# How federal countries appoint high court judges

*Federal countries come to terms with geography and politics in naming judges*

BY *ANNE TWOMEY*

**By** the end of the year, four new judges will be sworn in to serve on the highest courts of Australia, United States and Canada to replace justices Michael McHugh, William Rehnquist, Sandra Day O'Connor and John Major. All three countries are federal countries with a common legal heritage. In each case the appointed judge will adjudicate upon constitutional disputes between the federal government and those of the states or provinces. To what extent do federal interests affect the appointment of these new judges?

## Australia – the least "federal" appointment system

A woman from Victoria who was a justice of the Federal Court of Australia was recently chosen as the new justice of the High Court. On September 20, Australia's attorney general, Philip Ruddock, announced the appointment of Susan Crennan, 60, effective on November 1.

In Australia the Constitution requires the Governor-General in Council to appoint justices of the High Court on the advice of the federal attorney general, who puts forward the recommendation of the federal cabinet. The power to choose a justice of the High Court is therefore, in practice, vested in the federal government. The states have no constitutional role in the appointment of High Court justices.

Federal governments, when recommending appointees, have tended to favour judges who support an expansive interpretation of federal legislative and executive power under the Constitution. Unlike the United States, there is no formal confirmation process at which such views can be elicited and it is considered bad form for a federal attorney general to ask a potential judge about his or her views on legal or constitutional matters. In 1913, the prime minister sent a telegram to prospective High Court judge A.B. Piddington, asking his views on Commonwealth versus state rights. Piddington replied by telegram that he was "in sympathy with supremacy of Commonwealth powers". He was subsequently appointed to the High Court, but resigned shortly afterwards due to the public controversy concerning his reply and the suggestion that he had compromised his independence.

Nonetheless, it is relatively easy for the federal government to identify judges who, through their academic writing or judgments, show that they are sympathetic to the federal government's views. The states, however, have had no power to influence appointments in the other direction. In 1973 and in 1985, there were proposals to give the state governments power in the appointment of High Court justices. Both suggestions were rejected.

The only concession made in favour of state interests in High Court appointments occurred in 1979 with the enactment of section 6 of the *High Court of Australia Act*. It requires the federal attorney general to consult with the attorneys general of the states prior to recommending an appointment to the High Court. From all reports the consultation is haphazard and varies in its nature according to the inclination of the federal attorney general. Even if the consultation process does influence the recommendation of the federal attorney general, his or her recommendation can be, and has been in the past, overturned by the cabinet.

Unlike Canada, there is no custom of appointments being reserved for candidates from particular states. On the current High Court, five of the seven justices come from New South Wales; of the remaining two judges, one is from Victoria, the other from Queensland. This domination of the High Court by New South Wales lawyers is not unusual. In the history of the High Court, twenty-four justices have been appointed from New South Wales, twelve from Victoria, six from Queensland, two from Western Australia; none has ever been appointed from South Australia, Tasmania or the Territories. This is largely a reflection of the fact that High Court justices are drawn from the ranks of existing judges or barristers, and that the Sydney bar is the biggest and most competitive in the country. Apart from any bias in the way the federal government makes its appointments, barristers from Sydney would always be more likely to have a centralist focus than would barristers from the more far-flung states.

## United States – A Senate role

In July 2005, President George W. Bush nominated John Roberts to replace Sandra Day O'Connor on the US Supreme Court. But when Chief Justice William Rehnquist died on September 3, Bush withdrew his nomination of Roberts as O'Connor's successor and re-introduced him as the nominee for Chief Justice. The US Senate confirmed Roberts' appointment on September 29, 2005. Senators voted 78 to 22 to appoint Roberts, with only 22 Democrats opposed. But early in October, when Bush then nominated his White House counsel, Harriet Miers, to replace Sandra Day O'Connor, many Republicans opposed her nomination (she had never been a judge) while many Democrats supported her (her politics were seen as moderate).

Because the US president appoints Supreme Court justices with the advice and consent of the Senate and because the Senate can interview nominees, the process can sometimes become highly politicized. The Senate, composed of two

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senators from each state, is a federally influenced body. The process of confirmation hearings before the Senate's judiciary committee makes it possible to question judicial nominees about their views on federal versus state rights. However, in reality, the process is more politically partisan than federal in nature, and in recent years the focus has been on attitudes to human rights rather than states' rights. The geographic balance — or lack of it — among members of the Supreme Court does not appear to have had a great impact on the Supreme Court's interpretation of federal issues.

### Canada – the federalism of geography

The Canadian approach to the appointment of Supreme Court justices has a much stronger sense of federalism, at least in its geographic sense. As in Australia, the Governor-General, on the advice of ministers, appoints justices. Section 6 of the *Supreme Court Act*, however, requires that at least three of the nine justices appointed be judges or advocates from Quebec. In Quebec, civil law has been regulated by the *Code Civil* — not English common law — since 1774. The Criminal Code of Canada provides a uniform criminal law across all provinces. However, civil law in Quebec is regulated by Quebec's *Code Civil* rather than by the English common law that prevails in the other provinces. The major reason for requiring three Quebec justices in the Supreme Court is to cope with appeals from Quebec in its civil law cases, which to justices outside Quebec will be unfamiliar. By convention rather than law, three justices come from Ontario, two from the Western provinces and one from the Atlantic provinces. Accordingly, when a vacancy arises, convention or law requires that the justice who fills the position come from the geographic area or province of the vacating justice.

This geographic requirement influences the consultation process prior to appointment, with the federal attorney general consulting with the attorney(s) general of the relevant region as well as the chief justices of its courts and representatives of advocates in that region.

Does this appointment of justices from a wider geographic range influence whether they support a strong federal government and Parliament, or whether they support provincial rights? While perhaps judges from provinces more distant from the heart of federal government may be more inclined to see the value of provincial rights, this will not always be the case.

The provinces would be in a much stronger position if they could control the nomination list from which judicial candidates were drawn. Such a proposal formed part of two failed constitutional amendments — the Meech Lake and Charlottetown accords — both of which would have required the federal government to make appointments from lists submitted by the relevant provincial governments.

In 2004 the Bloc Québécois proposed to the House Standing Committee on Justice and Human Rights that the relevant provincial government draws up the initial list of candidates. This short list would be presented to an advisory committee, which would then select the final nominee from among the candidates. This suggestion was rejected by the federal government, which supported the idea of an advisory committee to reduce an initial candidate list to a short list of three, but wanted to ensure that the federal attorney general had control over the initial list and could make the final choice from the short list. The federal government proposed that provincial involvement be secured by consultation with the provincial attorney(s) general over the initial list and representation of the provinces on the advisory committee. The Standing Committee expressed its disappointment with the proposed system in April. The proposed system, with some modifications including the ability of private citizens to make input, was announced by Justice Minister Irving Cotler on August 8, 2005. There is to be an advisory committee that will evaluate the list of candidates proposed by the minister of justice after consultation with provincial justice ministers. That committee will be composed of one member of Parliament from each political party in parliament, a retired judge and, from the region where the Supreme Court vacancy arises, a nominee of the provincial attorney(s) general, a nominee of the law societies and two prominent Canadians who are neither lawyers nor judges.

### Appointment of justices in other federal systems

Federal involvement in the appointment of judges of constitutional courts is most obvious in Germany, where the *Bundesrat* appoints half the judges to the Federal Constitutional Court — the *Bundesverfassungsgericht* — and the *Bundestag* appoints the other half. The *Bundesrat* is supported by an advisory commission, composed of the ministers for justice of the *Länder*, which provides a short list of candidates. The members of the advisory commission also agree informally on a form of geographic distribution of appointments.

In Austria, the federal president appoints most members of the Constitutional Court (the president, vice president, six members and three substitutes) on the recommendation of the federal government, as well as three members and two substitutes from the nominations made by the popularly elected house, the *Nationalrat*. The inclusion of a federal element comes through the appointment of three members and one substitute from the nominations made by the *Bundesrat*. It also arises through the requirement that three members of the Court and two substitute members have their domicile out of Vienna.

In other countries, such as South Africa, the federal element appears through representation of the provinces or states in a judicial services commission that advises on appointments or prepares short lists from which appointments must be made. Even the United Kingdom — by no means a federal country — has in its proposal for a Supreme Court included representation from England and Wales, Scotland and Northern Ireland in its proposed Judicial Appointments Commission.