JUDICIAL APPOINTMENTS IN THE UNITED STATES OF AMERICA

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You would not know it in the mainstream American media today, but a silent transformation is gathering pace inside one of the three core structures of the American polity: the judiciary. A transformation that is seeing an arm of power slowly disappearing from an entire generation of liberal Americans everywhere.

Here is a quick example. Ruth Bader Ginsburg is currently 86 years old. If President Trump's youngest appointment so far to the US Court of Appeals lived to the same age as Ginsburg is now, this recent appointment would still be on the bench in 2069. In fact, most of Trump's 43 appointments to the Court of Appeals to date will still be on the bench in 2054 using the Ginsburg age measure. This is just a glimpse on how a conservative jurisprudential future in the United States is currently being locked down by President Trump and the Republicans.

I BACKGROUND

Article II of the United States Constitution ensures the President's judicial nominees must be approved 'by and with the Advice and Consent of the Senate.' Article III of the Constitution establishes the Supreme Court and also gives Congress the power to create 'inferior' courts. The most important point about Article III is that judges do not have

defined tenure; they serve only on the condition of 'good behaviour.' Effectively, they serve for life.

The foundation of this whole subject matter and what makes it so significant is the lifetime nature of these appointments. To sharpen the context in an Australian setting, imagine a situation where Dyson Heydon would still be on the High Court of Australia right now with at least another full decade to go if we applied the Ginsburg age measure. Or Ian Callinan still looking at another five years on the High Court.

But back to Article III and these 'inferior courts' served by judges only limited by 'good behaviour.' Today this takes the shape of the 678 District Court judges covering 94 districts across 50 American states and the US territories. Sitting above that are the 179 judges on the 13 circuit courts known collectively as the US Court of Appeals.

The appeals circuits are geographical in nature and go in ascending order from the First, Second, Third right up to the Tenth and Eleventh Circuits. In addition, there is the powerful and prestigious DC circuit and the specialist Court of Appeals for the Federal Circuit. Each circuit covers a geographical grouping of American states. The circuits all vary in size from the six judges of the First Circuit that covers four states, to the behemoth of the Ninth circuit with its 27 judges who hear appeals from California and eight other states. Then there is the caseload. The US Court of Appeals system has the final word in around 50,000 cases every year compared to the roughly 70 cases the Supreme Court finally determines each year.

II DONALD TRUMP'S RECORD

On 20 January 2017, Donald J Trump assumed office as President of the United States. Almost 18 months to the day — 18 July 2018 — his Administration achieved an ominous record. On that day, Trump could claim that he had appointed more judges to the Court of Appeals in the first two years of any American Presidency, the most during this timeframe since the Appeals Courts were established back in 1891. And on that day, the person confirmed to the powerful US Court of Appeals for the Fifth Circuit — covering Texas, Louisiana and Mississippi — offers us a statistical snapshot of what a Trump nominee at this level generally looks like.

His name was Andy Oldham, a standard, bespectacled white male with degrees from Cambridge and Harvard. As Trump's twenty-third Appeals Court judge amongst 43 appointments so far, Judge Oldham represents almost the statistical median of this cohort. Using the demographic metrics of the leading liberal organisation opposing Trump's nominees, the Alliance for Justice, Oldham is an Ivy League educated, heterosexual, able bodied, white male who represents the statistical mode in the data set of Trump's nominees: 86% of whom are white, 80% of whom are male. On the statistical mean side of things, this historic appointment under-indexed at just 39 years of age at the time of his appointment compared to the average age of all of Trump's Appeals Court appointments of 49 years.

By the end of his second year, Trump went on to see 30 Appeals court judges in place. This compares to 22 judges confirmed under President Bush Sr by the end of his first two years, with Reagan and Clinton both on 19, the younger Bush on 17, Obama on 16 and the Carter Administration on 12.

The speed with which appointments are made is a crucial measurement and the record setting pace under Trump can be more easily explained when you have a Republican Senate and a man obsessed with judicial confirmations like Senator Mitch McConnell as Majority Leader. In fact, it would be unfair not to feel a little sorry for President Obama not just because a Supreme Court vacancy was forcibly kept open for a year but also because he adhered closely to the conventions at the Appeals Court level. He always deferred to home-State Republican Senators, respected the 'blue slip' process, and sought consensus, bi-partisan candidates. All of this respect for tradition saw the Republican-controlled Senate allow only two Appeals Court nominees to be confirmed in Obama's last two years in office.

Despite forming a minority in the Senate, Democrats today have discovered their own methods of resistance by using certain procedural tactics to delay Trump's nominations. And the record shows such tactics have been used in an unprecedented manner.

III CLOTURE VOTES

The cloture vote is what we would refer to in the Australian Parliament as the guillotine. This is a delaying procedure that you will not find mentioned in the American liberal media. The cloture vote is — to quote the Congressional Research Service — 'the only procedure by which the Senate can vote to set an end to a debate without also rejecting the bill, amendment, conference report, motion, or other matter it has been debating.' To get a nominee confirmed, therefore, you must first end the theoretical debate on the nomination itself. To do that a group of 16 Senators must file a cloture motion and in the Senate's

Congressional Quarterly (or our Hansard) when the Senate is in session, you will notice this form of words that must be signed by at least 16 (in these cases, Republican) Senators: 'We, the undersigned Senators, in accordance with the provisions of Rule XXII of the Standing Rules of the Senate, hereby move to bring to a close the debate upon the nomination of [the nominee in question].'

To establish some context here we should go back to the era of the 'Reagan Revolution', except in terms of judicial appointments and cloture votes there was no revolution. Prior to that, at the Court of Appeals level, the Senate accepted the President's right to make appointments and confined itself to its true Constitutional calling of providing 'advice and consent.' Every one of the 83 Appeals Court judges selected by Reagan was confirmed without having to resort to a guillotine to stop debate and give the nominee an up or down vote.

In fact, from 1789 to 1980, more than 97 percent of the judges confirmed to the District Court, the Court of Appeals, and the Supreme Court had no opposition at all. Remarkably, if we look at judicial nominees that garnered more than 25% opposition on the Senate floor, we can safely claim that none of Reagan's appeals court nominees attracted this level of disapproval. Even the country's most celebrated conservative judge, the late Antonin Scalia, was confirmed by a vote of 98 to 0 in 1986.

The same can be said for the Administration of George Bush Snr, where 40 of his 42 Appeals Court judges were confirmed by unanimous consent. Only one of Bush's Appeals Court nominees went to an actual vote and the other a young African American appointed to the DC Circuit called Clarence Thomas sailed through without any resistance on a voice vote

(with not even the infamous liberal Ted Kennedy voting against him).

So, throughout 12 years of Reagan and Bush, there was not a single occasion where a guillotine was needed to force a vote on a Reagan or Bush nominated Appeals Court judge.

For other Administrations the record was scarcely different. Under the Clinton Administration there was only a single cloture vote amongst his 66 Appeals Court appointments and less than 2% of these nominees garnered more than 25% opposition on the Senate floor.

The Administration of George W Bush endured three such votes, just over 2% of all his judicial nominations. The Obama Administration saw two cloture votes against his Appeals Court nominees comprising less than 4% of all his nominees.

Thus, zero guillotine votes were required under the Reagan and Bush Administrations before such votes eventually reached an historic high of three. Now compare this to the Trump Administration. So far, a massive 38 cloture votes have taken place comprising over 88% of all Trump's Appeals Court nominees. In terms of opposition on the Senate floor we go from around 2% across previous Presidencies to a massive 81% percent of Appeals Court nominees attracting opposition of more than 25% in the Senate; a massive, unprecedented, not talked about spike.

(On a side note, every single one of Trumps Appeals Court nominees have had to face a roll call vote, which is another delaying tactic that requires the presence of every Senator in the chamber.)

IV LIBERALS HIDING – SENIOR STATUS

Despite all this frenzied opposition, Trump's nominees are being processed at a faster rate than his predecessor. It is taking Trump's Appeals court nominees around 151 days from nomination to confirmation, compared to 229 days for Obama's nominees. In fact, Trump is doing so well with the Appeals Court he is running out of vacancies to fill. After 43 appointments only four vacancies are now left open.

It is interesting to observe a tactic emerging amongst judges currently on the bench to use their lifetime tenure to 'wait out' this conservative, Republican executive till after the Presidential election late next year. Since 1984, a federal judge can take what is known as 'senior status' when he or she turns 65 years of age provided he or she has served at least 15 years on the bench. 'Senior status' effectively allows the judge to continue working on a part-time basis but with a full-time salary and benefits. While judges with senior status can still bring down decisions, their place on the bench officially becomes vacant.

Research conducted by the Heritage Foundation on data from the Federal Judicial Centre shows a very large number of Democrat-appointed judges who are currently eligible to retire on full benefits or qualify to work part time with 'senior status' but who are choosing to stay. Of 60 Appeals Court judges currently eligible to move to senior status or retire, 35 are judges appointed by Democrats, a number estimated to grow to 39 by Election Day 2020.

V NO LIBERAL APPOINTMENT SHORTLIST

Liberal Americans have simply never been concerned about judicial appointments as a core political priority. They make very clear who they are against, namely the Brett Kavanaughs and Andy Oldhams of the world, but you will never hear them talk about the nominees they support. Democrats talk about the threats conservative judges pose to LGBTIQ+ issues, abortion, immigration, and climate change but they never campaign for specific, liberal judicial nominees as the solution.

Judicial nominees, especially to the lower courts, have never been advocated for by Democrats during Presidential election campaigns. How this issue was not raised amongst the 20 Democrat hopefuls in their recent debates is astonishing. And it is quite striking that on 18 May, 2016, nearly six months before the 2016 Presidential election, Donald Trump took the unprecedented step of publicly releasing a shortlist of eleven judges from whom he would select a replacement for Antonin Scalia on the Supreme Court if he were elected President. An alternative shortlist in response was never released by Hilary Clinton. And again, on 17 November 2017, Trump expanded and publicly released a further shortlist to include a total of 25 potential nominees for a future seat on the Supreme Court. Again, no alternative list was ever released by any Democrat.

Trump also made clear his potential nominees are vetted and approved by well-known lawyer and conservative activist, Leonard Leo and the Federalist Society more generally. On the Left, there are no prominent individuals or organisations explicitly committed to advancing liberal judicial candidates. One needs to wonder why there is no vast liberal network of young potential judicial nominees equivalent to the Federalist Society and why no liberal version of Leonard Leo exists.

Recently on 13 June 2019, nearly two and a half years after Trump's inauguration, liberals made their first real attempt to match Trump's shortlist. The initiative called 'Building the Bench' is organised by leading liberal legal group, the Alliance for Justice.

But unlike Trump's transparency in 2016 and 2017, the Alliance for Justice and the other groups involved are keeping their lists of potential nominees (if they even exist) secret, and no Democrat presidential candidate is willing to say they would even use the list to select nominees if it were made public.

And the response received by Real Clear Politics when they pursued possible names on this list is instructive:

> RealClearPolitics reached out to a dozen of these [Democrat candidate] campaigns to ask whether they would commit to selecting appointees from the Building the Bench roster, but only a handful responded to repeated requests – and those responses were noncommittal.

The campaigns of the top contenders in the field -- Joe Biden, Bernie Sanders, Elizabeth Warren, Kamala Harris, Pete Buttigieg, Cory Booker, Amy Klobuchar, Kirsten Gillibrand and Julian Castro did not respond to repeated inquiries about this topic.

Jeffrey Toobin, a long-time CNN legal analyst, articulated things best in an article he wrote for the New Yorker magazine in June of this year:

> Democrats are different. Consider what happened after McConnell blocked the Garland nomination. After a few days of perfunctory outrage, most Democratic politicians dropped the issue. Neither President Obama nor Hillary Clinton, in their speeches before the Democratic National

> Convention, in July, 2016, even mentioned Garland—or the Supreme Court.
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> Four years later, this pattern is recurring. Consider, for example, the Web sites of three leading contenders for the Democratic Presidential nomination: Joe Biden, Bernie Sanders, and Elizabeth Warren. Each site has thousands of words outlining the candidates' positions on the issues—and none of them mentions Supreme Court nominations, much less nominations for lower-court judges. These omissions are especially striking in Biden's case, because he served for decades on the Senate Judiciary Committee, including several years as the chair.

VI CONCLUSION

After just two and a half years in office and despite unprecedented levels of resistance, Trump has already appointed a quarter of all the judges on the Court of Appeals and turned one circuit from a Democrat dominated one to one with a majority of Republican appointments. With nearly 40 Democrat appointed judges becoming eligible to retire or work part time over the next year there's opportunity for Trump to consolidate his record further.

What this all means for abortion, gun rights, immigration and other contentious matters is a story for another day. In the meantime, the Court of Appeals will continue to be ignored by Democrats while a more significant, macabre equation takes hold: can Ruth Bader Ginsburg heroically wait out a Republican presidency and avoid yet further conservative entrenchment on the Supreme Court? Or will she exhaust her seat to Trump, which according to one liberal commentator, will truly earn her the moniker 'Notorious RBG.'