THE POLITICS OF REFORMING JUDICIAL APPOINTMENTS

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Since the 2006 election, the minority Conservative government, led by Prime Minister Stephen Harper, has come under intense scrutiny for two reforms to the process of appointing judges. First, in making a Supreme Court appointment, the Conservatives held an innovative and highly publicized hearing that allowed an *ad hoc* parliamentary committee to interview the government's nominee, Justice Marshall Rothstein, before his official appointment. Second, they reformed the Judicial Advisory Committees (JACs) that screen the pool of candidates for all other federal judicial appointments into more and less qualified categories. I focus in this essay on the controversy generated by the JAC reforms. Rather than dealing with questions of institutional design—e.g. the relative merits of screening and nominating committees—I analyze the rhetorical reception of the JAC reforms. While defenders maintained that the reforms were relatively minor adjustments to the system, critics blasted them as a startling departure from the "merit principle" in judicial selection in favour of a dangerous ideological politicization of the judiciary. The minimalist defence of the reforms was wrong; they did represent significant departures from the JAC tradition. At the same time, the critique was more than a little overheated. Indeed, its exaggerations can be understood as the latest episode in the long-standing partisan demonization of the Harper Conservatives as anti-*Charter* and anti-court.

THE JAC REFORMS

Since the initial JACs in 1988, the committee members, all appointed by the federal Minister of Justice, have fallen into two categories: 1) a minority of *discretionary* ministerial appointments, and 2) a majority of *nominated* appointments, chosen by the minister from lists proposed by other constituencies.[1] The size of committees went from five to seven members in 1994, with three discretionary and four nominated appointments:

- a nominee of the provincial or territorial law society; a nominee of the provincial or territorial branch of the Canadian Bar Association;

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[1] Law Courts Education Society of BC, *Judicial Appointments*, online: Law Courts Education Society of B.C. <http://www.lces.ca/backgrounder18/>.

- a judge nominated by the Chief Justice or senior judge of the province or territory;

- a nominee of the provincial Attorney-General or territorial Minister of Justice.

The judicial representative, who was a full voting member, chaired the JAC. In 1988, JACs screened candidates into two categories: qualified and unqualified. In 1991, this was changed to a threefold distinction: not recommended, recommended, and highly recommended.

The Harper Conservatives made three main changes to this system:

- They added a representative of the law enforcement community to the list of nominated appointments.

- They limited the voting power of the judicial chair to breaking ties.

- They scrapped the threefold categorization, which distinguished among qualified candidates, and returned to the original twofold distinction between qualified and unqualified.

These reforms attracted considerable public comment and criticism. Indeed, it is instructive to compare the public attention generated by Harper's reforms with the 1994 Liberal government's expansion of JACs, which also included appointments for "diversity" reasons, though the particular kind of diversity was not as clearly specified as Harper's "law enforcement" appointments. Of the 277 news items turned up by a search of ProQuest databases using the term "judicial advisory committee," only 44 were written prior to the 2006 election of the Harper government, and only two of those—both relatively neutral—were about the 1994 reforms to JACs. The other 243 items all came after Harper's election and concentrated on his JAC reforms.[2] Prominent among the critics of the Harper reforms were the Canadian Judicial Council, Chief Justice Beverley McLachlin, and former Chief Justice Antonio Lamer. The ProQuest search turned up no such high-level commentary from the legal community about the 1994 reforms.

What accounts for this startling imbalance? There are two possibilities. First, that the Harper reforms were, as the critics claimed, startling innovations that substituted blatantly political criteria for the "merit principle" in judicial selection—in short, that the reforms politicized judicial appointments in unacceptable ways. Second, that the critique was a highly partisan exaggeration, consistent with a longstanding demonization of the Conservatives as anti-*Charter* and anti-court. I maintain that, while there is some truth in the politicization charge, it is much overplayed and rests on a misleading use of the term "merit". The over-dramatized

[2] The search used ProQuest's Canadian Newsstand and CBCA databases.

opposition between an apolitical judicial "merit" and corrupt political calculation is itself part of a broader phenomenon of rhetorical demonization.

MERIT VS. POLITICS: AN EXAGGERATED DISTINCTION

Although the Conservatives sometimes defended their reforms as simple adjustments within the JAC tradition, they differed from previous reforms in important ways. Critics have highlighted three in particular:

- The reforms were not undertaken in consultation with the legal community. Such consultation had played an important role in establishing JACs in the first place and had been part of all subsequent reforms.

- The screening categories were reduced from three to two. While this could be characterized as a "return" to the original 1988 situation rather than a startling departure, it nevertheless moved away from criteria that were put in place very early in the history of JACs, and was criticized as rendering JACs "virtually useless".[3]

- The combined effect of the new "law enforcement" representative and the reduced voting power of the judicial chair shifted the balance of power on JACs. This change was often misrepresented as tipping the balance in favour of discretionary ministerial appointments. The Canadian Judicial Council (CJC), for example, treated the "law enforcement" representative as a fourth discretionary ministerial appointment, meaning that of the "seven members who are ordinarily entitled to vote" (given the reduced voting power of the judicial chair), four are "chosen by the Minister of Justice". With "the majority of voting members now appointed by the Minister," argued the CJC, "the advisory committees may neither be, nor be seen to be, fully independent of the government."[4] In fact, however, the "law enforcement" representative is a fifth nominated appointment, not a fourth discretionary appointment. Nominated appointments thus retain the majority, even with the reduced voting power of the judicial chair. The Harper government's reforms did not tip the balance in favour of discretionary ministerial appointments. They clearly did, however, shift the balance of power between lawyers (including judges) and non-lawyers on JACs, and this appears to have been the real objection.

For the critics, the reforms moved away from a judicial screening process with some reasonable independence from political control to one more subject to political influence and discretion. The ultimate discretion to choose was always a purely political one, of course, but in practice only "recommended" or "highly

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[3] Peter Russell, "An Error of Judgment" *The Globe and Mail* (27 February 2007) A21.

[4] Canadian Judicial Council, Press Release, "Judicial Appointments: Perspective from the Canadian Judicial Council", (27 February 2007), online: CJC <http://www.cjc-ccm.gc.ca/english/news.asp?selMenu=1070220>.

recommended" candidates were appointed. Under the Harper government's reforms, politicians would still choose from the overall pool of qualified candidates but would no longer have to contend with the embarrassment of choosing a merely "qualified" candidate over a "highly qualified" one. Moreover, in assigning candidates to the qualified and unqualified categories, non-lawyers on the JACs (including law-and-order cops) might prevail over the more expert representatives of the legal community. The result, according to the critics, would be an unhealthy politicization of appointments that would dilute the principle of "merit" in judicial selection. Had the government only followed the tradition of consulting with the legal community, this blatant error in judgment might not have happened (which, of course, is precisely why the consultation never happened).

At this point, one must distinguish between two kinds of politicization. First is run-of-the-mill patronage—the appointment of one's political friends. This hallmark of federal judicial appointments survived the introduction of the JAC screening system quite nicely, with both major national parties continuing its practice when in power. This kind of traditional patronage was not, however, the primary basis on which the reforms were criticized. In portraying the reforms as diluting the commitment to "merit" as the basis for judicial appointment, the critics were necessarily saying that the existing process, despite being patronage ridden, was more oriented to merit. The new, and egregious, attack on "merit" came, for the critics, from a second kind of politicization: ideological politicization. The appointment of political friends was one thing; the appointment of policy ideologues was quite another. The Harper government, charged the critics, was preparing to stack the courts with social conservatives who would subvert *Charter* values. It was moving its "hidden agenda" into Canadian courtrooms.

In fact, the Conservatives did very little to hide this agenda, at least as far as law-and-order issues were concerned. Emphasizing his government's desire to "crack down on crime" and to "make our streets and communities safer", Harper wanted to ensure that the "selection of judges is in correspondence with those objectives."[5] Policy-oriented appointment was explicitly the name of the game. For the critics, it was this kind of ideological appointment that was especially objectionable, introducing an openly political bias that was highly corrosive of the merit principle in judicial appointments. But the distinction between apolitical merit and political judgment is not nearly as clean and clear as the rhetoric implies.

We can gain further insight into the concept of "judicial merit" at work here by considering the critics' claim that bringing policy considerations openly into the appointment process undermines the principles of judicial independence and impartiality on which our constitutional system rests. By judicial independence, the critics obviously have in mind more than the traditional security of salary, tenure, and administrative control that have long characterized our tradition and that remain unaffected by the Harper government's JAC reforms.[6] These traditional protections

[5] Richard Brennan, "Harper defends Tory bias in judge selection" *The Record* (15 February 2007) A1.

[6] Troy Riddell, "Let's rethink reforms to judicial appointments" *The Record* (16 January 2007) A7.

of judicial independence enable judges to be impartial between the parties before them. But, again, when they invoke "impartiality", critics of the Harper reforms have in mind much more than impartiality between parties. They also want impartiality on the issues of legal policymaking that must sometimes be determined to resolve the case between the parties. These are two different kinds of impartiality. As a case climbs the appellate hierarchy, the significance of the parties and impartiality between them tends to fall away, with the emphasis clearly shifting to legal policymaking. Indeed, at the highest levels it is not uncommon for judges to decide issues of legal policy not raised by the factual situation of the parties or to adopt policy solutions recommended by intervenors and of little interest to the parties. It is on such matters of legal policymaking that the critics want judges to be "impartial". The capacity to be impartial in this way on policy questions is part of the "judicial merit" that they believe judicial selection should emphasize and that the Conservative reforms de-emphasize.

But what can it mean to be impartial about the highly discretionary matters of reasonable disagreement that are typically the object of judicial policymaking? If one accepts—as a great many do—that the issues resolved by judges under entrenched constitutional instruments are indeed matters of reasonable disagreement, the idea of a kind of "merit" that somehow rises above the fray to sit in objective judgment on those engaged in legitimate disagreement becomes problematic. Indeed, in a democratic context, one might even begin to see some "merit" in the attempt by those who prevail in the clash of reasonable alternatives to ensure that their victory is not overturned by a few unelected officials taking the other side.

But perhaps, there is a way of rescuing the notion of "impartiality" in the face of "reasonable disagreements". Suppose one holds—as I do—that to describe something as a matter of reasonable disagreement is not necessarily to deny the possibility of a right answer. It is, rather, simply to acknowledge that even (what one considers to be) an objectively "wrong" answer can find support among people of good will and might be reasonably chosen by the democratic process. If this is true, might one not contend that the hurly-burly of the partisan politics within the political branches is less likely to produce the right answer—even in matters of reasonable disagreement—than the more dispassionate arena of the courtroom? True, no one realistically expects judges to be blank slates, without inclinations or pre-conceived views on issues that come before them, but, like students in a seminar, one might expect them to be more open to rational persuasion than partisan politicians are. Let me concede the point for the sake of argument (though I doubt it would survive fuller examination). What do we gain? Only this: that the judgment of the judicial seminar must trump the democratic judgment on matters of reasonable disagreement because the judicial institution is more likely to choose the right—or at least better—side in a legitimate debate among people of good will. If one thinks this through, I believe, it is a fundamental rejection of democracy in favour of the rule of "philosopher kings." If that is indeed the proper criterion of judgment, the Harper Conservatives can legitimately be criticized for moving in the wrong direction with their JAC reforms. If not, the vilification of their attack on judicial merit might well be seen as just a tad overwrought.

Now, I do not claim to have settled the debate about judicial merit and politicization. The theoretical issues are too complex to be fully captured by my brief commentary. In addition, important questions can be raised about the effectiveness of ideological appointments, even if one regards them as justified in principle. One might, for example, wonder about the ideological reliability over time of judges appointed for their policy views, especially because, once appointed, judges really do enjoy considerable "independence". Nor can one discount the effect, again over time, of their integration into the existing judicial culture, which surely shapes them as much as they shape it. It must also be recognized that what is sauce for the goose is sauce for the gander, and that when the Liberals regain power, they can be expected to similarly bring their own inevitable political calculations into the open. Perhaps, as Troy Riddell has argued, it would have been better for Harper to address his law-and-order-policy preferences not through judicial appointments, but through legislative changes to, say, sentencing issues.[7] But, of course, this neglects the ability of judges to sit in second judgment on such initiatives as mandatory minimum sentences. While I have not settled the matter, however, I hope at least to have shown that the claims of egregious villainy by the Harper Conservatives are not as starkly obvious as many of the critics suggest. The intensity of the critique, in other words, was a kind of exaggeration. The exaggerated rhetoric fits into, and is explained by, a pre-existing context of demonization of the Conservatives on judicial matters.

THE DEMONIZATION CONTEXT

Demonization of the Harper Conservatives as anti-*Charter* and anti-court has become a staple in the last several federal election campaigns, as well as in the partisan maneuvering between elections. The term "demonization", which I choose advisedly, suggests an exaggerated or inflationary level of rhetoric. This exaggeration is revealed by the fact that critics of the Conservatives on *Charter* and judicial issues often vilify—that is not too strong a word—positions they themselves once held. Jean Chrétien, for example, had, during the period of *Charter*-making, insisted that the s. 33 notwithstanding clause be made available to the federal government as well as the provinces, and he later defended s. 33 against Brian Mulroney's charge that it made the *Charter* "not worth the paper it's written on."[8] When his partisan opponents defended s. 33 during the 2000 election, however, Chrétien presented the section as appealing to "the dark side of people" and as a "nuclear bomb" that would "destroy the *Charter of Rights*."[9] Similarly, although Paul Martin had defended the use of s. 33 prior to the 2004 election, specifying circumstances under which he "would use it", during the election he reacted to Harper's very similar statements about s. 33 by completely rejecting the legitimacy of the clause. "My refusal to use the notwithstanding clause," he said, "is a very clear

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[7] *Ibid.*

[8] Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3d ed. (Toronto: University of Toronto Press, 2004); Ted Morton, "Chrétien and the Charter" *The National Post* (6 November 2000) A16.

[9] Thomas Walkom, "Chrétien's Charter arguments are curious" *Toronto Star* (2 November 2000) A6.

indication of the depth of the gulf between Mr. Harper and myself."[10] In the 2006 election, Martin went so far as to propose removing the notwithstanding clause in order "to protect the *Charter* against a prime minister [i.e., Stephen Harper] who might want to use the notwithstanding clause to attack minority rights".[11]

During the electorally charged period of the Martin minority government, 134 law professors entered the partisan fray by insisting that, were Harper to become Prime Minister, he could "honestly" enact the traditional heterosexual definition of marriage only by including a "notwithstanding clause" even though the Supreme Court in the same-sex marriage reference had explicitly refused to address the constitutionality of the heterosexual definition.[12] Those among the 134 who were on record as opposing the very kind of "prospective" use of s. 33 they were now insisting on were no more embarrassed by their self-contradiction than Chrétien or Martin had been about theirs.[13]

Similar about-faces were necessary to demonize the Harper Conservatives on the substantive *Charter* issues. The fact that Chrétien and Martin had voted with the huge majority of MPs who supported a 1999 parliamentary resolution in favour of keeping the heterosexual definition of marriage did not prevent them from later presenting the same position as evidence of the Conservatives social extremism (even though the latter supported the kinds of compromise civil unions in place in many other liberal democracies). Or consider Conservative MP Rob Merrifield's comment during the 2004 election that it might be useful for women contemplating an abortion to take some counselling first. The fact that Paul Martin has said the same thing earlier in the campaign did not prevent the Liberals from seeing in Merrifield's comments a "profoundly disturbing" and "very frightening hidden agenda" on social issues.[14]

The examples could easily be multiplied, but the point is clear. In the heat of partisan politics, the Conservatives have regularly been demonized as anti-*Charter* and anti-court for taking positions the demonizers themselves have subscribed to in other contexts. The Liberals consistently insist that they are the party of the *Charter* and *Charter* values while their Conservative opponents are anti-Canadian opponents of these values. Even scholars with some conservative inclinations have described the Liberals as the *Charter* party and the Conservatives as the *BNA Act* party.[15]

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[10] Lorne Gunter, "Nothing scary about notwithstanding" *The National Post* (9 June 2004) A16; Campbell Clark, "Liberals Highlight Left-Right Fault Line" *The Globe and Mail* (4 June 2004) A8.

[11] "Liberals would remove Ottawa's ability to override Charter of Rights: Martin" *Canadian Press* (9 January 2006) (CBCA Current Events database, Document Number: 968181541).

[12] Egale Canada, Media Release, "Law Professors Say Re-Opening Marriage Issue Now Pointless" (16 December 2005), online: <www.egale.ca/index.asp?lang=E&menu=2005&item=1253>.

[13] For example see Donna Greschner & Ken Norman, "The courts and Section 33" (1987) 12 Queens L.J. 192 & Errol P. Mendes, "Between Crime and War: Terrorism, Democracy and the Constitution" (2002) 17 N.J.C.L. 77.

[14] Don Martin, "A Bungled Attempt to Score Points on Abortion" *The National Post* (3 June 2004) A16.

[15] L. Ian MacDonald, "The BNA Act and the Charter: Two Mints in One" *Policy Options* (December 2007

This highly charged and inflammatory partisan context—one that has clearly embroiled intellectuals as well as politicians—cannot be ignored in assessing the public controversy that swirled around the Conservative JAC reforms. One cannot prove counterfactuals, of course, but it is worth asking what the reaction might have been had very similar reforms been enacted by a Liberal government. It is surely plausible to think that they would have garnered more attention—and more criticism!—than the 1994 Liberal reforms, but that the level of criticism would not have been as high or intense as in the case of the Conservative reforms. Given the ongoing "demonization context" in which the Harper government launched its reforms, it is difficult to deny that the reaction was influenced not only by "what" was done but also by "who" was doing it.

CONCLUSION

Have we arrived at the best system of federal judicial appointments? That is not my claim. I have tried merely to identify the ways in which the reforms have been demonized out of all proportion. Whatever their weaknesses, the Harper reforms will not be the unmitigated disaster that some critics foresee. On this point, I give the last word to Marshall Crowe. Crowe, who served on a JAC, responded to a claim that going from three screening categories—not recommended, recommended, and highly recommended—back to two made the JACs worse than useless because "to be simply "recommended", a candidate had only to meet the most minimal requirements." By implication, only the "highly recommended" candidates were truly worthy. Crowe disagreed. If it were true that only "the most minimal requirements" were necessary to make it into the recommended category, "[t]hat would mean recommending virtually every applicant," when "[i]n fact, we recommended only between a third and 50 per cent of all applicants." For Crowe, in short, the bar between qualified and unqualified was reasonably high. True, "the small number of "highly recommended" individuals were almost all appointed," but the other appointees also met reasonable standards because none of them, in Crowe's memory, came from the 50 to 70 per cent of candidates screened out as unqualified. Crowe concludes that:

> Criticism of the government's moderate proposals is exaggerated. I see no reason to expect the high legal quality of recommended candidates to diminish: The government will still have ample scope to make choices among those recommended. Given the unqualified constitutional authority of the executive over judicial appointments, that is how it should be.[16]

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[16] Marshall A. Crowe, "Judged as it should be" *Globe and Mail* (1 March 2007) A18.