Judicial Legitimacy

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In August of this year, an important report of the Australian Law Reform Commission was tabled in the Commonwealth Parliament.[1] The short title of the report is *Without Fear of Favour*.[2] The Law Reform Commission had been asked to consider the law concerning disqualification for judicial bias. It seized the opportunity to examine that assigned topic within the broader context of the structures and practices which together contribute to the quality and integrity of the performance of the judicial function. The report is well researched. Its recommendations are well considered.

Drawing on the analytical framework set out in the report, I want to distinguish four concepts which have often been merged: judicial independence, judicial competence, judicial impartiality, and judicial legitimacy.

"Judicial independence" I take to mean that measure of protection from external influence which needs to exist if a competent and impartial judiciary is to do its job of deciding controversies according to law without fear or favour. Judicial independence is not an end in itself. It is a means to promote competent and impartial decision-making.

"Judicial legitimacy" I take to mean that level of public confidence which needs to exist for a competent and impartial judiciary to do its job of deciding controversies according to law without fear or favour. Judicial legitimacy depends on the public maintaining a level of confidence that controversies will in fact be so decided. It depends on the public understanding, and respecting, the distinctiveness of the judicial function. It depends on the judiciary being able to draw on what has been described as "a reservoir of goodwill"[3] that runs deeper than the outcome of the judicial resolution of the politically charged controversy of the moment.

"Judicial competence" and "judicial impartiality" are not so clear cut. An important point to be taken from the analysis in the report is that competence and impartiality are not binary states. Each is a matter of degree. Each is a continuum. There will be a range of competences and a range of philosophies or ideologies that will be incompatible with the proper exercise of the judicial function. There will nevertheless be a line beyond which incompetence or partisanship, or the perception of incompetence or partisanship, will call judicial legitimacy into question. My own perception is that that line will be crossed by a court as an institution well before it is crossed by an individual judge. By that I mean that incompetence or partisanship on the part of one or more of its judges will tend to weaken the reputation and authority of a court well before it might be thought so extreme as to give rise to a ground for disqualification.

Much of this conference is devoted to judicial independence. Nothing I say is meant to diminish the importance of that topic. Numerous and diverse threats to judicial independence are being played out throughout the world as we speak. They range from the thuggish and brutal to the subtle and insidious.

Especially disturbing to me has been a report published four months ago by a group of members of the House of Commons and the House of Lords styling themselves as an "All Party Parliamentary Group on Democracy and the Constitution".[4] The Group examined what it saw as the impact of actions and rhetoric of the Executive on the constitutional role of the judiciary in the United Kingdom. The Group

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[1] Tabled in the House of Representatives on 2 August 2022.

[2] Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias*, Report No 138 (December 2021).

[3] Shiri Krebs, Ingrid Nielsen and Russell Smyth, "What Determines the Institutional Legitimacy of the High Court of Australia?" (2020) 43(2) *Melbourne University Law Review* 605, 607.

[4] All Party Parliamentary Group on Democracy and the Constitution, *An Independent Judiciary – Challenges since 2016* (8 June 2022).

identified in the report seven out of 40 public law decisions in the previous 18 months in which it was said that the Supreme Court of the United Kingdom had departed from previous authority, had assumed a position more palatable to the Executive, and had in some cases even adopted language similar to that used in executive political talking points.

The Group hedged the report with qualifications. It was careful to record that correlation does not necessarily equate to causation and that it was not stating a firm conclusion. But it did not hold back from expressing the conclusion that executive attacks on the judiciary may have created the impression that the Supreme Court had been influenced by ministerial pressure.

Whether that conclusion is objectively justified is highly contestable but is not to the point. What is deeply concerning is that the conclusion could be sincerely arrived at and publicly proclaimed by responsible political actors. What the preparation and publication of the report illustrates is how easily a breakdown in executive observance of norms of judicial independence can impact negatively on judicial legitimacy.

My theme is a little different. My theme is that before getting to judicial independence, what is needed for judicial legitimacy is a judiciary that truly is and is seen to be competent and impartial. Without judicial competence and judicial impartiality in the first place, judicial legitimacy cannot long exist other than as an illusion. Without judicial competence and judicial impartiality in the first place, judicial independence will only exacerbate judicial illegitimacy.

To develop that theme, I begin with a story from another time and another place. The time is the end of the 18th century. The place is the East Coast of what is now the United States. The main character is John Adams. He was an able and upright New England lawyer. Despite being an American patriot, he famously accepted the unpopular brief to defend British troops charged with murder in a notorious incident known as the Boston Massacre. He successfully secured their acquittal in a highly publicised trial before four judges and a jury in the Superior Court of Judicature for the Province of Massachusetts Bay. The story is in two parts.

The first part begins in 1776, the year following the commencement of the American Revolution. Adams in that year published a pamphlet entitled *Thoughts on Government*. In it, he wrote that "[t]he dignity and stability of government in all its branches … depends so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both". He wrote that "[t]he Judges therefore should always be men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness and attention. Their minds should not be distracted with jarring interests; they should not be depend[e]nt upon any man or body of men". "To these ends", he wrote, "they should hold estates for life in their offices, or in other words their commissions should be during good behaviour, and their salaries ascertained and established by law".

Three years later, Adams took on the job of the drafting of the *Constitution of the Commonwealth of Massachusetts*. The *Constitution* he drafted was adopted the following year: 1780. It is still in operation and is the oldest functioning written constitution in the world.

Article XXIX of the *Constitution of the Commonwealth of Massachusetts* as drafted by Adams opens with the following two sentences: "It is essential to the preservation of the rights of every individual … that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit." The Article concludes: "It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have … salaries ascertained and established by standing laws."

The language of the final sentence was derived from English precedent. The language came soon to be reflected in the requirement of Art III of the *Untitled States Constitution*. We see a version of the same language in Ch III of the *Australian Constitution*.

The language of the second sentence seems to have originated with Adams himself. The language would come much later to be reflected in the declaration in the *Universal Declaration of Human Rights* that

"everyone is … entitled to a … hearing by an independent and impartial tribunal".[5] The same language was in due course picked up in the *European Convention on Human Rights*[6] and the *Canadian Charter of Rights and Freedoms*.[7] In the *International Covenant on Civil and Political Rights*,[8] the same language would be supplemented to reflect the concern earlier expressed by Adams in his *Thoughts on Government* in the declaration that "everyone shall be entitled to a hearing by a *competent*, independent and *impartial* tribunal".

That is the first part of the story. The second part of the story takes place in Washington roughly 20 years after the first part ends.[9] The same John Adams had by then become the leader of the Federalist Party and the second President of the United States. He failed to gain a second presidential term, losing the presidential election of 1800 to his arch political rival, Thomas Jefferson, leader of the Republican Party.

During the three-month lame-duck period before the new President was due to take office on 4 March 1801, Congress enacted legislation which had the effect of creating 58 new judicial offices. With the clock ticking on his time left in office, Adams set about filling those and other unfilled judicial offices by nominating new judges, some of whom were lawyers of significant professional standing but many of whom were not. Many were friends, or friends of friends, or friends of political acquaintances. Most were members or former members of the Federalist Party.

Adams was accused in the House of Representatives of making the judiciary a "hospital for decayed politicians".[10] The Federalist controlled Senate nevertheless confirmed his nominations, whereupon Adams signed their judicial commissions, labouring at his desk – so legend soon had it – until midnight of the eve of his last night in office. After Adams signed the commissions, he gave them to his Secretary of State, John Marshall, who was by then also his nominee for appointment as Chief Justice of the Supreme Court. John Marshall had the commissions sealed with the Great Seal of the United States. He then sent the sealed commissions to be delivered by his brother, James Marshall.

As things happened, 23 of Adam's so-called "midnight judges" did not receive their sealed commissions before Jefferson took office. The new Secretary of State, James Madison, refused to allow their sealed commissions to be delivered.

One of the midnight judges, William Marbury, duly applied to the Supreme Court for a writ of mandamus to compel Madison to cause the delivery of his commission, giving rise to the great case of *Marbury v Madison*.[11] There, John Marshall, who had by then taken up his own new office as Chief Justice of the United States, famously ruled that Marbury had a vested right to obtain his commission but that the power which the Congress had purportedly conferred on the Supreme Court to grant a writ of mandamus was unconstitutional.

How could John Adams, author of *Thoughts on Government* and author of the *Constitution of the Commonwealth of Massachusetts* become John Adams, appointer of the midnight judges? I have read nothing to counter the inference that partisanship got the better of him. Adams distrusted the capacity of his incoming political rival to populate the newly expanded judiciary with what he regarded as the right kind of people. He used the dying days, and perhaps even the final moments, of his political incumbency to stack the judiciary with political appointees who could be expected to continue to apply the political ideology of his own political party after that ideology had ceased to have popular support. As Jefferson

[5] *Universal Declaration of Human Rights* Art 10.

[6] *European Convention on Human Rights Art* Art 6(1).

[7] *Canadian Charter of Rights and Freedoms* s 11(d).

[8] *International Covenant on Civil and Political Rights* Art 14(1).

[9] See generally *Final Report of the Presidential Commission on the Supreme Court of the United States* (2021) 39–42; Cliff Sloane and David McKean, *The Great Decision: Jefferson, Adams, Marshall and the Battle for the Supreme Court* (PublicAffairs, 2009); Charles G Geyh and Emily F Van Tassel, "The Independence of the Judicial Branch in the New Republic" (1998) 74 *Chicago-Kent Law Review* 31; Kathryn Turner, "The Midnight Judges" (1961) 109 *University of Pennsylvania Law Review* 494.

[10] Westel W Willoughby, *Supreme Court of the United States: Its History and Influence in Our Constitutional System* (Johns Hopkins Press, 1890) Ch VIII, 88, quoting John Randolph of Roanoke.

[11] *Marbury v Madison*, 5 US 137 (1803).

put it in a private letter at the end of 1801, the Federalists had "retired into the Judiciary as a strong hold" to entrench themselves in the face of electoral loss[12]

Fast forward to the same place – Washington – 221 years later.

Supreme Court of the United States

Photo taken Sunday, 15 May 2022 at 10.57am.

This is a photograph of the Supreme Court of the United States which I took in May this year. I had arrived in Washington late on a Saturday night. I had gone for a walk along the National Mall to the Capitol early the next morning. The Supreme Court building is only a few hundred metres away. It occupies an entire block. Around the entirety of the Supreme Court block was this newly erected metal barrier. There was a heavy police presence.

It was not long after the leak of the draft of Justice Alito's majority opinion in *Dobbs v Jackson Women's Health Organisation*[13] which foreshadowed the overruling of *Roe v Wade*.[14] There had been protests in the nearby streets involving tens of thousands of people at just days before. But that Sunday morning there was an eerie silence broken only by a lone protester shouting scurrilous personal abuse about one of the majority Justices.

Behind that metal fence, it seemed to me at the time and still seems to me now, was an institution undergoing a crisis of legitimacy.

The *Dobbs* opinion was published in its final form the following month. Linda Greenhouse, a Pulitzer-prize winning journalist who had been responsibly reporting on the Supreme Court for over 40 years, immediately published an essay in the *New York Times*. The heading was "Requiem for the Supreme Court".[15] Of the five Justices in the majority in *Dobbs*, all of whom had been chosen by Republican Presidents running on successive party platforms committed to overturning *Roe v Wade*, Greenhouse said this: "They did it because they could. It was as simple as that." President Biden called a press

[12] Letter from Thomas Jefferson to John Dickinson (19 December 1801), quoted in the *Final Report of the Presidential Commission on the Supreme Court of the United States*, n 9, 40.

[13] *Dobbs v Jackson Women's Health Organisation* (Docket No 19-1392).

[14] *Roe v Wade*, 410 US 113 (1973).

[15] Linda Greenhouse, "Requiem for the Supreme Court", *The New York Times*, 24 June 2022.

conference the same day.[16] He said that the decision was "the realisation of an extreme ideology" and a "tragic error". "With this decision", he said "the conservative majority of the Supreme Court shows how extreme it is, how far removed they are from the majority of this country". Former President Trump issued a statement claiming credit for the decision.[17]

Were those reactions attacks on judicial independence? Or were they manifestations of an erosion of judicial legitimacy resulting from a realistic perception that a partisan process of judicial appointment had led to a partisan judiciary? Though it pains me to say it, I have difficulty escaping the conclusion that it was the latter.

Chief Justice Roberts a few years ago issued a press release in response to provocation by President Trump in which he said that there were no "Obama judges or Trump judges, Bush judges or Clinton judges" in the federal judiciary: there were only judges.[18] The problem for judicial legitimacy in the United States is that almost nobody else seems to see it that way: not the press, not the public, not the President, not the former President, not members of the Senate and the House of Representatives, not even all Chief Justice Roberts' colleagues. Only last week, Justice Kagan was reported as having said that the "very worst moments" in the Supreme Court's history have been when judges have reflected their party's ideology in their decisions. "[T]he thing that builds up reservoirs of public confidence", she said "is the court acting like a court and not acting like an extension of the political process".[19]

The judiciary in the United States recovered from the scandal of the midnight judges. It survived the partisan strife of the Jacksonian era and the upheavals of the Civil War. It survived President Roosevelt's court packing plan in the 1930s. It survived a nationwide campaign by a private right-wing organisation known as the John Birch Society to impeach Chief Justice Earl Warren in the aftermath of *Brown v Board of Education*.[20]

History suggests that it will somehow get through the current crisis. But I expect that will take some time. And I expect that the breakthrough will not occur until the elected arms of government are able to agree on an institutionally acceptable process by which to ensure that the political leanings of those appointed to judicial office are not so extreme as to justify the perception that they will take party-political positions in the exercise of their judicial duties. The solution might be as simple as returning to the filibuster, a procedural mechanism in the Senate which for a long time effectively meant that the confirmation of a nomination for judicial office needed the support of three fifths of the Senate rather than the current simple majority. The filibuster was dropped for lower court judicial nominations by a Democrat-controlled Senate in 2013 and was dropped for Supreme Court judicial nominations by a Republican-controlled Senate only in 2017.

But the consequence of judicial independence is such that a problem of judicial legitimacy that arises from a perception of partisan appointments inevitably has a long tail. Even if a return to the filibuster were to occur tomorrow and were to result in new appointments to judicial office being limited to nominees sufficiently moderate to attract bipartisan support, those judges within the system who are today perceived as having extreme partisan leanings will remain in office. Without a mandatory retirement age, they can remain there if they choose literally for the terms of their natural lives.

My purpose in referring to the United States is not to criticise but to illustrate the link between judicial impartiality and judicial legitimacy and to illustrate the significance to both of judicial appointment. The relatively large pool of legal talent in the United States has meant that, with some well-published

[16] White House, "Remarks by President Biden on the Supreme Court Decision to Overturn Roe v. Wade" (Press Statement, 24 June 2022).

[17] See Olivia Olander, "Trump: 'God Made the Decision' Overturning Roe", *Politico*, 24 June 2022, citing Trump's statement that the decision was "only made possible because I delivered everything as promised, including nominating and getting three highly respected and strong Constitutionalists confirmed to the United States Supreme Court".

[18] Quoted in Gbemende Johnson "Degrees of Separation: Judicial-executive Relations in the US and Latin America" in Susan M Sterett and Lee D Walker (eds), *Research Handbook on Law and Courts* (Edward Elgar Publishing, 2019) 30, 41.

[19] Elena Kagan, "Constitution and the Courts" (Speech delivered at the Salve Regina University, 19 September 2022).

[20] *Brown v Board of Education*, 347 US 483 (1954).

exceptions at the level of federal district courts, competence has not there been much of an issue in appointments to the federal judiciary. The problem for judicial legitimacy there has been one of partisanship.

Much more extreme examples of appointments both partisan and incompetent could easily be taken from recent events in Eastern Europe and in South America. Professor Rosalind Dixon of the University of New South Wales co-authored a disturbing article a couple of years ago in which she discerned a pattern across jurisdictions of right-wing populist leaders choosing to white-ant courts and other institutions of government which might check their assertions of executive power by means which included the deliberate appointment of feeble and substandard individuals.[21] If the object is to weaken an institution from within, servile appointments can achieve that object regardless of their ideologies.

The problem with dwelling on those sorts of examples is that they can too easily be dismissed by us here as bad things that happened "there". We can look at them from afar in horror, confident that the same things will never happen here.

The reason I have chosen to dwell on the United States as a comparator is in part because I am personally familiar with the American system and in part because I believe that the comparison is more challenging. The similarity of our legal traditions combined with the constant and ever-increasing impact of extreme ideologies on our own political culture means that we fool ourselves if we think that something of the kind could not happen here.

In Australia, the relationship between judicial competence and judicial impartiality, on the one hand, and judicial legitimacy, on the other hand, was a refrain of Sir Gerrard Brennan during and leading up to his period as Chief Justice. He once said that judges "need experience and a wisdom that do not come in books to make judgments in harmony with the values of the common law as those values are applied in the daily workings of the courts".[22] In a speech to the Australian Judicial Conference in 1996, Sir Gerard echoed John Adams' contemporary, Alexander Hamilton, when he said that "the judiciary, the least dangerous branch of government, has public confidence as its necessary but sufficient power base" and that the judiciary "has not got, nor does it need, the power of the purse or the power of the sword to make the rule of law effective, provided the people whom [it serves] have confidence in the exercise of the power of judgment".[23]

In his "State of the Judicature" address two years later, Sir Gerard said this:[24]

> If we are to be governed by the rule of law, we must have a judicature to administer it. The characteristics of that judicature reflect the functions it is charged to perform. First, it must be a judicature that is and is seen to be impartial, independent of government and of any other centre of financial or social power, incorruptible by prospects of reward or personal advancement and fearless in applying the law irrespective of popular acclaim or criticism. Secondly, it must be a competent judicature; there must be judges and practitioners who know the law and its purpose, who are alive to the connection between abstract legal principle and its practical effect, who accept and observe the limitations on judicial power and who, within those limitations, develop or assist in developing the law to answer the needs of society from time to time. Thirdly, it must be a judicature that has the confidence of the people, without which it loses its authority and thereby loses its ability to perform its functions.

In the same year that Sir Gerard Brennan spoke those words, a group of distinguished parliamentarians, judges, lawyers and academics took part in a colloquium on parliamentary sovereignty and judicial independence. The product of their deliberations became known as the "Latimer House Principles" and were eventually endorsed by the Commonwealth Heads of Government in 2003.[25] The Latimer

[21] David Landau and Rosalind Dixon, "Abusive Judicial Review: Courts Against Democracy" (2019) 53 *University of California Davis Law Review* 1313.

[22] Gerard Brennan, "Courts, Democracy and the Law" (1991) 65 ALJ 32, 40.

[23] Gerard Brennan "Judicial Independence" (Speech delivered at the Australian Judicial Conference, Australian National University, Canberra, 2 November 1996). See also Brennan, n 22, 40–41.

[24] Gerard Brennan, "The State of the Judicature" (1998) 73 ALJ 33, 33–34.

[25] *Commonwealth (Latimer House) Principles on the Three Branches of Government* (November 2003).

House Principles postulate that "[a]n independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice" and that "[t]o secure these aims … judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process" which should ensure, among other things "appointment on merit".[26]

That principle regarding judicial appointments was taken up legislatively in the United Kingdom in 2005[27] and in New Zealand in 2015.[28] To date in Australia, it has been ignored legislatively other than in the Australian Capital Territory where it is addressed in delegated legislation.[29] Its observance as a matter of executive practice has been piecemeal and intermittent. Recent seminars conducted by the Australian Academy of Law dedicated to the topic of judicial appointment have highlighted both its contemporary importance and its recent neglect.

Refreshingly, the *Without Fear of Favour* report of the Australian Law Reform Commission recommended that the principle be taken up at the federal level.[30] The Commission emphasised that a transparent process for appointing judicial officers on merit is important to "minimise the perception that appointments are made for political or patronage reasons, and the perception that a judge's impartiality and independence may be compromised", to "ensure that the criteria on which candidates are selected include skills and attributes that are important to upholding confidence in judicial impartiality", and to "ensure that appointments are drawn from the widest possible pool of candidates with the appropriate skills and experience, both to maximise the chances of high-quality appointments, and to enhance the diversity of both expertise and lived experiences on the bench".[31] The Commission recorded that the submissions which had been made to it "were almost universally supportive of more transparent processes for judicial appointments and saw this as an important reform". Indeed, it recorded that just one submission – that of the Samuel Griffith Society – was not supportive.[32]

The Commonwealth Attorney-General has recently announced that the Commonwealth Government had accepted the recommendation in principle.[33] Its legislative implementation will bring judicial appointments to federal courts into line with international best practice.

Nearing conclusion, I borrow again words used by Sir Gerard Brennan in addressing the "State of the Judicature".[34] Sir Gerard said that "[a]t base, the state of the judicature means the quality of the judges and their ability to perform their functions". He said that the judicature was at the time he spoke, and had been, "in a good state". "But", he said, "that state has not been achieved by accident or by mere good fortune. It is the consequence of the structures, the traditions and the values of the judiciary and the profession". The structures, traditions and values of which he spoke have for the most part continued to serve us well. Their success, unfortunately, has risked leading us into complacency. Their continuing efficacy can no longer be taken for granted.

The *Without Fear or Favour* report is a wake-up call. To ensure ongoing judicial competence and judicial impartiality, and thereby to preserve judicial legitimacy, structural improvement can and should occur. We who have the privilege and responsibility of serving as existing members of the judiciary know that well. The report's recommendation on the topic of judicial appointments warrants the vocal and enthusiastic support of us all.

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[26] *Commonwealth (Latimer House) Principles on the Three Branches of Government*, n 25, 11.

[27] *Constitutional Reform Act 2005* (UK).

[28] *Senior Courts Act 2016* (NZ).

[29] *Supreme Court (Resident Judges Appointment Requirements) Determination 2015 (No 1)* (ACT).

[30] Australian Law Reform Commission, n 2, 434 [12.13]–[12.14].

[31] Australian Law Reform Commission, n 2, 434 [12.13].

[32] Australian Law Reform Commission, n 2, 435 [12.15].

[33] Mark Dreyfus, "Government Response to the Australian Law Reform Commission Report on Judicial Impartiality and the Law on Bias" (Media Release, 29 September 2022).

[34] Brennan, n 24, 45.