.

Julian Leeser once suggested to me that, after taking into account legal ability and experience, the three qualities to look for in a judicial officer are courtesy, industry and orthodoxy. Governments of alternative complexion have displayed very different preferences. That is their prerogative. The important thing is that they be held accountable for those preferences.

All of this magnifies the importance of my principal question: how can the independence of the judiciary, which critics of so-called political appointments cite as their primary concern, be reconciled with the principle of representative government?

My thesis is that the draftsmen of our Constitution answered that question quite adequately a century ago. Let us consider the traditional system, and conduct a brief survey of the alternatives.

Judicial appointments under the Australian Constitution

Being a good textualist, I will start my exposition with the text of our Constitution.

Chapter III provides:

> "The Justices of the High Court and of the other courts created by the Parliament:
> (i) shall be appointed by the Governor-General in Council;
> (ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;
> (iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office".

It is very clear from these provisions that the draftsmen intended the determination of judicial appointments to be a matter for the Executive. Had they intended for a panel of current and former judges to appoint their successors, the draftsmen might easily have so provided.

The reason they did not was eloquently explained by Governor-General Michael Jeffery in 2006, addressing the Judicial Conference of Australia:

> "While the Constitution guarantees federal judicial officers' independence, the political accountability of the Executive for judicial appointments forms the nexus between the judiciary and the fundamental principle of government by popular consent".[4]

Recognising the need for judicial officers to adjudicate cases free from political influence, the Constitution confers on them security of tenure and salary. Once appointed, judges can, and frequently do, disappoint the government that appointed them, with no personal consequences.

Yet our Constitution takes heed of Lord Acton's dictum: "Power tends to corrupt; absolute power corrupts absolutely".

Accordingly, it does not entrust the final arbiters of the law with the task of appointing their own successors. The draftsmen presumably concurred with former Attorney-General Philip Ruddock, who described such a system as "a self-appointing judicial élite."[5]

The Constitution recognises that a system of representative government requires that all branches of government derive their authority from the consent of the governed. Accordingly, the appointment of judges by the elected government creates the nexus of which the Governor-General spoke, between the votes we cast and the judges who judge us.

It is a more tenuous link than that between the electoral process and our legislators. It must be more tenuous, if judicial independence is to be maintained. But it must be present, if the principle of representative government is to be maintained.

Degrees of democratic separation

One might retort that the link has not been severed by the current changes, or even by the establishment of a Commission. After all, if the Executive decides to delegate its responsibilities, it is still accountable for that decision.

Yet in practice this argument is disingenuous. The more layers that one interposes between the electorate and the decision-maker, the weaker the accountability of elected representatives for the decision.

To understand this concept in the context of judicial appointment mechanisms, I introduced in a 2005 paper for the Centre for Independent Studies the concept of degrees of democratic separation.[6]

At zero degrees of democratic separation one has the judicial equivalent of Athenian democracy: a direct vote on the question at hand. Under this idealised model, all citizens would judge every judgment: we would all vote on the guilt of each criminal, for example, which would make for wonderful reality television, but perhaps not for very efficient administration of justice. The jury system may be construed as a limited expression of this model.

The first degree of democratic separation is what exists in some US jurisdictions: the direct election of judges. While this provides for a high level of democratic accountability, it compels aspiring judges to engage in the cut-and-thrust of democratic politics, an unedifying spectacle at the best of times. Such a process is unlikely to provide confidence for litigants that justice is being administered fairly, as the suspicion will always be that the judge in question delivers judgments with one eye fixed firmly on the electorate.

The second degree of democratic separation is that which applies under the traditional Australian model: the voters elect the government that appoints the judges. (Strictly speaking we elect the representatives from whom a government is formed, but in practical terms the electorate knows it is choosing between two alternative governments).

By combining this appointment process with guaranteed tenure and salary, the system provides for a high level of independence at the expense of some measure of democratic accountability. Judicial appointments are not subject to a direct popular vote; they are relegated to the same status as the host of other policy issues that can influence a voter's decision at the ballot box.

An optional extra is the sort of confirmation hearing process which applies to US federal judges, where judicial nominees are grilled by a panel of grandstanding Senators on everything from their view of abortion to their membership of college clubs, before being subjected to a vote, so that their authority will be permanently undermined by the eminent legislators who voted against their confirmation. It is unclear to me that this practice adds anything of value to the appointments process.

The third degree of democratic separation is the system that now prevails in the United Kingdom, which in 2005 established a full blown Judicial Appointments Commission. The changes in Australia, establishing ostensibly non-political panels to shortlist candidates, can be seen as a less entrenched version of the same: the people elect the representatives who choose the commissioners or panelists who select the judges.

It is hard to see how this system affords any greater independence to judges, although it may alter the behavioural pressures on lawyers who aspire to be judges. Whatever the gains, they come at the cost of almost all democratic accountability. The Government has very ostentatiously washed its hands of the responsibility to identify appropriate judges, and has a perfect alibi should a judge appointed during its administration manifestly fail.

In my submission, this extra intervening layer is an unjustifiable extreme on the spectrum of democratic separation, which constitutes the stage for the delicate balancing act between judicial independence and democratic accountability.

Motives of "reform" advocates

The flimsiness of the arguments for "reform" demands a frank appraisal of the motives and incentives of its advocates.

I have already alluded to one motivation: the desire for advancement and status by members of the legal élite. Lest I be accused of courting controversy with this proposition, let me cite a more authoritative source:

> "I'd doubt … that people who promote the idea of some kind of commission to advise governments about appointment of candidates are motivated principally by difficulties about identifying possible candidates. I think their objectives are rather different. I think their objectives are to extend their influence".[7]

Thank you, former Chief Justice Murray Gleeson.

A second, more sinister motivation is a desire to exploit the weakened democratic accountability of Commission-appointed judges to advance an unpopular political agenda by legislating from the Bench.

Anyone who has mixed in legal circles, but who has also been exposed to suburban Australia, would be conscious of the yawning gap between public opinion and legal élite opinion, on topics ranging from immigration and native title to criminal sentencing, Aboriginal customary law, drug offences and gay marriage. Around the Anglosphere and beyond, certain elements of the legal profession have seen the courts as an appropriate forum to effect social change in these areas, in purported advance of public opinion.

Yet such attempts, taken too far, have led to popular revolt. In the United States, where activist judges introduced school-bussing and discovered an unwritten constitutional right to abortion, it is a mainstay of Republican political campaigns to talk about the appointment of strict constructionist judges. Judicial appointments are a key motivator of the Republican base, contributing to the more conservative Supreme Court of today. The United States illustrates the effectiveness of democratic accountability at constraining judicial adventurism so long as a third degree of democratic separation is excluded.

When Australia's High Court reached the high water mark of its judicial creativity, with the *Wik* decision, it was widely rumoured that Cabinet had blocked an appointment proposed by Attorney-General Daryl Williams and nominated, in Tim Fisher's words, a "capital-C conservative" instead.

Believers in the project of social reform from the Bench recognise that the accountability of governments for judicial appointments is their greatest obstacle. The more divorced élite legal opinion becomes from that of the general public, the greater the risk that the democratic process will lead to an appointments backlash of the sort the United States has seen.

Small wonder that these true believers flock to the banner of a Judicial Appointments Commission, with the commissioners drawn from their own ranks.

For parties of the Left, facing the necessity to deliver radical social reforms to appease their memberships yet wanting to hold the centre ground, waging social policy warfare through judicial proxies is immensely attractive. Vesting appointment responsibilities in an ostensibly apolitical panel or Commission makes it even more attractive, as the remaining line of accountability is severed.

Such an approach is, in my submission, an abdication of a government's basic responsibilities. As former Chief Justice Murray Gleeson wrote:

> "No doubt, many judges have strong opinions about matters relating to judicial appointments, whether permanent or temporary. Even so, judges do not appoint one another. The responsibility for making decisions about judicial appointments, including

numbers and circumstances of appointments, rests with those who have the responsibility of paying the salaries and providing the necessary resources of the appointees, and who have political accountability for bad or unpopular decisions about appointments".[8]

Advocates of social reform may feel that the loss of this accountability is a small price to pay for the shining policy victories that beckon. Yet this is a short-sighted view.

Recent years have seen a modest decline in the high regard in which our courts are held by the public at large. The creation of a self-appointing judicial élite, dispensing its Olympian wisdom from on high to effect policy change without the troublesome imperative of convincing the electorate, will greatly exacerbate that institutional damage.

In the long-term, I believe it would lead Australian conservatives to shrug off their respect for traditional institutions and engage in political debate over the merits of particular judicial appointments. Seizing on instances of populist outrage at low sentences, or the overturning of immigration decisions, they would attack the judges and the Commission as biased and politicised. Ultimately, confronted with a self-appointing élite that frustrates their policy agenda, they would be tempted to call for the direct election of judges. I suspect this call might be very attractive to large segments of the community.

Of course, there is a third motivation behind those who call for reform of judicial appointments. Labor Attorneys-General have made some appalling appointments in recent years. The leader of the pack is Rob Hulls, whose notorious penchant for affirmative action led one member of the Bar to quip that the prerequisite for appointment was a lack of testicles. I would add to that membership of Liberties Victoria, the activist group from which Hulls has drawn a number of appointments.

I can understand why conservative members of the profession might find it attractive to wrest the appointments power away from an Attorney-General who espouses an undergraduate, Marxist philosophy of law as a class weapon. However, this attraction rests on the flawed assumption that the appointments Commission, or panel, will remain relatively depoliticised.

Given the underwhelming record of Australian conservatives at halting the long march of the Left through our public institutions, I consider this assumption to be irresponsibly optimistic.

Conclusion

In conclusion, I submit that the direct appointment of judges by the Executive is a well-crafted feature of our Constitution which should be preserved.

The reality of the judicial role is increasingly distant from that of dry legal technician, amenable to objective assessment of merit on the basis of how quickly one can craft a high quality judgment. Our judges are called upon to make ever more subjective determinations by reference to amorphous rights and values.

In this context, the need for democratic accountability of those who determine judicial appointments is greater than ever.

Endnotes:

1. French CJ, *In praise of unelected judges*, Address to the John Curtin Institute of Public Policy, 1 July 2009.

2. Alexander Hamilton, Federalist No. 78, *The Federalist Papers*, 1788.

3. 381 US 479 (1965).

4. Governor-General Michael Jeffery, *Address at the opening of the Judicial Conference of Australia Colloquium*, 6 October 2006.

5. Attorney-General Philip Ruddock, *Address to the Australian Bar Association Judicial Appointments Forum*, Sydney, 27 October 2006.

6. Alan Anderson, *The Rule of Lawyers*, Policy Magazine, Centre for Independent Studies, Summer 2005.

7. *Judicial appointments spark review call*, *The Australian Financial Review*, 10 March 2006.

8. *Forge v. ASIC* (2006) 80 ALJR 1606.