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# Parliamentary Scrutiny of Supreme Court Nominees: A View from the United Kingdom

Kate Malleson

*Commentary*

# PARLIAMENTARY SCRUTINY OF SUPREME COURT NOMINEES: A VIEW FROM THE UNITED KINGDOM©

KATE MALLESON*

The questioning of Supreme Court nominee Justice Marshall Rothstein before an ad hoc parliamentary committee in March 2006 was a momentous event in Canadian constitutional history. It was followed with great interest by many common law countries who are also grappling with the problem of how to ensure greater transparency and accountability in the selection of their increasingly powerful judges without undermining judicial independence. A key recurring theme in these debates is whether Supreme Court judges should be subjected to public scrutiny either before or after their appointment by the legislature. For many countries considering such a procedure, the experiences of the U.S. Senate Judiciary Committee confirmation hearings have cast a long shadow. The criticisms provoked by the questioning of Robert Bork and Clarence Thomas, in particular, have undermined the reputation of such hearings around the world. Concerns about the U.S. precedent loomed large in the recent Canadian debate on judicial appointments. Perhaps because the powerful neighbour is geographically closer and thus much more familiar, these concerns were subject to more critical scrutiny in Canada than they had been elsewhere.

This scrutiny reveals that the danger public questioning poses to threatening judicial independence and invading candidates' privacy is perhaps over-stated. The fact that a small number of high profile

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* Professor of Law at Queen Mary, University of London.

hearings in the United States have attracted criticism does not mean that the system itself is inherently flawed. In reality, most Senate confirmation hearings are relatively restrained affairs; indeed, they have sometimes been criticized for verging on the bland. However, the weaknesses of the confirmation process that currently occupy academics, judges, and politicians in the United States are much less about the content of the hearings than the political manipulation of the procedure leading to excessive delays and leaving judicial posts unfilled.[1] Furthermore, even if the hearings in the United States have sometimes degenerated, there is no reason to assume that this would necessarily be replicated elsewhere. Perhaps the best-known feature of the U.S. constitutional system is that its Supreme Court occupies a uniquely important place in the constitutional order. As a result, U.S. Supreme Court judges are not regarded as jurists occupying a place where they must be shielded from the "hurly-burly" of political life. Recently, Sandra Day O'Connor rightly reminded U.S. politicians that there are limits to the pressure which judges can take if judicial independence is to be preserved.[2] However, those limits are clearly much less tightly drawn in the United States than in any other common law country.

Another criticism of public hearings for judicial candidates is that they undermine the quality of the judiciary by deterring first-rate candidates from coming forward and facing public scrutiny. No doubt the anecdotal evidence to support this is real and some individuals have been put off by the process. Yet it seems clear that where public hearings are used, the deterrent effect is not sufficient to affect the overall quality of the judiciary. In South Africa, for example, the introduction in 1996 of public interviews of constitutional court and high court judges by the Judicial Service Commission (a body which includes politicians) led to widespread fears that good candidates would not apply. This did not happen, and the quality of the Constitutional Court is widely regarded as being extremely high.[3] Moreover, South African

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[1] M. Tolley, "Legal Controversies over Federal Judicial Selection in the United States: Breaking the Cycle of Obstruction and Retribution over Judicial Appointments" in K. Malleson & P. Russell, eds., *Appointing Judges in an Age of Judicial Power* (Toronto: University of Toronto Press, 2006).

[2] Sandra Day O'Connor, "Address"(Georgetown University, 9 March 2006) [unpublished].

[3] K. Malleson, "Assessing the Performance of the South African Judicial Service Commission" (1999) 116 S.A.L.J. 36.

judges are generally supportive of the system of public interviews, believing that it gives them an opportunity to strengthen public confidence in the court. Likewise, U.S. judges, although they certainly would not claim to enjoy the hearings, have often gone on record in support of the process as a means of enhancing their legitimacy. Public interviews can also offer the less obvious advantage of allowing judges to reveal certain information about themselves in a controlled environment. For example, in 1999, Justice Edwin Cameron, an openly gay member of the South African high court and a highly respected judge, informed the Judicial Services Commission that he was living with AIDS at his interview for a post on the Constitutional Court.[4] His subsequent appointment undoubtedly reinforced the commission's reputation for making non-discriminatory appointments.

While these examples show that public nomination or confirmation hearings do not automatically undermine judicial independence, invade candidates' privacy, or deter good candidates from applying, the risk of these outcomes cannot be dismissed altogether. Thirty years ago, most commentators in common law systems would have concluded that such risks were not worth the benefits in terms of increased openness and accountability. However, in light of the changing role of the judiciary, the cost-benefit equation has now tipped.

Around the world the political power of supreme court and constitutional court judges has grown in line with the increasing importance of human rights in the political process. Judges today are dealing with sensitive political issues that repeatedly arise in different countries. These include abortion rights, gay rights, aboriginal/minority rights, the death penalty, and anti-terrorism measures. Across a range of different countries, with varied court structures, the general pattern has been remarkably similar. While the level of judicial activism has ebbed and flowed within each jurisdiction, the overall trend is one of expanding influence. In some countries, including Canada, South Africa, the United Kingdom, and New Zealand, the change has come through the formal incorporation of a bill of rights. In others, such as Australia, it has been through the development of rights within the common law. Either way, supreme courts throughout the common law world have been given, or taken on, a role in political areas previously outside their

[4] F. Du Bois, "Judicial Selection in Post-Apartheid South Africa" in K. Malleson & P. Russell, eds., *supra* note 1, 292.

remit. There is no reason to believe that this trend will reverse in the foreseeable future. Indeed, if anything, the process of judicialization is likely to accelerate as more countries expand the scope of justiciable rights to include social and economic rights in areas such as housing, health, and employment. The wide range of rights found in documents such as the South African constitution and the Charter of Fundamental Rights of the European Union is likely to be more frequently included within new bills of rights or inferred into old ones.[5]

If this development continues on its current trajectory, courts throughout the common law world will increasingly be called upon to determine what obligations governments have to provide for their citizens in a wide range of policy areas. Sometimes the courts may take a strongly deferential line and leave elected governments a wide measure of discretion on these issues; at others times, they may be more activist and impose obligations that have significant policy and economic implications. Sometimes, as in the seminal South African Constitutional Court decision in 2000 concerning the rights of children to shelter, they may come up with imaginative ways to uphold basic rights and leave the politicians to determine exactly how these are to be implemented.[6] Whatever the particular outcome in individual cases, such issues are now more likely to find their way into the courts for their resolution. Supreme court justices are not politicians in wigs; rather, they play a crucial role in the interpretation and development of human rights standards around the world. They now make up a global community of jurists who meet at conferences and read each others' judgments, speeches and articles via the internet.[7] They are a powerful body of decision-makers whose judgments affect the lives of many citizens in many different states.

Against this background, the traditional point of balance between accountability and independence of the judiciary must now be rethought. Citizens have a right to be properly informed about the people who sit in their top courts and determine controversial issues of great moral and political sensitivity. Judges at this level cannot demand the anonymity of earlier years, hiding behind literal or metaphorical

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[5] See C. Guarnieri & P. Pederzoli, *The Power of Judges* (Oxford: Oxford University Press, 2002).

[6] *South Africa v. Grootbroom*, [2000] S.A.J. No. 57 (S. Afr. Const. Ct.).

[7] See A.M. Slaughter, "A Global Community of Courts" (2003) 44 Harv. Int'l L.J. 191.

wigs. If we accept that some form of public questioning of supreme court candidates or appointees by elected representatives is necessary to provide a link to the democratic process and greater public engagement with the judicial appointments process, then there are strong arguments for the legislature as the best forum for this process.

The argument for legislative hearings must be placed in the context of the decision in a number of common law countries to reduce or remove the power of the executive in appointing senior judges. The desire to curb the power of the executive in this area is understandable; as the power of the judges grows, the danger of inappropriate political patronage with a place on the Supreme Court bench as a reward for past judgments or anticipated future ones inevitably increases. Partisan political concerns will not, of course, be absent from a hearing before a legislative committee, but the involvement of a number of MPs from different parties ensures that no one ideological position will inevitably dominate.

In Canada, it is clear that the impetus for the introduction of hearings was as much driven by party considerations as by principle. For the Conservatives, scrutinizing judicial nominees holds out the promise of checking judicial activism. Conversely, questioning before a liberally minded parliamentary committee might be a means of checking the nomination of an extreme conservative. Clearly it would be naive to expect that party politics could be removed from the equation, but its presence does not undermine the sound principled reasons for the change. Moreover, the composition of a cross-party legislative committee will change from appointment to appointment, thereby ensuring that the political persuasion of the court cannot be so easily moulded over time to the interests of one political party. The array of different interests that will be found on such a committee facilitates a more effective and safer means of addressing the democratic deficit than exclusive appointment by the executive. The fact that parliamentary proceedings in different jurisdictions are now increasingly televised and accessible worldwide via the internet also means that the proceedings can be conducted in public in a very real sense.

The decision in Canada to introduce legislative hearings for the Supreme Court nominees has attracted particular attention in the United Kingdom because it coincides with the complete reform of the judicial appointments process. Under the *Constitutional Reform Act 2005*, the responsibility of selecting the judges for the new Supreme Court in the United Kingdom has been passed from the Lord

Chancellor to a new judicial appointment commission made up of judges and members of the regional judicial appointments commissions of England and Wales, Scotland, and Northern Ireland. While the legal and political cultures of the United Kingdom and Canada differ in detail, many of the debated issues around judicial appointments in the two countries are strikingly similar. The key difference is that whereas Canada favoured accountability, the United Kingdom moved to a system that prioritizes independence at the cost of democratic input. During the passage of the Constitutional Reform Bill in the United Kingdom, a number of witnesses, including myself, argued before the parliamentary Constitutional Affairs Select Committee that one way to counter the democratic deficit caused by the removal of the executive from the appointments process would be to develop a role for the legislature. The decision of the United Kingdom to reject this option, and of Canada to adopt it, is somewhat paradoxical given that Canada has no tradition of judges appearing to give evidence before legislative committees; by contrast, this is a common and increasingly popular practice at Westminster.

The first Canadian nomination hearing, as might have been expected, was successful. The questions were sometimes searching, but never intrusive, and the session achieved its aim of giving the public some sense of Justice Rothstein's views and values. Of course, the spotlight was on the committee, and the members of parliament were on their best behaviour. But the success of the first hearing bodes well, particularly since the committee sought to establish the parameters of acceptable questioning, taking evidence from a constitutional expert on the subject and making clear that judges should not be asked about issues which might come before them at the Court. There is no guarantee that MPs will stick to these rules in all subsequent hearings. Some future sessions may indeed give the candidates a rougher ride. Still this is not an inevitable cause for concern. The nature of the questions asked will differ according to the particular candidate, as Justice Rothstein himself noted when asked what sort of questions he thought should be put to nominees. What is relevant must be determined on a case-by-case basis. In some instances it may be appropriate to ask searching questions which may be uncomfortable for the candidate. In hindsight, it is less obvious whether the questioning of the U.S. nominee Clarence Thomas regarding allegations of sexual harassment was as inappropriate as many critics claimed it was at the time.

Canada has reason to be proud of leading the common law countries in the area of judicial appointments reform by seeking to increase accountability through the introduction of legislative hearings. The decision in the United Kingdom not to take this route is unlikely to cause any public disquiet for the time being, because the majority of the public in the United Kingdom knows little about judges and even less about the system by which they are appointed. However, this will change once the new United Kingdom Supreme Court is created in 2009, with its own building in Westminster Square, and the Supreme Court justices are in a much closer position to their Canadian counterparts. Journalists, academics, and politicians will become more aware of this powerful institution, and questions will be asked about the way its members are chosen. The failure to address the democratic deficit in the selection process to the Supreme Court is likely to become increasingly problematic. If the new system in Canada is seen to be successful, having avoided the failing of the U.S. system, the United Kingdom and other countries which have rejected this option to date may well change their minds. Canadian MPs should be aware that they are being watched with great interest around the world to see if they can strike that difficult balance between rigorous and informative questioning on the one hand, and respect for personal privacy and judicial independence on the other.