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Commentary

THE SERENDIPITOUS SOLUTION TO THE PROBLEM OF SUPREME COURT APPOINTMENTS©

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Judges matter. In the age of the *Charter*,[1] there can be no question about this[2]—the role of courts and judges has expanded to include a wider range of legal and policy issues, invoked by a wider universe of groups and individuals, than anyone would have imagined possible even a few decades ago. There was a time when most political science textbooks did not include a chapter on the courts; today, such an omission would be unthinkable. We are all court-watchers now.

The logical corollary is that who the judge is also matters: when a vacancy must be filled, especially on the Supreme Court of Canada, it makes a difference whether it is filled by person X or person Y. Some find this observation unpalatable—others would even suggest it is insulting to the judges—but every time the Supreme Court hands down a 5-4 decision, it makes the argument for me.[3] And there have been some very important 5-4 decisions recently: *Doucet-Boudreau*[4] on judicial remedies for *Charter* violations, *Amselem*[5] on freedom of

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [*Charter*].

[2] In Canada, this is the obvious explanation, but extensive judicial policy engagement is a global phenomenon and has been treated by some as an attribute of the modern administrative state, encouraged by, but not necessarily requiring, a formal entrenchment of rights. John Ferejohn, "Judicializing Politics, Politicizing Law" (2002) 65 Law & Contemp. Probs. 41.

[3] See David M. Levitan, "The Effect of the Appointment of a Supreme Court Justice" (1996) 28 U. Tol. L. Rev. 37.

[4] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3.

[5] *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551.

religion, not to mention the 3-3-1 confusion of *Chaoulli*[6] on the constitutionality of certain aspects of the medicare system. As the doctrine of *stare decisis* softens—as the Court is more willing to change its mind from what it has decided just recently, sometimes subtly and sometimes substantially—these divisions mean that individual judges' votes matter.

Traditionally, we have shrugged off such concerns with two arguments. The first argument suggests that the identity of specific judges does not matter because there is always a single correct answer to any legal question, and judges are trained professionals who know the objective and logical processes that take them to that correct answer; it is only outsiders (like social scientists) who think there is an element of choice such that individuals make a difference. But formalism (the interpretive doctrine that made this plausible) has been replaced by the open-endedness of "contextualism" (the Court's own label[7]) and of "purposive interpretation."[8] This is not to say that there are no constraints, not to suggest that judges are, as Weiler once put it, "just making it up as they go along,"[9] but simply to say that there is not infrequently a zone of discretion within which judges can legitimately choose between more than one not-incorrect answer.[10] In Lawrence Solum's terminology, judicial decisions are neither determined nor undetermined, but *under*-determined.[11] At any rate, the "only one correct answer" assertion was always undermined by the phenomena of judicial dissent and separate concurrence: if there is always a single correct answer, why are so many judges so often unable to agree on what it is?

The second argument is that the problem can be finessed simply by filling any vacancy with the single very best candidate available. The problem, appointment announcement encomiums notwithstanding, is

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[6] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791.

[7] See *e.g. Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415.

[8] See *e.g.* Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005).

[9] Paul Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974).

[10] See Aharon Barak, *Judicial Discretion* (New Haven: Yale University Press, 1989).

[11] Lawrence B. Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma" (1987) 54 U. Chicago L. Rev. 462.

that we have no transparently objective way of determining which candidate is truly "the best." We can separate the good candidates from the poor ones, and perhaps even distinguish the very good ones from the (merely) good ones, but not much more. In the American literature, Gulati and Choi provoked a long-running debate by suggesting they had developed a neutral mechanism for generating a "score" identifying the candidate from the lower courts who best deserved elevation to the circuit courts of appeal or the U.S. Supreme Court itself.[12] Simply to describe the project invites skepticism: even assuming agreement on all the items to be measured (doubtful in itself), how do we translate them into inter-commensurable numbers, and then how do we decide how to weight them against each other?

But this just brings us back to the initial problem: even once we have limited the pool to "very good" candidates, selecting the "best" will still involve some assessment of the congruence between the values and priorities of the candidate and those of the evaluator. The long-standing practice of patronage, now in public disfavour, was a crude mechanism for accomplishing this. Today, a more nuanced and effective assessment is possible, especially when candidates already serve on lower courts,[13] because judges value consistency so much that yesterday's decisions are a good indicator of tomorrow's.[14] Indeed, we would think less of the appointment process if it did not consider these factors. From time to time, otherwise commendable judges deliver decisions that diverge from those of their fellow judges and from the mainstream of informed opinion—an appointing authority should certainly take this into account. Other things being equal, those who appoint judges will try to create a court reflecting their own values and priorities. Because of this tendency, most countries have created judicial appointment procedures

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[12] The initial paper was entitled "A Tournament of Judges" (2004) 92 Cal. L. Rev. 299; the follow-up pieces culminated in "Mr. Justice Posner? Unpacking the Statistics" in 2005 *NYU Annual Survey of Law*. Both papers are downloadable from the Social Science Research Network site, online: <http://www.ssrn.com>. The *Florida State University Law Review* devoted a special issue to this debate in (2005) 32:4 Fla. St. U. L. Rev.

[13] See especially Nancy Scherer, *Scoring Points: Politicians, Activists and the Lower Court Appointment Process* (Stanford: Stanford University Press, 2004).

[14] See Reed C. Lawlor, "Personal *Stare Decisis*" (1967) 73 S. Calif. L. Rev. 41.

(especially for their national high courts) that require co-operation between different sets of actors.[15]

Canada is the great exception. Peter Russell has described us as "the only constitutional democracy in the world in which the leader of government has an unfettered discretion to decide who will sit on the country's highest court."[16] When Paul Martin included the Court appointment process as part of the "democratic deficit" he wanted to tackle as prime minister, it required only his fiat (nothing as messy as legislative approval, let alone constitutional amendment) to adopt a new process in 2004 with Irwin Cotler, the minister of justice, defending appointees before an ad hoc legislative committee. It was equally easy in 2005 for Martin to substitute a new system (a council of judges, lawyers, and politicians to narrow a shortlist of eight to a shorter list of three), and as easy again for Stephen Harper in 2006 to add an appearance by the nominee before another ad hoc parliamentary committee. Not only the final decision but all the bells and whistles leading up to it are in the complete control of the prime minister, who is as constrained as he wants to be (but no more).

To be sure, we have sometimes noticed the problem. During the constitutional reform debates of the 1970s and 1980s, the most obvious problem with the unilateral appointment process was federalism: if the Supreme Court is to serve as a referee of federalism, then it is anomalous that "Team Federal" brings the referee and "Team Provincial" has to hope for the best. If federalism is the problem, then the provincial premiers are the solution, in the sense of deserving some meaningful role to balance that of the prime minister. Had the Meech Lake Accord been approved, prime ministers would choose Supreme Court justices from shortlists submitted by premiers. Although the parallel provision for senators gave us a number of new senators before the Accord died, no judges were appointed in this way. But today, federalism and the federal/provincial division of powers no longer

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[15] See, for example, the excellent collection by Kate Malleson & Peter Russell, eds., *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press, 2006).

[16] Canada, The Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Improving the Supreme Court of Canada Approitments Prcoess* (Ottawa: The Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, 2004) (Chair: Derek Lee), online: <http://cmte.parl.gc.ca/cmte/committeepublication.aspx?com=8795&lang=1&sourceid=84157>.

centre the debate about judicial power; in Canada, as in other countries, the "rights stuff" that used to be secondary and derivative has taken pride of place.[17] When the House of Commons Justice Committee held public hearings on the appointment process in the spring of 2004, only two of a parade of expert witnesses (both political scientists) even mentioned the federalism issue and its practical corollary, a significant role for provincial premiers.

Suddenly faced with two unexpected Supreme Court vacancies in the summer of 2004, the government offered a minor adjustment to the appointment process: once former prime minister Martin had selected nominees through the usual procedures, their names would be presented to an ad hoc committee of legislators. However, the committee would not be permitted to question either the nominees or the prime minister who had selected them; under this scheme, it would be the minister of justice's function to answer questions about the nominees' credentials. Further, the committee would not have any power of veto or even delay. This caricature of an American-style "advise and consent" confirmation was, as one journalist quipped, the equivalent of sending your mother to do your job interview. But the real problem was less that the reform did not go far enough than that it was headed in the wrong direction. Even without the current American deadlock on judicial appointments to warn us off, the problem is that the process risks becoming either an important but essentially empty symbolic rubber stamp or an occasion for conflict between the nominator and the ratifier with the nominees caught in the cross-fire.

Eighteen months later, anticipating another Court vacancy, the Martin government came up with a new procedure. The minister of justice would submit eight names to an ad hoc committee including judges, lawyers, and politicians, whose private deliberations would reduce the list to three names from which the prime minister would select. This new procedure was annoyingly nervous about the committee, which was constrained in a variety of ways, all of which enhanced the role of the minister of justice. However, the more basic problem was that the initial set of eight names was proposed by one member of a federal cabinet, to be reduced to three names for final

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[17] Martin Shapiro, "The Success of Judicial Review" in Sally J. Kenney, William M. Reisinger & John C. Reitz, eds., *Constitutional Dialogues in Comparative Perspective* (New York: St. Martin's Press, 1999).

selection by another member of the same cabinet. By no stretch of the imagination was this a process insulated from direct political (even partisan) considerations. From a caricature of an American-style confirmation process, we have "progressed" to a caricature of an independent judicial nominating committee.[18] At least we were, in my opinion, finally looking at the right end of the process—a neutral way of coming up with an initial shortlist is a more effective way of containing partisan influences than a last-minute stand-or-fall ratification.

But a funny thing happened on the way to the 2006 Court appointment: a federal general election intervened and a new government took office. The new process was already well under way; eight names had been submitted to the committee, the deliberations had taken place, and a shortlist of three names had emerged. To defuse controversy, Prime Minister Harper announced that he would make his selection from the existing shortlist, simply adding an appearance by the nominee before the same sort of ad hoc legislative committee that we had seen in 2004 (with a retired constitutional law professor to run interference on potentially inappropriate questions).

But in fact, the continuity was an illusion, and the accident of an intervening election completely changed the appointment procedure in a positive and promising way. *Before* the election, the minister of justice (a Liberal) submitted eight names to a committee, which duly deliberated to reduce the list to three; *after* the election, the prime minister (a Conservative) selected one of the three names. Instead of a process bracketed by officials within a single political party, the committee became a bridge between government and opposition, resulting in a professionally qualified candidate acceptable to both of them.

We got here by accident, but we should take this happy chance and run with it. Instead of the minister of justice providing the initial names, the opposition parties should do so: say, four names provided by the official opposition and two names from any other party enjoying official party status within the Commons. They could draw on the existing information-gathering processes of the Department of Justice to guide their choice. The fact that more than one party submits names creates a competitive incentive for the opposition parties to come up

[18] For a more extended discussion, see Peter McCormick, "Selecting the Supremes: Judicial Appointment in Canada" (2005) 7 J. App. Pr. & Pro. 1.

with strong candidates who will survive committee scrutiny and be acceptable to the prime minister. The prime minister retains the final choice, but his discretion is tightly contained. There is a need for some additional tweaking of the current rules—for example, too many of the members of the committee are described simply as "a person chosen by" a minister; it is open to question whether the prime minister should have the option of simply rejecting the final list; and one day the procedure should be appropriately entrenched rather than depend on governmental self-restraint. Essentially, however, we are looking at a modest and easy operational change in an already existing procedure, all the more delightful because it emerged by accident.

For some, the reason for changing the appointment process is a desire to constrain the creative imagination of the Court, at least to the extent that it is directed by the agenda of a particular political party or party leader. But every coin has an obverse, and under this scheme the Court would no longer be vulnerable to attack as the prime minister's personal toy or Ottawa's lapdog, criticisms that have been hard to reject in the past because they had a kernel of truth. A more neutral appointment process would cover the Court's weak flank by pre-empting such criticism. Potentially, the big winner from these changes will be the Court itself.

Justice Rothstein is the first member of the Court to be chosen through a healthy and positive interaction between the government and opposition. He must not be the last.