Appointments and disappointments:

The High Court and the US Supreme Court over the last century

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Justices of the High Court are formally appointed by the governor-general on the advice of the Executive Council. This means in practice that the appointments are made by the Cabinet. It would be normal for the attorney-general to make a recommendation to the Cabinet but, in the case of appointments to the High Court and, no doubt, some other significant public offices, this recommendation may not always be accepted. It would appear that on at least some occasions in recent years it has not been.

Over the last three decades all appointments to the High Court have been persons who have spent their entire professional life at the Bar and/or on the bench. In earlier years, however, quite a number of the court's members had broader experiences of public life – somewhat akin to the more varied backgrounds of justices of the United States Supreme Court.

The first five justices of the High Court were all former politicians. When the court assembled for the first time on 6 October 1903 it had three members only – Sir Samuel Griffith, a former premier and then chief justice of Queensland; Edmund Barton, first prime minister; and Richard O'Connor, a senator and also a minister in the first Commonwealth parliament. In 1906 the court was made up to five members with the appointments of Isaac Isaacs, then the Commonwealth attorney-general, and Henry Bourne Higgins, a former Commonwealth attorney-general. All of these five judges had been active in the conventions of the 1890s that produced the Constitution. There was no love lost between some members of the court. Barton wrote to Griffith about Isaacs and Higgins: 'You will see how little decency there is about these two men. All the same, I think they hate each other, although they conspire.'

The first real controversy over an appointment to the court took place in 1912 when O'Connor died. A B Piddington, a Sydney barrister and non-Labor member of the NSW Parliament, was appointed after being questioned by the Commonwealth attorney-general – W M Hughes – about his views as to questions of Commonwealth and state powers. Meetings of barristers in Sydney and Melbourne condemned the appointment and Piddington resigned without ever sitting. He was replaced by a Melbourne barrister, Frank Gavin Duffy, and two further appointments to make the bench up to seven – Charles Powers, the Commonwealth crown solicitor (the only person not a member of the Bar ever appointed) and George Rich, a Sydney barrister.

The next major controversy came in 1930 and was precipitated by the resignation in 1929 of Chief Justice Adrian Knox and Justice Powers. At the federal election late in 1929 the Scullin government took office. Isaacs was appointed chief justice but soon afterwards was appointed governor-general. Gavin Duffy, although 78 years old, became chief justice. This still left two vacancies but Scullin and his attorney-general, Frank Brennan, decided that they should not be filled for the time being. These two then set sail for London where they were to have a series of meetings with British officials. In their absence the Cabinet proposed to fill the two vacancies. Scullin and Brennan sent cables telling them not to do so. They were ignored. The two appointments were Herbert Vere Evatt, 36 years old, who had been a Labor back-bencher in the NSW Parliament in the 1920s and Edward McTiernan, 38 years old, who had been NSW attorney-general in the 1920s and was at this time a Labor member of the House of Representatives. There was a storm of criticism from the Opposition, and from some sections of the press and the legal profession but both appointees took their seats on the court.

In 1935 Gavin Duffy resigned as chief justice and his place was taken by Sir John Latham, who had left the Commonwealth Parliament the year before and who had been Opposition leader there in the early 1930s. In 1940 the mercurial Evatt reversed this exercise when he stepped down from the court and stood successfully for a seat in the House of Representatives and became – shortly afterwards – attorney-general and minister for external affairs in the Curtin and Chifley governments. Evatt returned to the court as counsel to argue the bank nationalisation case in 1948 – and again in the Privy Council in 1949 – a case that resulted in 35 days of argument in the Privy Council but a judgment of only 31 pages in the law reports.

There were a number of resignations from the court in the early 1950s – Hayden Starke, who was 78, and Rich who was 87. They were replaced by Wilfred Fullagar from the Melbourne bar and Frank Kitto from the Sydney Bar. In 1952 Latham stepped down and was replaced by Sir Owen Dixon, who had been on the court since 1929. His vacancy on the court was filled by Alan Taylor of the Sydney Bar.

Over the next 50 years all appointments to the court – with two exceptions – have been members of the Bar and/or the bench for almost all of their professional life – and almost all of those from the Bar and Bench in Sydney or Melbourne. There have been two Western Australians – Wilson and Toohey – and three Queenslanders – Gibbs, Brennan and Callinan. The two exceptions were Sir Garfield Barwick and Lionel Murphy. Barwick was minister for external affairs when he was appointed chief justice in 1964, although he had previously been attorney-general and had come to politics relatively late after a hugely successful career at the Sydney Bar. Murphy was Commonwealth attorney-general at the time of his appointment in early 1975 and had a lengthy career at the Sydney Bar. He had, however, been a highly controversial

character in the Whitlam government and a meeting of Victorian barristers was specially convened to consider a motion expressing regret at this appointment on the basis that he was not 'pre-imminent within the legal profession' and that his fitness for office was 'a matter of public controversy.' The motion was lost by 188 votes to 64. When Barwick's advice to Sir John Kerr in November 1975 was made public, Murphy wrote to Barwick – who was sitting just down the corridor presumably – to say: 'I disassociate myself completely from your action in advising the governor-general and from the advice you gave.' Barwick responded, also in writing:

> I note your remarks. I fundamentally disagree with them, both as to any legal opinion they involve and as to any matter of the propriety of my conduct. I see no need to discuss with you either question.

The current court seems a more peaceful place. It is to be joined by Justice Crennan, who, except for the fact that she is only the second woman appointed to the court, essentially matches the background and profile of the other members of the court and almost all of the appointments made over the last fifty years.

Although welcomed as a good appointment, there have been some criticisms of the process by which it occurred. Some commentators have proposed a committee of commission that would make recommendations to the government. Such a proposal was first made by Sir Garfield Barwick in 1977, perhaps as a response to the Murphy appointment. But, as already suggested, an analysis of the appointments over the last half century strongly suggest that there would have been very little, if any, difference if these had been filtered through a commission. As it is, of course, the Australian Government receives formal recommendations from the states and informal recommendations from the various legal professional bodies.

In the case of the US Supreme Court, Article 2, Section 2 of the Constitution provides that the president 'shall nominate, and by and with the advice and consent of the Senate, shall appoint …judges of the Supreme Court.' In the first century of the republic this power of rejection was frequently used. The first nominee was rejected in 1795 when John Rutledge was nominated to succeed the first chief justice, John Jay. The Reconstruction period following the Civil War was particularly stormy. During the presidency of Ulysses S Grant – 1868-1876 – one nominee was voted down and three nominees – two of them for chief justice – were forced to withdraw their nominations.

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Over the twentieth century there were relatively few rejections, although some extremely hard fought contests. The first appointment of the century – which did not involve a contest – was that of Oliver Wendell Holmes, who was nominated by President Theodore Roosevelt in 1902. He was to remain on the court for thirty years. The first great contest came in 1916 when President Woodrow Wilson nominated Louis Brandeis, a Boston attorney who had introduced social and economic issues into constitutional cases before the court. The American Bar Association bitterly opposed the nomination but Brandeis was confirmed by a vote of 47-22 in the Senate. It was also in 1916 that Justice Charles Evatt Hughes stepped down from the court to run against Wilson as the republican candidate in the presidential election. He lost very narrowly and then returned to the court in 1930 as chief justice. His predecessor as chief justice was William Taft – the only person to have held the offices of president (1908-1912) and chief justice (1921-1930). And, most importantly of all, he had also been solicitor general!

The first nominee in the twentieth century to be rejected was John Parker, a federal judge from North Carolina who was rejected by 41-39 votes in 1930 after a strong campaign by labor and minority groups who were opposed to his judicial record. A number of the court's great names were appointed in the 1930s, including Benjamin Cardozo, Felix Frankfurter and William O Douglas who was to become the court's longest serving judge. Frankfurter was only the second nominee who was requested to appear and testify before the Senate Judiciary Committee. Since 1955, however, all nominees have appeared and testified before the Judiciary Committee.

It was also in the 1930s – in 1937 – that President Roosevelt put forward a radical plan to shift the balance of power on the court. He asked Congress for power to name an additional justice for each of those over 70 who did not resign – up to a court of 15 judges. At this time six justices were over 70. The proposal stalled in Congress – one of Roosevelt's rare failures to achieve a publicly-announced goal. But over the next four years seven members of the court were replaced so Roosevelt had the most complete opportunity to change the complexion of the court of any president.

It was Frankfurter who gave some evidence – not publicly, of course, at the time – of the tensions that are bound to exist between some members of a court. When Chief Justice Fred Vinson died in 1953 – shortly before the continuation of

argument in *Brown v Board of Education* – Frankfurter, who was an agnostic, said: 'This is the first indication I have ever seen that there is a God.' Vinson was replaced by Earl Warren, who had been governor of California in the 1940s and the vice-presidential candidate on the Republican's losing ticket in 1948.

It was 38 years since the last Senate rejection when President Lyndon Johnson nominated Abe Fortas, who was already an associate justice of the court, to succeed Warren in 1968. By this time, however, Johnson had said that he was not standing for re-election in the presidential election scheduled for November of that year. Fortas was known to be extremely close personally to Johnson and his financial affairs were, while legal, rather convoluted. The Republican senators launched a filibuster and, when it became clear that the debate could not be ended, Fortas asked Johnson to withdraw his nomination. As a result, the Johnson administration did not get to fill the vacancy for chief justice and this was done by the new Nixon administration in the form of Warren Burger, who was to remain in that position for seventeen years.

Then came, however, two rejections in rapid succession. In 1969 Nixon nominated Clement Haynsworth, a South Carolina appeals court judge. In the wake of the Fortas debate, the Democrats in the Senate opposed the nomination on the basis of financial conflicts of interest. There was also strong opposition from labour and civil rights organisations. The nomination was finally rejected by a vote of 55-45. Nixon then nominated a Florida appeals court judge, Harrold Carswell, but he too was rejected by a vote of 51-45, largely on the basis of his undistinguished record. Nixon's third choice – a Minnesotan appeals court judge, Harry Blackmun – was then unanimously approved by the Senate.

Although Warren Berger had been appointed by Nixon, he presided over what was still largely the Warren court. He was one of three dissenters in the Pentagon papers case in 1971 when the court refused to injunct publication by the *New York Times in the Washington Post* of internal government documents concerning the Vietnam War. He joined, however, in a unanimous opinion of the court in 1974 upholding a federal court subpoena to President Nixon to produce the Watergate tapes, which precipitated Nixon's resignation two weeks later. In 1973 the court decided a case that is still the subject of intense political controversy – *Roe v Wade* which held that, for at least the first three months of pregnancy, any decision on abortion cannot be regulated by state law.

In 1986 William Rehnquist, who had been appointed to the court in 1971, was confirmed as chief justice. The following years, however, there was a spectacular contest over the nomination of Robert Bork. Bork was at that time a federal appeals court judge and had been a prominent academic lawyer. He was, however, best known for his role in the so-called Saturday night massacre in 1973. Archibald Cox, who had been solicitor general in the Kennedy administration and who probably would have joined the court if Kennedy had lived, had been appointed as the special prosecutor in the Watergate case. Nixon proposed to dismiss him and asked Attorney General Elliot Richardson, to do so. Richardson refused and resigned. Deputy Attorney General William Ruckelshause also refused and resigned. Then Bork, as solicitor general, accepted the order and dismissed Cox. This was what really cost Bork a place on the Supreme Court. His nomination was rejected by a vote of 58-42.

The nomination of Clarence Thomas by President George Bush Snr in 1991 was also the subject of a fierce conflict in the Senate but the nomination was ultimately confirmed, although very narrowly by a vote of 52-48. As everyone will be aware, John Roberts was confirmed as chief justice a little over a month ago. The nomination of Harriet Miers to fill the vacancy created by the resignation of Justice O'Connor was withdrawn without being voted on by the Senate. In place of that nomination, President Bush has sent to the Senate the name of Judge Samuel Alito, who has been for some years a member of the Federal Appeals Court for the 3rd Circuit, which is based in Philadelphia.

It is evident that the last three decades of the twentieth century have produced some of the most widely publicised and acrimonious confirmation hearings in the court's history. This is to some extent caused by the realisation that the Bill of Rights means that many of the questions before the court are essentially political ones and that the judges can therefore have a significant political impact through their decisions. This point was underlined by the role of the court in effectively determining the result of the 2000 election by a vote of 5-4 along party lines.

There is an on-going debate in Australia about the merits of a Bill of Rights at the federal level but one factor – it is only one factor – to be taken into account is the long-term consequences of involving the judiciary in what are basically political controversies. This may have an effect not only on how judges are appointed but also on how they are regarded by the general community.

Photo: Courtesy of the High Court