

A Comparative Study of Judicial Appointments to the High Court of Australia and the United States' Supreme Court

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Abstract

The capabilities of ultimate appellate courts in performing its constitutional functions, administering laws and protecting citizens' rights are heavily influenced by how members of the judiciary are selected. This essay discusses the different procedures in which judges are currently appointed to the High Court of Australia and the Supreme Court of the United States. It then takes a comparative approach by examining the criticisms surrounding these judicial appointments, concluding that the Australian judicial appointment system better supports the principal public law values of judicial independence, the separation of powers and the rule of law.

I. Introduction

The High Court of Australia and the Supreme Court of the United States have important functions in regulating the federal distribution of powers and acting as 'Constitutional guardians'.¹ Both courts also exercise their powers as ultimate appellate courts to safeguard liberal rights and to protect their citizens from arbitrary governmental powers under the rule of law.² The quality of these courts is underpinned by the 'impartiality, integrity, and independence' of the judges, which depends largely on the framework of judicial appointments.³

This paper argues that Australia should not adopt a similar mechanism to that used in the Supreme Court of the United States, where the Senate must confirm judicial appointments. In theory, the United States' model is more transparent and upholds the doctrines of separation of powers by allowing the legislature to act as a check on the executive. However, Senate confirmations are problematic in practice due to their over-politicised nature, which impairs judicial independence and is likely to undermine public confidence in the legal system. Section one will examine the current appointment processes in Australia and the United

¹ Max Spry, 'Executive and High Court Appointments' (Research Paper No 7, Parliamentary Library of Australia, 2000) 13.

² Michael Lavarch, 'The Appointment of Judges' (1994) 2 *Australian Law Librarian* 331.

³ Sarkar Ali Akkas, 'Appointment of Judges: A Key Issue of Judicial Independence' (2004) 16 *Bond Law Review* 200–3.

States. Section two will take a comparative approach by evaluating the criticisms surrounding the role of the executive and the legislature in judicial appointments and their effects on the principles of Australian public law. This paper will then conclude by recommending viable alternatives to Australia's current appointment process.

II. Current Appointment Processes in Australia and the United States

There are significant differences between judicial appointment processes in the United States and Australia, particularly with the involvement of the legislature and the executive.⁴ In Australia, the executive government makes judicial appointments.⁵ Before a High Court appointment, there is a statutory requirement for the federal Attorney-General to consult with his or her state counterparts in order to recommend suitable candidates to the executive government.⁶ The federal Attorney-General may also informally consult professional legal bodies, serving and former judges, politicians, and relevant community groups.⁷ Once the consultation process is completed, the selected candidates are then 'appointed by the Governor-General in Council' as required by section 72(i) of the Constitution.⁸ While the Constitution does not prescribe any requisite qualifications for appointment, section 6 of the High Court of Australia Act 1979 (Cth) requires that candidates must have served as a legal practitioner for at least five years.⁹ Former Attorney-General Philip Ruddock also stated that appointments are based on 'merit'.¹⁰

By contrast, the appointment of judges to the United States' Supreme Court is more transparent and consultative, as it involves both the executive and the legislature.¹¹ In Article II, section 2, clause 2 of the United States' Constitution, the President appoints members of the judiciary 'by and with the advice and consent of the Senate'.¹² This means that once a President nominates a person, that person then participates in a confirmation hearing conducted by the Senate

⁴ Michael Kirby, 'The High Court of Australia and the Supreme Court of the United States – A Centenary Reflection' (2003) 31 *University of Western Australia Law Review* 171–3.

⁵ *A-G (NSW) v Quin* (1990) 170 CLR 1, 18 (Mason CJ).

⁶ *High Court of Australia Act 1979* (Cth) § 6.

⁷ Rachel Davis and George Williams, 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia' (2003) 27 *Melbourne University Law Review*, 819–20.

⁸ *Australian Constitution* s 72(i).

⁹ Above n 6, s 7.

¹⁰ Simon Evans and John Williams, 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 295–7.

¹¹ Daryl Williams, 'Judicial Independence and the High Court' (1998) 27 *University of Western Australia Law Review* 140–6.

¹² *United States Constitution* art II, § 2, cl 2.

Judiciary Committee for further investigation and scrutiny.¹³ The full Senate then decides whether to confirm or reject the nomination.¹⁴ The criteria for accepting or rejecting presidential appointments are often based on professional qualifications, integrity, political and ideological considerations, and position on specific legal controversies.¹⁵

III. Critiques of Senate Confirmations

Daryl Williams and many other legal scholars note that the current system of appointment in Australia 'has served the nation well' and its standards are as high as any other equivalent common law court.¹⁶ Nevertheless, the High Court's appointment system has faced numerous reform proposals and scrutiny since the early 1990s.¹⁷ Arguably, if Australia adopts a similar mechanism to Senate confirmations, the public law principles of judicial independence and impartiality, the separation of powers and public confidence under the rule of law would be better served.¹⁸ However, the United States' appointment system is problematic because the possibility of over-politicisation by the Senate means these values may not be adequately protected.¹⁹ Such views emphasise the inadequacy of Senate Confirmations and express the need for Australia to adopt other viable alternatives.

A. *Judicial Independence and Impartiality*

In *Attorney-General for the Commonwealth v The Queen; Ex parte Boilermakers' Society of Australia*, the Privy Council held that the judiciary has a constitutional guarantee of their independence.²⁰ All judicial selection systems involve political considerations to varying degrees, as they often depend on the other branches of government to appoint judges.²¹ Yet, it is crucial that judicial appointments are protected from governmental manipulation and bias as explained in *Mistretta v United States*:

¹³ Joel Grossman and Stephen Wasby, 'The Senate and Supreme Court Nominations: Some Reflections' (1972) *Duke Law Journal* 557–63.

¹⁴ Albert Melone, 'The Senate's confirmation role in Supreme Court nominations and the politics of ideology versus impartiality' (1991) *75 Judicature* 68–70.

¹⁵ *Ibid.*

¹⁶ Williams, above n 11, 146.

¹⁷ Kate Malleson and Peter Russell, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press, 2006) 122.

¹⁸ Michael Barker, 'On Being a Chapter III Judge' (2010) *35 University of Western Australia Law Review* 1–16.

¹⁹ Williams, above n 11, 146.

²⁰ 1957 95 CLR 529–40.

²¹ Peter Webster, 'Selection and Retention of Judges: Is There One "Best" Method?' (1995) *23 Florida State University Law Review* 1–10.

The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colours of judicial action. footnote(1989) 488 US 361–407.

A significant issue with Senate confirmations is it may reduce the judiciary's impartiality and independence through political bias towards the legislative.²² While judges are required to be as objective as possible when applying the law, true judicial independence and impartiality depend on the composition of the bench as selected by the other government branches.²³ Some may argue that political appointments in Australia have been common even without involving the legislature, as seen by the appointment of several former politicians. However, the High Court has not had a politician-judge since 1975.²⁴ According to Lemieux and Stewart, around 88% of Supreme Court candidates were confirmed by Senates under the president's party, while opposition Senates have only confirmed 59% of candidates.²⁵ Although this survey is outdated, these trends indicate that a potential exists for judges to be selected based on the government's own interests such as ideological compatibility, party affiliation, and financial contributions.²⁶ These factors have little to do with professional ability or legal knowledge and they do not result in the appointments of the most qualified or meritorious candidates.²⁷

A diverse bench is also important in maintaining judicial impartiality as it ensures that legal decisions are not influenced by a particular legal, political, or ideological perspective.²⁸ The Attorney-General's Department, for example, have included 'fair reflection' as a criteria for selecting judges to ensure that all parts of society are 'not unfairly under-represented in the judiciary'.²⁹ However, political bias found in Senate confirmations may lead to a partial and homogenous bench if the Senate decides to alter the direction of the court to make particular decisions.³⁰ This may undermine the integrity of the court, especially when judicial decision-making

²² Rebecca Gill, 'Beyond High Hopes and Unmet Expectations: Judicial Selection Reforms in the States' (2013) 96 *Judicature* 278.

²³ Gabrielle Appleby, 'Appointing Australia's highest judges deserves proper scrutiny' (9 December 2014, The Conversation) <<http://theconversation.com/appointing-australias-highest-judges-deserves-proper-scrutiny-35039>>.

²⁴ Appleby, above n 24.

²⁵ Peter Lemieux and Charles Stewart, 'Senate Confirmations of Supreme Court Nominations from Washington to Reagan' (Working Paper, Hoover Institution, 1990).

²⁶ Bryan Williams, 'Say "No" to Senate Confirmation of Supreme Court of Canada Appointments' (1992) 50 *Vancouver Bar Association* 207.

²⁷ Melone, above n 14, 70.

²⁸ Williams, above n 11, 154.

²⁹ Malleon and Russell, above n 17, 141.

³⁰ Lemieux and Stewart, above n 26, 2.

can shape the outcome of constitutional issues and highly controversial cases.³¹ Australia should not adopt a similar mechanism to Senate confirmations because it is inadequate for ensuring judicial independence and impartiality.

B. *The Separation of Powers*

The United States' Supreme Court and the High Court of Australia are part of the judiciary, which is one of three co-equal branches of government along with the legislature and the executive. This division is known as the separation of powers.³² Under this principle, the three government branches have defined powers and responsibilities to avoid any distortion of power and to provide checks and balances on each other.³³

Australia's appointment system has generated great concern because it is now uncommon for the power of judicial appointments to be vested in the executive only.³⁴ Several legal scholars have criticised this lack of parliamentary supervision, as it allows the executive to have unfettered discretion in the appointment of judges to Australia's highest court.³⁵ Without enough legal safeguards, the separation of powers may be breached if the executive misuses the power of appointment to intervene in the judicial branch.³⁶ Bryan Williams asserts that this risk is unlikely to occur in the United States because there is a legislative control upon the executive through Senate confirmations.³⁷ However, very few judges and politicians in Australia favour this approach due to the strong 'ideological and partisan' nature of the Senate.³⁸ Former Chief Justice Anthony Mason expressed a strong opposition to Senate confirmations, stating that it serves 'little or no purpose apart from occasionally providing a media spectacle and continuously politicising the appointment process'.³⁹ Australia does not have a complete separation of powers like the United States because some of the roles of the government overlap.⁴⁰ There is already a simultaneous check on executive power as the Attorney-General is considered a politician and the Governor-General, who

³¹ Appleby, above n 24.

³² Parliamentary Education Office, *Separation of Powers: Parliament, Executive and Judiciary* <<http://www.peo.gov.au/learning/fact-sheets/separation-of-powers.html>>.

³³ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 10–11.

³⁴ British Institute of International and Comparative Law, 'The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice' (2015, The Commonwealth).

³⁵ Williams, above n 11, 146.

³⁶ British Institute of International and Comparative Law, above n 35, 24.

³⁷ Williams, above n 27, 207.

³⁸ David Strauss, 'The Senate, the Constitution, and the Confirmation Process' (1992) 101 *Yale Law Journal* 1491–4.

³⁹ Anthony Mason, 'The Appointment and Removal of Judges' in Cunningham H (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Judicial Commission of New South Wales, 1997).

⁴⁰ Parliamentary Education Office, above n 33.

ultimately appoints judges to the High Court, is part of the legislature and the executive.⁴¹

C. *Rule of Law: Transparency and Public Confidence*

Judicial appointment methods can significantly affect public confidence in the judiciary, which is an essential factor in upholding the rule of law.⁴² Because legal decisions can have far-reaching consequences on people's lives, judges are expected to be politically neutral. Thus, it is important that the judiciary is independent from the other political branches and that appointment mechanisms are transparent and open to public scrutiny.⁴³ However, unlike many other common law countries, Australia's High Court appointments are secretive. In 2012, the Attorney-General's Department published a report explaining that many High Court candidates are from the serving judiciary and are already known to the government. Thus, there is no need to make the appointment criteria and the pool of candidates available to the public.⁴⁴ This is a major limitation of the Australian system, as it is difficult for the public to be confident in a legal system where the appointment of judges is unknown and possible bias can be concealed.⁴⁵

Defenders of the United States' system argue that Senate confirmations provide greater transparency because the selection criteria and confirmation hearings are open to the public.⁴⁶ However, while there is merit in this argument, Sir Anthony states that confirmation hearings tell very little about the candidates and their judicial philosophy that were not previously known to the public.⁴⁷ This is because senators tend to spend more time delivering speeches, rather than examining a candidate's qualifications.⁴⁸ Moreover, Supreme Court appointments are still largely based on political considerations and ideological leanings rather than qualifications, despite established selection criteria. This is because the criteria of a meritorious judge in the United States' are broadly defined and can still be interpreted subjectively by the Senate.⁴⁹

⁴¹ Parliament of Australia, 'Infosheet 20 – The Australian system of government' (February 2014, Parliament of Australia) <http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government>.

⁴² British Institute of International and Comparative Law, above n 35, 20.

⁴³ Akkas, above n 3, 203.

⁴⁴ Federal Courts Branch, 'Judicial Appointments' (Attorney-General's Department (Cth), September 2012) 3.

⁴⁵ George Williams, 'High Court Appointments: The Need for Reform' (2008) 30 *Sydney Law Review* 163–68.

⁴⁶ Williams, above n 27, 207.

⁴⁷ Mason, above n 40.

⁴⁸ Norman Dorsen, 'The selection of U.S. Supreme Court justices' (2006) 4 *International Journal of Constitutional Law* 653–61.

⁴⁹ Webster, above n 21, 13.

IV. A Viable Alternative

The appointment of federal judges should remain with the government to avoid constitutional amendments, which are difficult to pass, but also because the appointment of judges is an exercise of public power.⁵⁰ Senate confirmations may allow appointments to be more transparent and publicly understood, as well as to regulate the executive. However, legal commentators suggest that Australia would benefit more by establishing an advisory panel or a judicial nomination committee with criteria and assessment processes that meet democratic standards.⁵¹ In 2008, McClelland suggested a new approach where the executive must comply with broader consultation, publish selection criteria for the public, advertise appointments, and create advisory panels to consider nominations.⁵² These procedures have been highly successful in other common law countries like Canada, New Zealand, and the United Kingdom.⁵³ These processes are also more likely to improve the quality of the High Court bench by ensuring the selection of the most qualified candidates and removing perceptions of the judiciary as a political decision-maker.⁵⁴

V. Conclusion

While the overall strength and quality of the judiciary have been widely recognised in Australia, the current system for selecting High Court judges is facing numerous reform proposals and public scrutiny. This is because judicial appointments are vested exclusively in the executive without any checks provided by the legislature. However, this paper demonstrates that a similar mechanism to Senate confirmations in the current American system should not be adopted in Australia. The judiciary in the United States' is more prone to political influence by the legislature. It appears that the system's disadvantages far outweigh any potential advantages. This is because an appointment system that politicises the judicial bench is inconsistent with the separation of powers and does not reflect the legal interests of the Australian community. A viable alternative is that the power of appointing Justices of the High Court remains with the executive, with the establishment of an independent advisory body to advise the executive by applying known criteria. This will safeguard the independence and impartiality of the High Court, allowing it to adequately perform its constitutional functions and to safeguard individuals from arbitrary powers of government.

⁵⁰ Barker, above n 18, 14.

⁵¹ Elizabeth Handsley and Andrew Lynch, 'Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008–13' *Sydney Law Review* (2015) 37 *Sydney Law Review* 187–94.

⁵² Appleby, above n 24.

⁵³ Williams, above n 46.

⁵⁴ Gary Simson, 'Taking the Court Seriously: A Proposed Approach to Senate Confirmation of Supreme Court Nominees' (1990) 7 *Constitutional Commentary* 283–321.

References

- Akkas, Sarkar Ali, 'Appointment of Judges: A Key Issue of Judicial Independence' (2004) 16 *Bond Law Review* 200–3
- Appleby, Gabrielle, 'Appointing Australia's highest judges deserves proper scrutiny' (9 December 2014, The Conversation) <<http://theconversation.com/appointing-australias-highest-judges-deserves-proper-scrutiny-35039>>
- Attorney-General (NSW) v Quin* (1990) 170 CLR 1
- Attorney-General for the Commonwealth v The Queen; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529
- Australian Constitution Act 1900* (UK)
- British Institute of International and Comparative Law, 'The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice' (2015, The Commonwealth)
- Davis, Rachel and George Williams, 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia' (2003) 27 *Melbourne University Law Review* 819–20
- Dorsen, Norman, 'The selection of U.S. Supreme Court justices' (2006) 4 *International Journal of Constitutional Law* 653–61
- Evans, Simon and John Williams, 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 295–7
- Federal Courts Branch, 'Judicial Appointments' (Attorney-General's Department (Cth, September 2012) 3
- Gill, Rebecca, 'Beyond High Hopes and Unmet Expectations: Judicial Selection Reforms in the States' (2013) 96 *Judicature* 278
- Grossman, Joel and Stephen Wasby, 'The Senate and Supreme Court Nominations: Some Reflections' [1972] *Duke Law Journal* 557–63
- Handsley, Elizabeth and Andrew Lynch, 'Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008–13' *Sydney Law Review* (2015) 37 *Sydney Law Review* 187
- High Court of Australia Act 1979* (Cth)
- Kendall, Christopher, 'Appointing Judges: Australian Judicial Reform Proposals in the Light of Recent North American Experience' [1997] *Bond Law Review* 175
- Kirby, Michael, 'The High Court of Australia and the Supreme Court of the United States – A Centenary Reflection' (2003) 31 *University of Western Australia Law Review* 171–3
- Lavarch, Michael, 'The Appointment of Judges' (1994) 2 *Australian Law Librarian* 331
- Lemieux, Peter and Charles Stewart, 'Senate Confirmations of Supreme Court Nominations from Washington to Reagan' (Working Paper, Hoover Institution, 1990) 2

Malleson, Kate and Peter Russell, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press, 2006) 122, 141

Mason, Anthony, 'The Appointment and Removal of Judges' in Cunningham H (ed, *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Judicial Commission of New South Wales, 1997

Melone, Albert, 'The Senate's confirmation role in Supreme Court nominations and the politics of ideology versus impartiality' (1991) 75 *Judicature* 488

Mistretta v United States (1989) 488 US 361–407

Parliament of Australia, 'Infosheet 20 – The Australian system of government' (February 2014, Parliament of Australia) <http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government>

Simson, Gary, 'Taking the Court Seriously: A Proposed Approach to Senate Confirmation of Supreme Court Nominees' (1990) 7 *Constitutional Commentary* 283

Spry, Max, 'Executive and High Court Appointments' (Research Paper No 7, Parliamentary Library, Parliament of Australia, 2000) 13

Strauss, David, 'The Senate, the Constitution, and the Confirmation Process' (1992) 101 *Yale Law Journal* 1491–4

United States Constitution

Webster, Peter, 'Selection and Retention of Judges: Is There One "Best" Method?' (1995) 23 *Florida State University Law Review* 1–10, 13

Williams, Bryan, 'Say "No" to Senate Confirmation of Supreme Court of Canada Appointments' (1992) 50 *Vancouver Bar Association* 207

Williams, Daryl, 'Judicial Independence and the High Court' (1998) 27 *University of Western Australia Law Review* 140–6, 154

Williams, George, 'High Court Appointments: The Need for Reform' (2008) 30 *Sydney Law Review* 163

Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1