Chapter Seven

The High Court under Howard

Benjamin Jellis

In 1994, Mr Justice Callinan, prior to his appointment to the High Court of Australia, asked, in a speech to The Samuel Griffith Society, whether the Court had become "an over-mighty court". Now, nearly 20 years and two changes of federal government later, it is timely to look again at the place of the High Court in Australian society. What, if anything, has changed? Has government policy towards judicial appointments changed anything about the Court?

This paper considers one of the least discussed aspects of the legacy from 11 years of coalition government led by Prime Minister John Howard – that is, to assess whether the approach of his government to High Court appointments was a success.

It intends to open discussion about an area of government decision-making that has been the subject of little debate and discussion in Australia. That is: what approach *should* a government take to judicial appointments? It will conclude that the Howard Government's approach was one of appointing quality black letter judges to the Court. This policy facilitated return of a more orthodox approach to judging. This had the significant consequence of restoring public faith in the High Court and halting a deterioration in public sentiment that might have resulted in some measure of politicisation of the bench.

During the 1996 federal election campaign, a key phrase used by the incumbent Prime Minister, Paul Keating, was the warning: "when you change the government you change the country". History recalls that the Australian people took this warning to heart. They enthusiastically voted to change the country.

Over its 11 years in power the Howard Government appointed six judges to the seven judge bench (replacing all but two members of the court (Justices Gummow and Kirby) and appointing a new Chief Justice, Murray Gleeson). After Howard, only Menzies as Prime Minister has been responsible for more appointments to the Court.

Such is the significance of the High Court in the legal system that it could be said that, to adopt Keating's aphorism, if the High Court changes, so does Australia. But did the Court change?

Success – what success?

This paper argues that the approach of the Howard Government towards judicial appointments was something of a success. This is a conclusion that might, however, seem – at least from an outcome-based perspective – to be somewhat surprising. This can be illustrated by reference to two matters of concern to this Society:

- Federalism; and
- "implied-rights" in the Australian Constitution.

Federalism

Federalism is one of the central values of The Samuel Griffith Society. Fears about the decline of federalism in Australia are one of the factors that led to establishment of the Society and its first conference in 1992.

It can scarcely be said that by 2007, the end of the Howard Government, that the health of Australian federalism had improved. In his retrospective on the Howard years, "Our Greatest Prime Minister?", John Stone expressed considerable concern with the centralist philosophy of the Howard Government – legitimated by the High Court upholding what Stone described as the "notorious" Work Choices legislation.[1] Alongside this we can include other recent High Court decisions such as *AG (Vic) v Andrews.*[2] In combination, they demonstrate the relatively unobstructed continuation of a long decline in federalism that can be traced from *Engineers'* to *Tasmanian Dams* through the Howard years and to the present day.

Implied constitutional rights

What then of implied constitutional rights? Discussion of implied rights begins with the decisions of the High Court in the early 1990s which discovered a hereto unrecognised right to freedom of political communication within the Constitution.[3] These decisions have been criticised for taking Australian constitutional law down a path that had been specifically rejected by the founders – that of judicially enforceable constitutional rights more familiar to American constitutionalism.

Such activism in the constitutional sphere had particularly worrying consequences.[4] These include the fact that the Court had, without a clear constitutional mandate, asserted a new sphere in which it could render democratically-enacted legislation (in respect of political speech) invalid; and the further issue that, having done so in constitutional decisions, they had put this new judicial power beyond ordinary democratic amendment.[5] A consequence was effective disenfranchisement of Australian citizens over certain areas of social policy – a clear irony in cases that reasoned from principles of representative government.

The greater concern, though, was that this "implied right" might be the thin end of the wedge. Having taken this dramatic constitutional step, it was unclear just how far the High Court might expand this jurisprudence. It was speculated, for example, by one member of the Court that this could have been part of a move towards a broader "implied" bill of rights.[6] Further, some minority dicta existed, from Deane and Toohey in *Leeth v Commonwealth,*[7] that a broad-based right to equality might be implied into the Constitution: a finding that, if it was to persuade a majority of judges on the Court, might have provided those judges with a new and extremely broad power to assess the merits of Commonwealth legislation.

Controversy about a number of aspects of the basis and scope of the implied freedoms was settled in 1997 in the *Lange* decision. A full bench of seven justices upheld the doctrine in the context of a defamation action involving former New Zealand Prime Minister, David Lange, a unanimous decision that included the hitherto unconvinced Justice Dawson. The state of affairs captured in the decision was described by one future appointee to the Court as a settlement of which the fourth French republic would be proud, and one in which all seven judges agreed to something that none of them had hitherto believed.[8]

Yet, looking back from 2011, this patchwork precedent is one that has held together. During the years of the Howard Government there was no substantial unwinding of the implied rights jurisprudence. Indeed, in respect of an implied right to the franchise in prisoner voting and the regulation of the electoral rolls, there has even been a limited expansion of this jurisprudence.[9]

In some ways courts are like ships. They take a long time to change direction, and it is not always easy to judge if they are turning at all. But, in respect of federalism and implied rights, it is fairly clear that there has been no substantial shift in the decisions of the Court. After a decade of conservative government, what are we to make of this? Is it, with the continued decline of federalism, a sign of failure for that side of politics?

Success or failure?

There is a metaphor that comes to mind when assessing this aspect of the legacy of the High Court during the Howard years. It comes from *Slaughterhouse 5* by Kurt Vonnegut. He described the protagonist watching a war movie backwards:

> the formation flew backwards over a German city that was in flames. The bombers opened their bomb bay doors, exerted a miraculous magnetism which shrunk the fires, gathered them into cylindrical steel containers, and lifted the containers into the bellies of the planes . . . . some of the bombers were in bad repair. Over France, though, German fighters came up again and made everything and everybody as good as new.
>
> When the bombers got back to their base, the steel cylinders were taken from the racks and shipped back to the United States of America, where factories were operating night and day, dismantling the cylinders, separating the dangerous contents into minerals.[10]

In some conservative fantasies it may have been hoped that the High Court during the Howard period would simply be the activist years of the Mason Court in reverse. With heroic conservative judges flying backwards through the *Commonwealth Law Reports* and overturning bad precedent back to the Gibbs Court or beyond.

That is not how things turned out. Things cannot be so simple, particularly when the critique of earlier activism is based upon the orthodox theory of judging known as legalism.

This is an important dynamic that needs to be borne in mind when considering the success or failure of the High Court in the Howard years; legalism places great significance on previous authority.

Take federalism as an example. A different decision in *Work Choices* may have required repudiation of the longstanding *Engineers*' doctrine: something that only two judges of the Court (Justices Kirby and Callinan) appeared willing to countenance. Similarly, overturning the implied rights jurisprudence, an idea only toyed with (perhaps) by one judge in the *Lenah Game Meats* decision,[11] would have required repudiation of the seven-judge settlement in *Lange* referred to above.

This is the conservative tragedy: a conflict between the need to give weight to precedent as against other considerations that might lead to the correct outcome.

This problem has drawn some consideration in addresses to this Society. One such paper was presented by John Gava, an academic who obtained some attention for his "Hero Judges" critique of the Mason Court during the 1990s.[12] He suggested that it would be "activist" for a judge and, in particular, Justice Callinan (whom he labelled an "activist federalist and originalist" judge), ever to overturn longstanding precedent. So he suggested Justice Callinan in the *Work Choices* Case "deserves exactly the same criticism" as the "judicial activism of the Mason Court".[13]

With respect to Professor Gava, I doubt matters are so clear as that – identification of what is, without doubt, a tension, is not the same as providing a resolution of that tension.

What has been identified is, as I have said, a tragedy. A judge who seeks to apply an approach of legalism in the face of precedent that has been forged in a different spirit will face a choice between two *wrong* (or perhaps right) outcomes.

Professor James Allan has discussed this issue which he refers to as an asymmetry problem. He states:

> Where some judges are more precedent-respecting than others, there comes a point at which those who feel themselves to be more constrained by past decisions than their judicial colleagues start to look like chumps (to the outside observer). Movement is all one way. The interpretively-conservative, precedent-respecting judge can only ever hold

> the existing line. His or her judicial philosophy does not allow for the recapturing of lost territory. Once lost, it is lost forever. The upholding of past decisions, even of what are seen to be wrongly decided precedents, counts for too much for these judges.[14]

A well-known example that brings this difficulty into its clearest focus is provided by the *Territorial Senators* Cases. These arose, after the Whitlam Government sought to provide Senate representation in the Senate to the ACT and the Northern Territory – in the face of considerable (genuine) ambiguity as to whether such action was constitutional, having regard to section 7 of the Constitution (which, on one view, might have exclusively limited such representation to the States). This was to be the minority view: representation was upheld by a 4-3 majority of the Court with Sir Harry Gibbs among the dissenters.

Shortly afterwards a second challenge was brought, in substance raising the same issue. There had, however, been a change in the composition of the bench; one of the previous majority had been replaced by Justice Aickin, an appointment of the new Fraser Government who was believed to be sympathetic to the earlier minority view. So it was thought 4-3 might have been converted into 3-4. As it happened, Sir Harry Gibbs along with Justice Stephen switched to the outcome favoured by the previous majority on the basis that, whatever justified the departure from previous High Court precedent, a mere change in the composition of the Court was not sufficient to return to the *status quo ante*.

An amusing comparison is provided by a relatively recent decision of the United States Supreme Court. There a majority *was* convinced to abandon a precedent established only the year before. In his dissent, the conservative judge, Justice Antonin Scalia, wrote of the majority: "the changes are attributable to nothing but the passage of time (not much time, at that), plus application of the ancient maxim 'That was then, this is now'."[15]

Reflecting on the *Territorial Senators* decisions in the inaugural Sir Harry Gibbs Oration, Mr Justice Heydon remarked on the significant way in which the approach of Gibbs and Stephen contributed to rule of law values of "reasonable certainty and stability.[16]

Few cases, though, present the tension between precedent and correctness in such stark terms. The High Court in the Howard years had to deal with far more difficult cases, where different legitimate approaches were open.

To resolve such difficulties, a useful pathway may be to reflect on one of the less discussed benefits of precedent, which is that it allows the law to embody wisdom beyond what can be possessed by an individual judge at a particular time. The common law is best understood as a collection of accumulated wisdom. Reflecting on the Dixonian tradition, Justice Dyson Heydon has observed: "It subordinated individual judicial whim to the collective experience of generations of earlier judges out of which could be extracted principles hammered out in numerous struggles".[17]

The healthy respect (although not total deference) required by legalism for the collective wisdom of others is a legal approach that, interestingly, has plenty in common with conservative *political* philosophy more generally.

Indeed, it is somewhat consistent with the approach of Prime Minister Howard who, although always more a pragmatist than an ideologue, worked from conservative principles encapsulated in his reflection that "a conservative is someone who does not think that he is morally superior to his grandfather."[18] Both ideas embody a pragmatic, though not doctrinaire, respect for the contributions of previous generations.

The Howard Government's approach to appointments could not remedy the tragic choices created by previous activist decisions (what to do with precedents that were created without sufficient regard for earlier precedent?).

But, as will be argued below, restoration of a more orthodox approach to judicial decision-making may make such problems less likely to arise in the future.

A snapshot of the High Court in the early to mid-1990s

To continue with this inquiry, it is helpful to provide a snapshot of the High Court in the early to mid-1990s.

Public Faith in the Court

Consider this retrospective assessment by high profile Geoffrey Robertson, QC. He remarked: "If there were an Olympic medal for teams of judges – and why not, since there are medals for tae kwon do and beach volleyball? – the Mason High Court (of the 1980s) would have won gold year after year."[19]

Such effusive praise of a set of judges is a pretty good clue that those judges might have gone a fair way beyond their remit. Whenever judges are lionised, alarm bells should start ringing and, indeed, there is plenty of evidence indicating widespread alarm around the time the Howard Government came to office.

Here is Professor Greg Craven speaking to The Samuel Griffith Society in 1997: "judicial activism is a more popular topic of conversation in Australia now than at any time in its history". He went on: "we live in an age of prevalent judicial controversy, where the doings of the courts are discussed almost as frequently and with as much venom as those of our more usual anti-heroes, the politicians".[20]

Such a view sounds foreign to our ears now. It would be considered totally bizarre if I had stood up and said the equivalent at the opening of my presentation. This underscores an important cultural change that occurred during the years of the Howard Government.

Much of this was a consequence of the Court in the early 1990s embracing a more active, and openly acknowledged, role in setting public policy. This approach was articulated by Chief Justice Sir Anthony Mason during an interview on the ABC in 1994 where he agreed that it was a "fairy tale" that judges did not make the law,[21] and that "the protection of individual rights is better left in the hands of judges than it is in the hands of politicians".[22] He went on to imply that judges were less likely to be criticised if they were open about what he suggested was their creative law-making role.[23]

One consequence of departure from legalism, and particularly in embracing a role in making public policy decisions, is that people may justifiably ask why it is that judges are entrusted to make those policy decisions? It will surprise nobody that this point was well-understood by Sir Harry Gibbs. In 1988 an idea similar to that which Mason would espouse in 1994 was put to Gibbs. He was asked, "what is the creative role of judges?" He replied:

> Individuals and governments would not be prepared to entrust their destinies to the will of a few persons who would make their decisions simply in accordance with their individual beliefs and principles. But they entrust them to judges, who decide in accordance with the law. The courts ultimately can function only if they command general respect within the community. Their judgments command respect as a general rule because they are seen not as the expression of the personal prejudices or beliefs of the judges, but as an attempt to apply existing legal principles, which bind the judges just as much as they bind the people. The judges are performing a role which, although it is undoubtedly creative, is at the same time subject to great restraints. **If the judges cast off those restraints they are likely to lose the confidence of those who are affected by their judgments**.[24] [emphasis added]

At this point it is instructive to remember the degree of criticism which was levelled at the High Court during this time. Many of these were collated by Justice Michael Kirby in a speech in 1998 in which his Honour said:

> Recent High Court decisions, the Court and the justices were labelled "bogus",

> "pusillanimous and evasive", guilty of "plunging Australia into the abyss", a "pathetic . . . self-appointed [group of] Kings and Queens", a group of "basket-weavers", "gripped . . . in a mania for progressivism", purveyors of "intellectual dishonesty", unaware of "its place", "adventurous", needing a "good behaviour bond", needing, on the contrary, a sentence to "life on the streets", an "unfaithful servant of the Constitution", "undermining democracy", a body "packed with feral judges", "a professional labor cartel".[25]

Some of this controversy can be brought back to the aftermath of the politically controversial 4-3 decision of the High Court in the *Wik* case.[26] Yet one would not want to give the impression that this is a solely post-Wik phenomenon.

The High Court's earlier embrace of a more political role laid the groundwork for the post-Wik outbreak of political controversy. For example, the former Chief Justice, Sir Garfield Barwick, said of the Mason Court in 1994 that it ". . . is undemocratic. It is making law not just interpreting it, and in doing so, it has taken over what should be the role of our parliament".[27]

Judge Richard Posner of the United States 7th Circuit Court of Appeals often tells a joke to illustrate what he says about legal reasoning:

> a devout Jew is startled, walking past the office of the local mohel [the person who performs circumcisions in accordance with Jewish law], to see pocket watches displayed in the window. He enters and says, "Mohel, why are you displaying watches in your window?" The Mohel replies, what would you like me to display.[28]

Posner's point is that legal reasoning is displayed in the place of what would be unacceptable: a mere statement of the judges' personal views and preferences. Posner remains sceptical about forms of legal reasoning, but there is a strong counter view in Australian law within the Dixonian tradition of legalism. This rejects the view that all judging is essentially political. Noting that key doctrines such as judicial independence must be based upon an ideal of judging that holds the policy preferences of individual judges to be separate from the law.

Writing post-retirement in the context of the bill of rights debate, John Howard made the following comment about the relationship between the Parliament and the courts:

> The strength and vitality of Australia's democracy rests on three great institutional pillars: our Parliament with its tradition of robust debate ; the rule of law upheld by an independent and admirably incorruptible judiciary; and a free and sceptical press.[29]

He went on to describe these as "the title deeds of our democracy". In the 1990s public disillusionment about the political role taken by the High Court had reached the point that these title deeds were becoming somewhat frayed.

The approach of the Government to appointments

We have seen how perceptions of activism damaged the High Court in its public standing during the 1990s. The task, therefore, for the Howard Government was how to arrest these problems through its approach to judicial appointments. So, what was the Government's approach to appointments?

John Howard has expressed the view that "judges should be appointed according to legal merit, not social or political bias".[30] This is reflected in public statements of both Attorneys-General during the Howard years, the first of whom, Darryl Williams, stated simply that the "essential criterion" is merit.[31]

No inquiry into political views or views on particular issues

The Howard Government took the approach that it would not inquire into the personal or political opinions of possible appointees.[32] The temptation to make political appointments was avoided.

In this they continued what is a long-standing, bipartisan commitment not to vet prospective High Court appointments for their personal or political views, one that was continued by the Rudd Government.

For many reasons Australians should be glad the alternative path was not taken. This was wise, not least because attempts to "stack" a Court have a notorious tendency to be counter productive. The United States provides two illuminating examples. The first, Harry Blackmun, was appointed by the Republican President Nixon as part of an attempt to dampen down what was seen as the activism of the Supreme Court under Chief Justice Earl Warren. Blackmun ended up writing the legally unorthodox lead judgment in *Roe v Wade*: a case that has assumed totemic significance (at least for the conservative side of US politics) as an example of constitutional activism.[33]

The second, the appointment of Justice Souter by the Republican administration of George Herbert Walker Bush – who was expected to be the last conservative vote needed to overturn a raft of liberal authority from the Warren era (but including *Roe v Wade*). Souter almost immediately became the Court's most liberal judge.

Appointment of black letter judges

In 1994 the increasing activism, and consequent potential for politicization of the High Court, caused Ian Callinan to ask this Society: "are we going down the American path of critical and searching examination of the views and philosophies of any potential candidate for appointment to the Court?"[34]

Looking back at the High Court during the Howard Government, we can answer this question in the negative.

A key reason for this is the decision of the Government to appoint judges of a "black letter" persuasion, which is to say those more in the tradition of Dixonian legalism. This had the useful side effect of lessening the impetus to make a political appointment, as the more orthodox the legal approach of a particular judge, the less their personal politics will matter.

Any attempt to appoint a particular "kind" of judge is unpredictable; they may not take the particular approach to judging that you predict. Judicial independence means there may always be surprises. Chief Justice Mason himself was appointed by the McMahon Government, and seemed to have impeccably orthodox credentials – including being a star of the commercial bar. No-one could have predicted the trajectory of his time on the Court.

There is an interesting passage in David Marr's biography of Sir Garfield Barwick. Marr describes Mason touring the electorate of Parramatta in a hired loudspeaker van spruiking for Barwick who was then seeking election as a Liberal MP.[35] If the image of Mason spruiking like a character in the *Blues Brothers* is not irony enough, consider the early impression of Marr himself who, at least in the 1980 edition of the book, seemed underwhelmed by Mason, describing him as "cautious and conservative" but "at least a post-war man".[36]

Commentators who assessed the Howard years have generally come to the conclusion that a more black letter style of judge was appointed. To this point, these appointments have given rise to few surprises. Over the period of the Howard Government a more orthodox style of legalism was adopted by the Court with greater predictability in its decisions and less open discussion of the Court's law-making role. Unsurprisingly, a significant consequence of this was a restoration of public faith in the institution of the High Court and an almost total decline in controversy surrounding the Court.

To illustrate, I might close with the *Work Choices* decision. It is a case that has caused great heartburn among many members of The Samuel Griffith Society owing to its consequences for federalism, but a silver-lining is the almost total absence of expectation that the High Court would

(or did) discharge its duty in that case in a political manner. Indeed, there was never an expectation that the Howard appointees would vote one way, and the two remaining Keating appointees in another. And this, in ruling on the most politicised legislation in recent Australian history. The contrast to reporting on "Obamacare", for example, which is currently working its way through lower courts to the Supreme Court of the United States, is striking. So, too, the decision in *Bush v Gore* that decided the US Presidential election in 2000.[37]

I recently attended a speech by Justice Antonin Scalia of the United States Supreme Court. He was asked about *Bush v Gore*, he told the audience: "get over it!", to great laughs. But it cannot be easy to do so. In deciding the US election between a Republican and Democrat candidate, the Court (except for Souter, referred to above) divided directly along the lines of party appointment.

Chief Justice Gleeson has pointed out that the only time his High Court directly split 4-3 along the lines of political appointment was in the negligence case, *Brodie v Singleton Shire Council*.[38] And, as Gleeson has observed, that "had nothing to do with politics".[39]

An epitaph for the High Court constituted during the Howard years might conclude, more or less, the same.

Conclusion

The more activist a court becomes, the greater the incentive to appoint those with similar ideological views to the court. By using its power over judicial appointments to appoint judges with a more orthodox approach to the exercise of judicial power the Howard Government, ironically though quite deliberately, lessened the political significance of the judicial appointment power – reversing the opposite trend during the early years of the 1990s.

I have long believed that judges are like surgeons: the better known they are, the worse of a sign that is. High Court judges are now less likely to be household names, and a Court that was once frequently front-page news in Australia has now been relegated quite firmly to the middle pages of the newspaper where it belongs This is an important, and continuing, sign of the return to legal orthodoxy on the High Court.

Endnotes

1. John Stone, "Our Greatest Prime Minister?", Keith Windschuttle et al. (eds), *The Howard Era,* 2010, 18.
2. (2007) 233 ALR 389.
3. *ACTV Pty Ltd v Commonwealth* (1992) 177 CLR 1;*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
4. Well set out by Professor Jeffrey Goldsworthy in a devastating contemporary *Quadrant* critique. Jeffrey Goldsworthy, "The High Court, Implied rights and Constitutional Change", *Quadrant*, vol 39(3), 46-54.
5. Ibid.
6. John Toohey, "A Government of Law, And not of Men?",*Public Law Review*, vol 4(3), 158-74.
7. (1992) 177 CLR 106.
8. J. Dyson Heydon, "Judicial Activism and the Death of the Rule of Law",*Quadrant* January 2003, 9-22.
9. See, for example, *Rowe v Electoral Commissioner* [2010] HCA 46;*Roach v Electoral Commissioner*

[2007] HCA 43.

10. Kurt Vonnegut, *Slaughterhouse 5,* 1969, 53-54.
11. *ABC v Lenah Game Meats Pty Ltd*(2001) 185 ALR 1.
12. John Gava, "The Rise of the Hero Judge," *University of New South Wales Law Journal*, vol 24, 2001, 747-759.
13. John Gava, "Can Judges Resuscitate Federalism?", *Upholding the Australian Constitution,* vol 19.
14. James Allan, "When does Precedent become a Nonsense?", *Upholding the Australian Constitution,* vol 19.
15. *County of Sacramento v Lewis* 523 US 833 (1998).
16. J. Dyson Heydon, "The Inaugural Sir Harry Gibbs Memorial Oration – Chief Justice Harry Gibbs – Defending the Rule of Law in a Federal System", *Upholding the Australian Constitution,* Vol 18.
17. J. Dyson Heydon, "Judicial Activism and the Death of the Rule of Law", *Quadrant*, January 2003, 9-22.
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19. Geoffrey Robertson, *The Statute of Liberty,* 2009.
20. Greg Craven, "Reflections on Judicial Activism: More in Sorrow than in Anger" *Upholding the Australian Constitution,* vol 9.
21. Geoffrey Lindell (ed), *The Mason Papers,* 2007, 400.
22. Ibid 405.
23. Ibid 400.
24. Garry Sturges and Phillip Chubb (eds), *Judging the World: Law and Politics in the World's Leading Courts*, 1988, 351.
25. Michael Kirby, "Attacks on Judges – A Universal Phenomenon", 1998.
26. *Wik Peoples v Queensland* (1996) 187 CLR 1.
27. Garfield Barwick quoted in Geoffrey Lindell (ed), *The Mason Papers,* 2007, 398.
28. Richard Posner, *How Judges Think*, 2008,351.
29. John Howard, "Don't Risk What We Have", *Don't Leave us With the Bill – The Case Against an Australian Bill of Rights,* 2009, 68.
30. Ibid 67.
31. Daryl Williams, "High Court Appointment", *Sky News*, 17 December 2002, in George Williams, "High Court Appointments: The Need for Reform", *Sydney Law Review*, vol 30, 164. For Ruddock see Philip Ruddock http://blogs.theaustralian.news.com.au/yoursay/index.php/theaustralian/comments/ruddock_bringing_judgment_to_account - 14 August 2007.
32. Philip Ruddock at http://blogs.theaustralian.news.com.au/yoursay/index.php/theaustralian/comments/ruddock_bringing_judgment_to_account - 14 August 2007.
33. For an interesting account of expectations of Blackmun and the ramifications of his appointment, see Bob Woodward and Scott Armstrong *The Brethren,* 1979.

34. Ian Callinan, "An Overmighty Court?", *Upholding the Australian Constitution*, vol 4.
35. David Marr, *Barwick*, 1980, 136.
36. David Marr, *Barwick*, 1980, 239.
37. *Bush v Gore* 531 US 98 (2000).
38. [2001] HCA 29.
39. Interview with Chief Justice on "The Law Report" 19 August 2008 at: http://www.abc.net.au/rn/lawreport/stories/2008/2338639.htm.