

Federalism and the High Court

Fixing the appointment process



Amber Agustin

Observers of the recent confirmation hearings for President George W Bush's nomination of Judge Samuel Alito to the US Supreme Court may be forgiven for experiencing a thrill of *schadenfreude*. The pomp and pageantry, the circus and staging, the props and the politics: it's just not the Australian way.

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But the self-laudatory smugness of the 'there but for the grace of God' club is not entirely justified. Even as we congratulate ourselves on the modesty and refinement of our own High Court appointment process, we must recognise that it is a process characterised by an absence of transparency, ill-defined selection criteria and inadequate consultation. The process is also haunted by, at best, the apparent politicization of the appointment of Justices of the High Court and, at worst, the spectre of nepotism and Government patronage.

Is it not that the limited opportunity for public scrutiny of the candidate's credentials and the informality of

the consultation process is inadequate protection against the risk of an 'it's not what you know, it's who you know' approach?

While acknowledging that legal excellence must be the primary requirement of a candidate for appointment to the High Court, there are certainly other appropriate criteria. Few would dispute that candidates for judicial appointment should also have demonstrated impartiality and integrity, be of good character and have experience in matters of constitutional and federal law.

Matters of geography might not immediately come to mind when con-

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sidering the appropriate qualifications required for the judicial officers of the High Court. Consider this: the High Court is the final arbiter of power struggles between the States and Commonwealth and yet, since 1950, the High Court has seen just five appointments from States other than New South Wales, Victoria and Queensland. The less populous States and the Territories have cause for concern about a Court whose members are drawn almost exclusively from Sydney and Melbourne.

In April 2005, Prime Minister Howard said in an address entitled *Reflections on Australian Federalism*, 'I have very little time for vestiges of state parochialism.... Our ideal position is that the States should meet their responsibilities and we will meet ours. And our first impulse is to seek state co-operation with States and Territories on national challenges where there is overlapping responsibility. But I have never been one to genuflect uncritically at the altar of States' rights'. Contrary to Mr Howard's views, the first impulse must be to uphold the Constitution.

The High Court appointment process is informal and shrouded in the Cabinet's mystery. It is, therefore, not protected from the increasingly centralist tendencies of the Federal Government. As a result, federalism, our increasingly maligned and disregarded form of government, has been overlooked as relevant to the appointment of Justices to the High Court, at the expense of a bench reflective of the nation.

Is it not essential to the protection of our federal Constitution that the High Court appointment process is transparent, that defined selection criteria apply and that broad and genuine consultation is required?

Federalism, our system of government in which power is divided between the Federal Government and the States, is established by the Constitution.

In a nation as vast and varying as Australia, federalism has two great advantages. First, it leaves regional matters in regional hands and places the balance of power in the hands of the Commonwealth where necessary and appropriate. Second, it divides power so that there is no one central repository of power.

The High Court, in its first century, was called upon as the final arbiter of disputes between the Federal Government and the States as the various polities struggled for power. Being the nominated arbiter of disputes, the Court ought to be the defender of the Constitution, which clearly intended a more than ceremonial role for the States.

The High Court has, however, taken a somewhat centralist view of Constitutional federalism, but despite the leaning towards central power over States rights, it remains for the High Court to draw the line between the States and the Commonwealth. In spite of the sometimes frenzied battles over States' rights, the States remain fundamental polities within Australian government and the Court will be required to determine the breadth of Commonwealth power unless and until the Constitution undergoes major reconstructive surgery.

In addition to its original jurisdiction as the forum for constitutional disputes, the High Court has exclusive jurisdiction in disputes between the Commonwealth and the States and disputes between the States. The High Court also has an appellate jurisdiction

as the final court of appeal from the various State and Territory Supreme Courts.

The geographic make-up of the High Court

Yet, in more than a hundred years, there has never been a High Court Justice appointed from South Australia or Tasmania.

The High Court, never having counted a South Australian among its number, is the final court of appeal from matters of South Australian law and is the original and final court for matters between, say, the Commonwealth and South Australia or New South Wales and South Australia.

Of the 45 Justices appointed to the High Court since its creation, there have been more appointments from New South Wales than from all the other States and Territories combined. Twenty-four appointments have been from New South Wales, while only 13 have been from Victoria, six from Queensland and two from Western Australia. Over 80 per cent of High Court appointments have been from New South Wales and Victoria. Over 95 per cent of High Court appointments have been from the three large eastern states.

Many Australians may view federalism as an anachronism in a modern Australia united by technology, communications networks and the 'think global or perish' mentality. Perhaps Australians see themselves as no longer divided by regional differences. Or perhaps it is only the residents of the major cities in the eastern States who hold that view.

Perhaps some see the borders between the States and Territories as mere formalities and a unitary system could see the end of the troublesome and oft-maligned Commonwealth Grants Commission. Federalism, however, is not an optional extra to be overlooked at will, or with the help of a willing Senate. Federalism is our constitution-

ally-entrenched system of government. Notwithstanding the ongoing efforts of the Federal Government to centralise power in Canberra and the High Court's complicity in this, federal judicial appointments should acknowledge and embrace the role and importance of federalism.

Of more popular significance, however, are the consequences for the High Court and indeed for federalism of the historical and ongoing absence of Justices from all States and Territories within the Commonwealth. The High Court appointment process has failed to ensure that the Court reflects the federation over which it presides as the final arbiter of disputes and the guardian of the Constitution.

Chief Justice Murray Gleeson of the High Court has remarked that an argument that the High Court should include Justices from across the nation was the same as saying that an Australian sporting team should have players from across the nation. With the greatest respect to Chief Justice Gleeson, a better analogy would be to a State of Origin Series in which all the umpires are from New South Wales. Notwithstanding the great integrity of the umpires, it is the appearance of bias that will concern the Queensland supporters and thus call into question the integrity of the result. The High Court Justices are not players—they are umpires.

The appointment of Justices from the various States and Territories (and indeed allowing the Justices to reside in their home States) keeps the Court in touch with 'the shade of thought and attitude around the nation' and would 'keep the Court in tune with the Federal nature of Australia'.

In contrast, the disproportionate appointment of Justices from Sydney and Melbourne may lead, and has arguably already led, to an actual, or at least perceived centralist tendency on the part of the Court at the expense of the smaller States and Territories and the prestige of the Court.

It may yet be too controversial to presume that a Justice's State of origin is a factor that informs, albeit subconsciously, a Justice's jurisprudence or method. Most of the caseload of the High Court is made up of hard cases. Easy cases, or those cases where the application of the law to the facts is clear, usually do not reach the High Court. The Court is left with hard cases and often the bench is split as to the outcome and the reasons. Hard cases and

tralisising tendency on the High Court may not be as great as it has been for the last 50 years'.

Fixing the appointment process

There are a number of options for the formalization of the federal judicial appointment process. Most of these options would require Constitutional amendment.

Some States in the United States select judicial officers by popular elec-

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uncertain law are fertile grounds for the seeds of experience, personal philosophy and social engineering to flourish. It follows that the Court should benefit from diverse experiences both of the community and the practice of law by its Justices, including those from the various States and Territories.

There is certainly tension between the more populous eastern states and the balance of the nation. There is a great need for public confidence in the High Court.

New South Wales has not been above complaining that its fair share of the Commonwealth Grants Commission pie is being consumed by the less populous states, including Queensland. These tensions have been particularly visible in recent times in relation to the distribution of the GST revenue.

The Hon. Michael Atkinson, Attorney-General of South Australia, said on the occasion of the appointment of Justice Heydon to the High Court, 'there's anxiety in South Australia ... that all Federal governments are centralising and the High Court seems to accommodate that centralisation, and if there were some High Court Justices from the smaller States, perhaps a cen-

tion, while the US Supreme Court Justices are appointed by a nomination and Senate confirmation procedure. There is no election of judges in the US federal judiciary.

It is easy to point to the disadvantages of the popular election of judges. Judicial appointments would be grossly politicized. Judges would, in effect, be the elected representatives of their electorates.

Slightly less unpalatable is the legislative election model, seen in some European countries, including Switzerland and Germany, and in the European Court of Human Rights and the International Court of Justice. The election by the legislature of High Court Justices to hold tenure would remove the process from the clutches of fickle voters, only to deliver it into the cauldron of partisan politics. There would remain concerns about Justices representing their supporters, and candidates might be tempted to court nomination by pandering to a party's political agenda.

The antithesis of the election of judges is the career judiciary, seen in civil law jurisdictions including France and Italy. Judges are trained

as a separate branch of the profession and progress through the ranks of the judiciary through their careers. While it is true that some Australian magistrates and judges have been elevated to the bench from the ranks of the courts' administration, it cannot be said that there is a tradition of a career judiciary in Australia. Judicial officers are drawn from the Bar, law firms and academia. A career judiciary would not be suited to the Australian experience, nor would such a proposal be likely to receive support from a legal profession that accepts that judicial officers will be drawn from its ranks.

Another option would be the creation of a system in which the States and Territories play a substantive rather than ceremonial role in the appointment process. A rotating system of appointments by the States and Territories would certainly remedy concerns about the centralizing of the Court, but at the expense of the integrity of the Court. Considering a proposal of this nature, Sir Edmund Barton argued that such a Court would create 'a suspicion that the Chief Justices chosen from the various states were intended to be in some sort of way the representatives of provincial interests'.

The United States Supreme Court appointment process, which provides for nomination by the President and the advice and consent of the Senate, has a number of merits. The Senate Judiciary Committee conducts hearings which allow for the public examination of the credentials of the nominee and her/his fitness for judicial office. The accountability of the Executive is thus enhanced and the process allows for considerable transparency.

Needless to say, the process is political and can result in vicious battles, pulling the Court down into the political mire. One risk of Senate-confirmable judicial appointments is that the appointments might be used as bargaining chips in a trade-off in which

the Court fails to secure the services of the most qualified candidate in a triumph of palatably partisan mediocrity.

The Court's richness and its great capacity for dissent should not be limited by politicizing the process.

A judicial appointments commission

Did the drafters of the Constitution intend to give the Government *carte blanche* when appointing the Justices of the High Court? It seems so. Does the Court benefit from counting among its numbers brilliant jurists of diverse experience? Unquestionably. Would the Court benefit from a broader consultative process? Undoubtedly.

The Government of the day should be able to appoint its nominee to the bench, but the process would be improved by greater transparency, the development of criteria to define the concept of 'merit' and the formalization of the process to ensure that the Attorney-General's inquiries are sufficiently broad and appropriate.

Various countries, including the United Kingdom, New Zealand, Canada and India, have adopted various judicial appointment commission models. The British Secretary of State for Constitutional Affairs said of a proposal for the Judicial Appointments Commission,

In a modern democratic society it is no longer acceptable for judicial appointments to be entirely in the hands of a Government Minister... The appointments system must be, and must be seen to be, independent of Government. It must be transparent. It must be accountable. And it must inspire public confidence.

Judicial appointment commissions are seen as improving the judicial appointment procedure which is significant in terms of public confidence in the process and thus in the judiciary itself. The establishment of a High Court

Judicial Appointment Commission would address the flaws in the appointment process and enhance the process of making appointments to the High Court.

The benefits of a judicial appointment commission for the High Court would be numerous. The brief of such a commission might be to undertake consultation, identify potential candidates, research and interview candidates, receive submissions, assess candidates against defined selection criteria and make recommendations to the Attorney-General. Such a model would not require constitutional amendment, as the commission's role would be advisory and not determinative.

The members of the commission would ideally be drawn from the Federal and State judiciaries, the profession, academia and the legislature (including representatives of the Government, the Opposition and significant minor parties).

The formalization of the selection criteria and the process of consultation would allow relevant secondary considerations, such as the State or Territory of residence and practice of a candidate for High Court appointment, to be taken into account. The transparency and formality of such a process would allow for greater confidence in the process and in the High Court which, after all, is the High Court of Australia, not the 'High Court of Sydney and Melbourne'.

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