PERSONAL OR POLITICAL PATRONAGE? JUDICIAL APPOINTMENTS AND JUSTICE LOYALTY IN THE HIGH COURT OF AUSTRALIA

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Abstract

We examine whether Justices appointed to the High Court of Australia are more likely to find in favour of the Federal Government when the Prime Minister who appointed them is in office than when subsequent Prime Ministers are in office, over the period 1995 to 2019. We find evidence of a loyalty effect, even when subsequent Prime Ministers are of the same political party as the Prime Minister who appointed them. We distinguish between Justices appointed by Labor and Liberal Prime Ministers and show that the loyalty effect holds for Justices appointed by the Howard and Turnbull governments. These findings are important because they are central to the understanding of judicial independence and the rule of law.

Introduction

The potential influence of the judicial selection process on judicial decision-making raises the critical issue of judicial independence. The independence of judges—designed to ensure that judges are free from political pressure—may be undermined if the Justices feel a sense of obligation to the person who appoints them. We examine whether Justices appointed to the High Court of Australia (HCA) are more likely to find in favour of the federal government when the Prime Minister who appointed them is in office than when subsequent Prime Ministers are in office. Employing data on all HCA cases decided over the period 1995 to 2019, we find evidence of a loyalty effect, with Justices finding in favour of the federal government more frequently when the Prime Minister who appointed them is in office. When we distinguish between Justices appointed by Labor Party and Coalition Prime Ministers, we find that the loyalty effect holds for only in the terms of Liberal Prime Ministers John Howard and Malcolm Turnbull.

Our findings extend several strands of political science literature on the HCA. The first is the growing literature on the factors associated with how Justices of the HCA vote (Myers, 2020; Robinson et al., 2020; Smyth, 2001, 2005; Weiden, 2011). Taken together, these studies establish that the Justices' background and ideology influence how they decide cases. We extend these findings to address the influence of Justice loyalty to the government of the Prime Minister who appointed them on judicial voting behaviour. The second strand of literature to which we contribute are studies on the federal government as a litigant in the HCA. This literature has tested

party capability theory, finding that the federal government enjoys a substantial litigation advantage in the High Court (Sheehan & Randazzo, 2012; Smyth, 2000). These studies, however, do not examine whether this reflects a judge's loyalty to the Prime Minister who appointed them or examine whether the litigation advantage differs across successive governments. The third, and most directly relevant, literature to which we contribute are studies that examine how the way in which Justices votes change over time. Smyth (2002) examines whether there is a freshman effect on the HCA from its inception up to 1975. Other studies have examined in a descriptive manner, the ideological drift of specific Justices on the HCA over time (Kirby, 1995), the manner in which justices write their opinions on the Court (Lynch, 2020, and similar earlier studies), and the relationship between electoral politics and judicial review (Smyth & Mishra, 2015).

We also extend the comparative judicial behaviour literature. Specifically, we extend US findings on whether judges are more loyal to the President who appointed them than subsequent Presidents in the United States (Ducat & Dudley, 1989a, 1989b; Epstein & Posner, 2016; Yates, 1999, 2002; Yates & Whitford, 1998) to a different jurisdiction with a different judicial appointment process. As we discuss in more detail in the next section, appointments in Australia are made in secret and can be largely regarded as the 'gift' of the Attorney General and Prime Minister. As McIntyre (2020) describes it, 'the federal cabinet has a largely unfettered discretion to appoint almost any lawyer they want to the High Court. Nearly every aspect, including timing, candidates, relevant criteria and consultation process, is secret'.[1] This makes it relatively easy for the government to appoint individuals with whom the Prime Minister, Attorney General or other key ministers might have long standing personal connections and whom might feel more obligated to the government who appointed them. The secretive nature of the appointment process in Australia means that the HCA provides a better setting to test whether there is a loyalty effect than the U.S. Supreme Court, where the scrutiny of the Senate confirmation process acts as a check on the ability of the President to appoint friends or political allies, who might feel a sense of obligation to the President. In this sense, one might actually expect to see stronger evidence of a loyalty effect in Australia as compared to the US.

Finally, our research pertains to the independence of federal judges in Australia. If the government can exert (even limited) political pressure on its appointees, then it is important that the scope and level of such influence is assessed. Our findings, though inconsistent, show that Judges are on average more likely to rule in favour of the Prime Minister who appoints them than those who come after. We stress that this is not to assume intentional loyalty on the part of Justices,

[1] For a discussion of the judicial appointment process in Australia see Davis and Williams (2003). On the differences between the judicial appointment processes in Australia and the United States see Tobias (2018).

rather that Prime Ministers who have a clear understanding of the preferences of candidate judges may choose the Justice whose preferences most closely match their own. In what follows, we first introduce our theoretical approach, outlining four distinct models of appointment of High Court Justices. Second, we examine the descriptive statistics of cases involving the federal government followed by an analysis of individual Justices with reference to details of their appointment and their decision-making record on federal government litigation. We then conduct a multivariate conditional logit regression to test our loyalty hypotheses while accounting for competing explanations.

Background to the Empirical Study

Our hypothesis is that Justices vote for the government of the Prime Minister who appointed them more than subsequent governments, irrespective of political persuasion, controlling for ideology and other factors that influence voting patterns. One reason why Justices might be more willing to vote for the government that appointed them is 'a sense of personal obligation' (Scigliano, 1971, p. 132) or 'loyalty [that] can … result from gratitude' (Epstein & Posner, 2016, p. 408). Epstein and Posner (2016, p. 408) note: 'Psychologists believe that gratitude compels the beneficiary to reciprocate – by providing a benefit to the original benefactor if possible'. There is much evidence of personal obligation and reciprocity in the economics and political science literatures in other contexts (Baldwin, 2013; Cruz et al., 2017; Finan & Schechter, 2012; Gonzalez Ocantos et al., 2014). These studies suggest that sense of personal obligation is stronger the longer the personal or professional ties and that reciprocity is self-reinforcing.

We suggested in the introduction that the judicial appointment system in Australia makes it relatively easier than the United States to appoint individuals with personal connections to the Attorney General or Prime Minister. Formally, Section 72(i) of the *Commonwealth Constitution* states that Justices of the High Court '[s]hall be appointed by the Governor-General in Council'. Since the inception of the High Court, this provision has been interpreted to mean that the Governor-General appoints Justices on the advice of the federal government. The only further formal requirements are set out in the *High Court of Australia Act* (1979). Section 7 requires an appointee to be a judge of a federal or state court or to be enrolled as a legal practitioner for at least five years. Section 6 states that the '[Commonwealth] Attorney General shall consult with the Attorneys-General of the States'. In practice, this leaves the Attorney-General and Prime Minister with a lot of leeway to appoint almost anybody that they wish to the Court, provided that they are qualified as a lawyer with at least five years' experience.

Donegan (2003) argues that the Prime Minister has become much more important in the appointment process since John Howard was Prime Minister. However, it is likely that various Prime Ministers had influential roles in appointing Justices to the Court before the Howard government. For example, Robert Menzies was instrumental in appointing Dixon as Chief Justice in 1952, was clearly influential in deciding which puisne Justices were appointed to the Dixon Court through the 1950s and 1960s and in appointing Barwick as Dixon's successor as Chief Justice in 1964 (Durack & Simpson, 2001; Howard, 2014). Donegan (2003) suggests that the Prime Minister tends to accept the recommendation of the Attorney-General, unless the Prime Minister had a legal background in which case he or she plays a more important role. One clear exception is Paul Keating who played an active role in appointments to the Court, although not a lawyer (Bramston, 2016). The relative influence of the Attorney-General and Prime Minister might also depend on the influence of the Attorney-General. It has been suggested that an important reason why John Howard was particularly influential in the appointment process is that Daryl Williams was regarded as ineffectual in cabinet and 'a better lawyer than politician' (Donegan 2003, p, 11).

Epstein & Posner (2016) identify four 'appointment models'; namely, the consistency, merits, ideological and patronage models; the latter two expressly political models form the basis of our empirical study. The consistency model is really just a norm which ensures regional representation with dominance from New South Wales and Victoria and, more recently, gender representation with three Justices being women. Thus, in the Morrison government's most recent appointments, Simon Steward from Victoria replaced Geoffrey Nettle from Victoria while Jacqueline Gleeson from New South Wales replaced Virginia Bell from the same state.

Under the merits model, the most qualified candidate is appointed to the Court. When Attorneys-General give their reasons for appointment, it is nearly always couched solely in terms of the merits of the candidates (King, 2000; Ruddock, 2003; Williams, 1998). However, the question of who is the best qualified candidate is highly subjective. For example, scholarship on appointments of justices have argued that perceptions of meritorious judicial appointments are gendered, placing a social premium on typically masculine traits (Thornton, 2007; McLoughlin 2015). We assume that, while merit is difficult to measure, by virtue of the prestige of their careers prior to appointment, Justices appointed to the Court are sufficiently competent for the role. However, given the subjectivity of merit and the comparatively large pool of qualified candidates, other (political) considerations are also likely to decide appointments.

Under the ideological model, governments appoint candidates with strong ideological credentials. While it is generally accepted that judicial appointments in Australia are not as overtly political as in the United States, there are instances of governments appointing judges who they

consider will further their political agendas that go back to the early twentieth century. Deakin's prime motive in expanding the Court from three to five Justices, and appointing Higgins and Isaacs, in 1906 was to increase Commonwealth power (Galligan, 2001). Hughes famously appointed Piddington with a view to increase Commonwealth power on the Court.[2] Examples of Labor appointments have been regarded as political are Evatt and McTiernan appointed by the Scullin government and Murphy appointed by the Whitlam government. Evatt's appointment had the strong backing of the ACTU (Tennant, 1970), but the appointment of both Evatt and McTiernan 'was greeted with indignation in conservative and legal circles' (Murphy, 2016, pp. 91-92). Whitlam appointed Murphy to strengthen the centralist position on the Court with a series of pending cases in which states were challenging the validity of Commonwealth legislation (Hocking, 1997).

When Michael Lavarch was Attorney-General, it is reported that Keating was interested in where a potential appointee stood on the definition of excise tax in Section 90 of the Constitution (Bramston 2016).[3] The Keating government appointed Michael Kirby to the Court, while Kirby had been passed over by the Hawke government. Bramston (2016) argues that Keating appointed Kirby because Keating had been an admirer of Lionel Murphy and he wanted to inject some Murphy-like radicalism on to the Court. Brown (2011) records that Keating saw Kirby as being likely to interpret Section 90 of the Constitution in favour of the Commonwealth as being a decisive factor. Another potential reason for appointing Kirby is that he is a Monarchist and Keating thought that by appointing Kirby to the Court he could further his objectives to make Australia a Republic by silencing a vocal opponent (Brown, 2011).

On the Coalition side of government, when Joseph Lyons appointed John Latham, who had previously been Attorney General in the UAP government, the appointment was criticized by the Opposition. Cowen (1965, pp. 31-32) records: [Latham's] involvement as Attorney-General with legislation and other activities in the highly sensitive and turbulent industrial field exposed him to such attack'. While Menzies had a reputation for making largely apolitical appointments, consistent with the merit model (Fricke, 1986; Sawer 1967), some could be regarded as ideological. For example, Windeyer was a well-known supporter of the Liberal Party (Donegan, 2003), who

[2] Hughes contacted Piddington prior to appointing him to elicit Piddinton's views on how he would decide cases when Commonwealth and State powers were in conflict. He replied that he favoured Commonwealth power and Hughes made the appointment, but the furore was such that Piddington resigned before ever sitting on the court (see Fricke 1986, 77–83).

[3] (Bramston, 2016, p. 540) states that, according to Michael Lavarch, 'Paul had an interest in where a candidate might stand on the definition of an excise [in] section 90 of the Constitution, as the High Court was then taking a narrower view of what was captured by an excise, which meant that a range of state taxes were not an excise and hence could not be levied'. Similarly, Brown (2011, p. 266) records that Keating wanted to know 'what each candidate was most likely to do, if faced with [deciding whether] a range of State taxes were 'license fees'. As Treasurer, Keating had identified these taxes as inefficient, a barrier to reform and an unwanted brake on federal control of the economy'.

had been a Liberal Senate pre-selection candidate (Dominello & Neumann, 2001), while Barwick had been Attorney-General and Minister for External Affairs. Owen had been a New South Wales Liberal parliamentary candidate (Dominello & Neumann, 2001). While not a member of Parliament, Douglas Menzies 'had been an active member of the Young Nationalists Organization and of the Liberal Party' (Fricke, 1986, p. 175). More recently several Conservative appointments have been known for having reputations as 'black letter' lawyers. The Howard government appointed several judges – and most notably Ian Callinan and Dyson Heydon– with conservative credentials after then Deputy Prime Minister, Tim Fischer called for the appointment of 'capital C conservatives'. Of the two most recent appointments to the Court by the Morrison government, media reports have noted that Simon Steward was 'considered a favourite among legal conservatives espousing a 'black-letter' approach to the law' (Whitbourn, 2020).

Under the patronage model, the Prime Minister and Attorney General appoint individuals who are allies, confidants or friends to either reward them for past services or with a view to receiving a sympathetic ear on the Court. One of the clearest recent examples of a patronage appointment was Campbell Newman's appointment of his friend, Tim Carmody, as Chief Justice of Queensland. Another prominent example was when Christian Porter, when Attorney General of Western Australia, appointed his long-time friend, James Edelman, to the Supreme Court of Western Australia. Menzies appointed Latham as Chief Justice when Attorney General and Dixon as Chief Justice when Prime Minister. Menzies was 'always particularly close to Latham and Dixon' (Maher, 2001, 478). Menzies was a close professional and political colleague of Latham (Maher, 2001). Dixon was Menzies 'great friend and mentor' (Galligan, 2001a, 556).[4] Menzies regularly consulted with Dixon about potential appointees to the Court when the latter was Chief Justice (Ayres, 2003; Galligan, 2001a; Simpson, 2001). Robert Menzies, as Prime Minister, and Garfield Barwick, as Attorney General, appointed Douglas Menzies to the High Court. In addition to being Robert Menzies' cousin, Douglas Menzies was also 'Barwick's greatest friend at the Bar' (Marr, 1981, p. 130). A couple of the High Court appointments of the Hawke government have characteristics of the patronage model. Bob Hawke appointed Michael McHugh to the High Court. It has since come to light that McHugh provided private advice to Hawke on managing the Combe-Ivanov Affair in 1983 that was instrumental in saving the government from embarrassment (D'Alpuget, 2010). Hawke appointed John Toohey to the High Court. Toohey and Hawke had been friends at law school together.

[4] Menzies (1970) devotes a whole chapter to Dixon; of whom, he writes in glowing terms. See also Ayres (2003) who records that they were lifelong friends and that in their final years, when unable to visit each other because of poor health, they would exchange taped messages recorded on cassette recorders.

It is important to note that most appointments involve elements of each model. While all appointments to the Court could be regarded as meritorious, and many appointments could be motivated by consistency (e.g., the need for gender or state representation), there is often an important, and decisive, role for ideological and patronage considerations at the margin. It is also clear that ideological and patronage considerations are often intertwined. Personal relationships that underpin the patronage model are frequently forged through political alliances and similar ideological outlook. In what follows, we examine the extent to which the explicitly political appointment motivations (personal or partisan ties) affect disposition toward the federal government.

Data and Methods

We track the decisions of the HCA from 1995-2019, capturing 437 cases in which the federal government was a litigant (either appellant, respondent or applicant – excluding cases in which the Commonwealth intervened). In total, this resulted in 2,577 individual opinions from 21 High Court Justices serving under six Prime Ministers. Notable across Tables 1 and 2 is the long tenure of John Howard as Prime Minister, with comparatively short terms for Rudd, Gillard, Abbott, and Turnbull, and Keating and Morrison's tenures being left and right censored, respectively. Howard's term as Prime Minster saw the federal government as a litigant in 224 cases between 1996-2007, more than four times the number of cases than any other Prime Minister in the dataset. Further, some Prime Ministers did not sit long enough to see their appointments adjudicate cases brought by their governments and our data only covers eight cases litigated by the Keating government and no cases at all for Malcolm Fraser and Bob Hawke. These characteristics of the dataset present a challenge for statistical inference, which we address in more detail in the multivariate analysis.

Table 1. Federal government as a litigant, over time.

	Applicant (original jurisdiction cases)		Appellant (appellate cases)		Appellant + Applicant (original jurisdiction and appellate cases)		Respondent		
	N	%	N	%	N	%	N	%	Total (N)
Keating	0	0.0	1	12.5	1	12.5	7	87.5	8
Howard	7	3.1	68	30.4	75	33.5	149	66.5	224
Rudd 1	0	0.0	18	37.5	18	37.5	30	62.5	48
Gillard	1	1.8	15	26.8	16	28.6	40	71.4	56
Rudd 2	0	0.0	0	0.0	0	0.0	2	100.0	2
Abbott	1	3.3	7	23.3	8	26.7	22	73.3	30
Turnbull	9	19.1	14	29.8	23	48.9	24	51.1	47
Morrison	1	4.5	6	27.3	7	31.8	15	68.2	22

Note: Kevin Rudd served two terms as Prime Minister from December 2007 to June 2010, and again between June 2013 and September 2013.

As in Smyth (2001), Table 2 indicates a consistent advantage for the Commonwealth in High Court litigation, with an overall case win rate of 66.5 per cent. Similarly, between 1995-2019, Justices voted for the federal government at a rate of 64 per cent. However, there is considerable variation between governments in relative levels of success; Malcolm Turnbull's government was the most successful with 85.6 percent of Justice votes in its favour. Contributing to Turnbull's high overall win rate were eight constitutional cases brought by the government (as applicant) with a 100 per cent success rate. Further, the Turnbull government's record as respondent is also high when compared with other Prime Ministers. By contrast, Tony Abbott's government was the only administration to lose more votes than it won when it was a respondent in High Court cases.

Table 2. Votes in favour of federal government, by Prime Minister.

	Applicant (original jurisdiction cases)		Appellant (appellate cases)		Appellant + Applicant original jurisdiction and appellate cases)		Respondent		Total	
	N	%	N	%	N	%	N	%	N	%
Keating	0	-	5	100.0	5	100.0	38	50.0	43	55.8
Howard	46	32.6	391	71.1	437	67.0	893	59.7	1330	62.1
Rudd 1	0	-	98	77.6	98	77.6	177	55.4	275	63.3
Gillard	6	0.0	83	75.9	89	70.8	247	54.7	336	58.9
Rudd 2	0	-	0	-	0	-	11	54.5	11	54.5
Abbott	6	100.0	38	84.2	44	86.4	123	46.3	167	56.9
Turnbull	59	100.0	76	80.3	135	88.9	142	82.4	277	85.6
Morrison	7	100.0	32	78.1	39	82.1	99	55.6	138	63.0

Turning to Table 3, for our dependent variable we code Justice votes as any opinion that was in favour of the position of the federal government. Our independent variable is each Justice's relationship with the sitting federal government, which we divide into three categories: first, the sitting Prime Minister appointed the Justice in question – this captures a Justice's votes for the sitting Prime Minister, which we deploy as a proxy for a personal loyalty effect; second, the sitting government is of the same party as the Prime Minister who appointed the judge, with a different Prime Minister leading the government – this is a proxy for a partisan loyalty effect; and third, the sitting Prime Minister is of a different party to the appointing Prime Minister – this captures Justice votes that are nominally free of personal or partisan ties.

We have relatively little evidence to analyse a personal loyalty effect from the earlier Justices in the data because they were appointed before the beginning of our study window. Further, comparisons along partisan lines (the differences between other Prime Ministers of the same party and Prime Ministers of other parties) are limited for the appointees of Hawke and Fraser, but we begin to see clear comparisons along partisan lines for Justices Gummow and Kirby. William Gummow, appointed by the Keating government, was in fact more closely aligned ideologically

and personally with the appointees of John Howard (Robinson et al., 2020), in particular Dyson Heydon, for whom Gummow was best man at Heydon's wedding (McClymont & Maley, 2020). Gummow voted for a Labor Prime Minister around 60 per cent of the time, while his tendency to vote for John Howard was moderately higher, at 66 per cent. Justice Kirby, another of Keating's appointments but whose liberal credentials were beyond doubt, acted as a dissenting voice (often accompanied by Mary Gaudron) when Howard was Prime Minister. His record, in a largely acquiescent court, was 98 votes for the federal government and 100 votes against. In comparison, during the final year of his tenure on the High Court under the first Rudd government, Kirby voted for the Commonwealth thirteen times and against only five times.

Table 3. Votes for appointing Prime Minister versus other Prime Ministers, by Justice.

Nominating Prime Minister	Justice	Date Appointed	PM is Appointing PM		Party Same as Appointing PM but not Same PM		PM and Party Not Same	
			%	N	%	N	%	N
Fraser	Deane	25 June 1982	-	0	-	0	60	5
Fraser	Dawson	30 July 1982	-	0	58.3	24	60	5
Hawke	Gaudron	6 February 1987	-	0	40	5	47.2	108
Hawke	Toohey	6 February 1987	-	0	62.5	8	61.5	26
Hawke	McHugh	14 February 1989	-	0	50	8	57.7	149
Keating	Brennan CJ	21 April 1995	57.1	7	-	0	58.8	34
Keating	Gummow	21 April 1995	60	5	59	78	66.5	203
Keating	Kirby	6 February 1996	-	0	72.2	18	49.5	198
Howard	Hayne	22 September 1997	72.2	158	50	22	55.4	83
Howard	Callinan	3 February 1998	64	150	-	0	-	0
Howard	Gleeson CJ	22 May 1998	69.2	169	-	0	100	12
Howard	Heydon	1 February 2003	70.5	78	-	0	55.2	87
Howard	Crennan	1 November 2005	72.7	33	56.2	16	66.3	89
Howard	Kiefel	4 September 2007	-	0	67.5	40	62.5	88
Rudd 1	French CJ	8 September 2008	56	25	56.4	55	67.4	46
Rudd 1	Bell	3 February 2009	63.2	19	57.7	52	69.6	79
Gillard	Gageler	9 October 2012	80	10	-	0	72.2	90
Gillard	Keane	1 March 2013	60	5	100	1	72.8	81
Abbott	Nettle	3 February 2015	33.3	3	81	58	-	0
Abbott	Gordon	9 June 2015	-	0	78.3	60	-	0
Turnbull	Edelman	30 January 2017	91.3	23	57.9	19	-	0
Turnbull	Kiefel CJ	30 January 2017	88	25	65	20	-	0

For Howard's appointees, patronage seems likely given Howard's long-term and relatively close association with Murray Gleeson. Further, of those Justices appointed by Howard who heard several cases brought by other governments – Susan Crennan, Dyson Heydon and Kenneth Hayne – Crennan was a protégé of David Bennett QC, a friend of Howard's at law school and sitting Solicitor-General (Shiel, 2005), while Heydon had both studied and taught at the same school (McClymont & Maley, 2020). Only Hayne, who was Victorian, seems not to have had an extensive network overlap with Howard prior to his appointment (Lane et al., 1997). Crennan, Hayne and Heydon were all more likely to vote in favour of Howard's government than for the Prime

Ministers that came after, regardless of political party, ranging between 6 and 22 percentage points less likely to vote for Prime Ministers that did not appoint them.

Plausible comparisons are available for Rudd's appointees to test the effects of both personal and partisan ties. Chief Justice Robert French, appointed by the Rudd government in 2008, had personal ties with the ALP. Kim Beazley, the former ALP Leader considered French one of his oldest friends (Dick, 2008). While described as a 'black letter lawyer', French had 'great sympathy for people in trouble' (Dick, 2008). His ideological position defies easy categorical placement and many consider him a centrist, much like his appointing Prime Minister Kevin Rudd (Robinson, et.al, 2021). French's record in federal government litigation spanned 25 cases for the Rudd government, with a government success rate of 56 per cent, a similar rate (56.6 per cent) for the Gillard government over 55 cases, and an increased success rate of 69.6 per cent over 46 cases for the Coalition governments of Abbott and Turnbull. If we take a weighted average on how we might expect French to vote given overall figures for the Abbott and Turnbull period, we would expect French to have sided with the federal government around two thirds of the time. Virginia Bell, whose ideological position sat firmly on the left wing of the Court (Robinson et al., 2021), shows a similar pattern of judgments in federal litigation to French, with a slightly reduced tendency to vote in favour of Julia Gillard's government (57.7 per cent) compared with Rudd's government (63.2 per cent). French and Bell's propensity to vote for Coalition governments more often than the party and Prime Minister who appointed them is perhaps only a reflection of the quality of federal litigation brought before the Court by each successive government – certainly, the Turnbull government seems to have been singularly successful in the High Court, regardless of the influence of its appointees as we discuss below.

The political instability in federal politics that began with the withdrawal of Rudd's party support in 2010 ushered in a series of comparatively short Prime Ministerial tenures. Rudd, Gillard, Abbott and Turnbull each nominated two High Court Justices, though many Justices joined the bench late in the terms of their appointing Prime Ministers. None of the appointees of Gillard or Abbott saw their appointing Prime Minister's government litigate in the High Court more than ten times, limiting what we can infer from their records in terms of personal loyalty. Further, the rapidity of changes of leadership from Gillard to Turnbull also limits within Justice comparisons of partisan loyalty due to a very limited number of cases heard by Justices Gageler and Keane in Rudd's second term. Further, a Labor government has not yet replaced the sitting Coalition government to observe partisan comparisons for all Justices appointed by Abbott and Turnbull.

Finally, we observe a marked difference between Turnbull's appointees, Chief Justice Susan Kiefel and Justice James Edelmen, in voting for the federal government during Turnbull's

tenure and then later during Scott Morrison's government. Kiefel was 23 percentage points more likely to vote in favour of the Turnbull government, while Edelman voted in favour of the Turnbull's government in 91.3 per cent of cases, but only 57.9 per cent of cases brought by the Morrison government. Turnbull, it seems, did not appoint from professional and personal networks in a similar manner to John Howard; Kiefel had already served on the High Court as an Associate Justice since 2007, while James Edelman had closer ties with other members of Turnbull's cabinet.[5] Rather, his government's high success rate in High Court litigation (over 80 per cent) may explain the relative loyalty of Edelman and Kiefel. Turnbull also brought original jurisdiction cases (as applicant) to the High Court at a far higher rate than other Prime Ministers (more than six times as a percentage of total cases than Howard, the next most likely to bring original litigation), winning all cases (see Table 2). Turnbull's relative success as a litigator – along with the loyalty effect that follows as a necessary consequence – may reflect his background as a barrister of note, suggesting that perhaps he saw successful litigation as a priority for his premiership.

Modelling Strategy

In this section, we examine the relationship between judicial-executive ties and the success of the federal government when appearing as a litigant in HCA cases in a multivariate setting. We estimate a conditional logistic regression, with strata at the Justice level. We do so, instead of clustering standard errors at the judge level, because the latter does not account for the potential for confounding due to Simpson's paradox (Pearl, 2009). This inferential problem occurs when an association that holds for all observations does not hold when considering clusters of observations, often individuals measured repeatedly over time. Our data may be particularly prone to this type of confounding since terms on the HCA are up to 20 years for each Justice. We capture many incomplete tenures, and therefore could make the mistake of directly comparing the judgments of Justices in their early careers, with those further into their tenure.

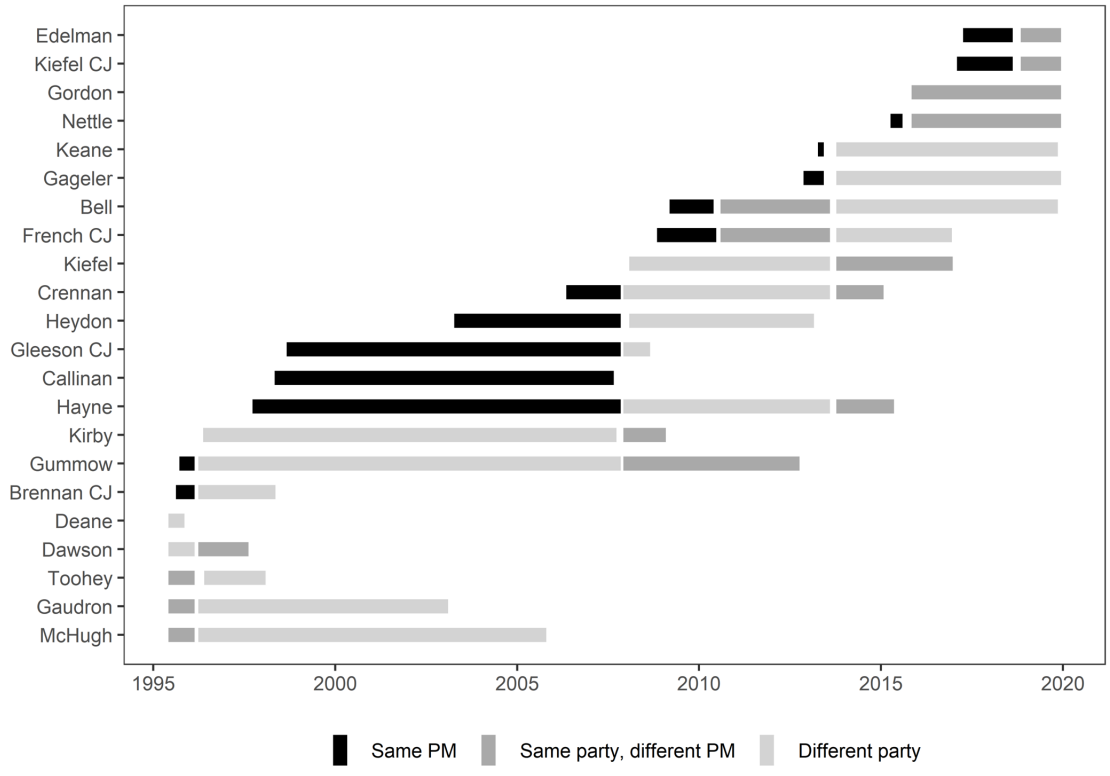
Figure 1 illustrates each Justice's tenure within the window of the study. We do not observe the early High Court careers of Justices Deane and Dawson and, therefore, do not observe how often they decide in favour of Malcolm Fraser, who appointed them. We would not want to classify any lack of agreement by Dawson or Deane with the government of the day in 1995 as a loyalty effect, since we do not know how they might have voted in 1983. It may be that they were even less likely to vote in favour of the Fraser government, so while they may not have a strong record

[5] Notably the future Commonwealth Attorney General, Christian Porter, who was sitting Attorney General of Western Australia during Edelman's appointment to the WA Supreme Court.

in voting in favour of a Labor government, we cannot assume that disloyalty to the federal government is because of a lack of personal or partisan ties. Conditional logistic regression helps to reduce misattribution errors of this kind by restricting inference to within-individual changes in the relationship between the Justice and government.

Table 4 displays the results of four conditional logistic regressions, estimating changes in the likelihood of a Justice voting for the federal government. Our independent variables are measured at the Justice-case level, indicating the nature of the relationship between the Justice and the federal government at the time of deciding the case. As above, 'Same PM' indicates that the Prime Minister at the time of the opinion is the same Prime Minister who appointed the Justice. 'Same Party' indicates that the Justice is deciding a case involving a different Prime Minister of the same party as their appointer. For example, this would apply to a Justice appointed by Kevin Rudd sitting on a case in which Julia Gillard's government is a party. In both cases, the baseline is specified as all other prime ministers.

Figure 1. Justice tenure and federal government relationship shifts, by Justice.



Note: Susan Kiefel appears twice in the data. We consider her appointment as Chief Justice as a new entry in the data.

We include several co-explanatory variables in the model. First, we use two-party preferred measures of government popularity (relative to the opposition) using historical Newspoll data. We took the most recent Newspoll at the time of each decision, subtracted the vote intention for the

government from the opposition to produce an estimate of the government's popularity. If an important driver of decisions in the High Court is public opinion towards the government, we may see any loyalty effect fade away in the face of potential public backlash.

It is plausible that particular kinds of cases are more likely to affect how the Court treats the Federal Government in litigation particularly when they have a high media profile or when the outcome is more likely to constrain the actions of the government in some way. We identify three such types of cases. First, we create an indicator of cases brought to the court as examples of original jurisdiction (Section 75 of the Constitution). The criteria for original jurisdiction, in which the Court acts as the first and only court to hear a case as opposed to an appellate court, pertains mostly to matters relating either to the Commonwealth or international law and as such are likely to be high profile cases in which the Court may be under additional pressure to find in favour of the Commonwealth. Second, we create an indicator for cases which are primarily concerned with matters of federal constitutional law. The stakes in such cases, since their outcomes are binding on the scope of the authority of the federal government, are comparatively high and may also lead to additional pressure on Justices to find in favour of the Commonwealth. Finally, cases involving matters pertaining to refugees and their asylum status have been prominent both in numbers and in media reporting in recent years (Cooper, et. al., 2017), we account for whether the federal government is more likely to be successful in such cases.

Next, we control for a possible early tenure effect since it may be that the loyalty to the appointing Prime Minister is motivated mostly by a form of recency bias, in which new appointees seek to reward the government for appointing them – not through loyalty to the Prime Minister, but simply because they are new to the job. We measure this period, sometimes called the freshman effect, as whether the Justice is in the first year of their tenure (Hagle, 1993; Howard, 1968). We also control for whether the federal government is acting as appellant or applicant, as we see from our initial analysis that the Commonwealth enjoys an advantage when participating in HCA litigation in this role. Finally, in models 3 and 4, we condition our analysis on the party of appointment and appointing Prime Minister to understand how judicial loyalty was mediated through party politics over the last 25 years.

Table 4. Conditional logistic regression: Predicting votes for the federal government.

	Model	Model 2	Model 3	Model 4
Same PM	0.529	0.418 **		
	(0.175)	(0.193)		
Same Party	-0.190	-0.112		
	(0.135)	(0.140)		
Same PM × ALP			-0.256	
			(0.333)	
Same PM × Coalition			0.629**	
			(0.259)	
Same Party × ALP			-0.111	
			(0.171)	
Same Party × Coalition			-0.139	
			(0.243)	
Same PM × Keating				-0.048
				(0.657)
Same PM × Howard				0.491**
				(0.190)
Same PM × Rudd				-0.576
				(0.382)
Same PM × Gillard				-0.129
				(0.669)
Same PM × Abbott				-2.136
				(1.305)
Same PM × Turnbull				1.172*
				(0.585)
Controls				
Freshman		0.041	0.223	0.278
		(0.222)	(0.238)	(0.248)
Fed. Gov. Appellant		0.818***	0.819***	0.855***
		(0.100)	(0.100)	(0.110)
Government 2PP Newspoll		0.002	0.003	0.005
		(0.006)	(0.006)	(0.006)
Case Involves Refugees		0.078	0.076	0.127
		(0.114)	(0.114)	(0.122)
Case Involves Constitutional Law		0.844 ***	0.844 ***	0.966 ***
		(0.117)	(0.117)	(0.131)
Case Under Original Jurisdiction		0.033	0.030	-0.049
		(0.111)	(0.111)	(0.122)
N	2577	2564	2564	2232
Log Likelihood	-1596	-1525	-1522	-1303
AIC	3196	3066	3064	2629

Note: *** $p < 0.001$; ** $p < 0.01$; * $p < 0.05$. Conditional logistic regressions constrain the constant to zero.

Model 1, estimated without controls, suggests that Justices who are sitting on cases in which the government is led by the Prime Minister who appointed them are significantly more likely to vote for the federal government than in cases in which the government is led by another Prime Minister. Exponentiating the coefficient allows us to quantify the change in probability; Justices were approximately 70 per cent (central estimate: 1.69 ;95% CIs: 1.20 – 2.39) more likely to vote for the federal government when the Prime Minister who appointed them was still in office. However, we do not find any evidence for party loyalty to Prime Ministers who did not appoint the sitting Justice – Justices appointed by Rudd, for example, were no more likely to vote in favour of an ALP government lead by Julia Gillard than they were to a Coalition government

lead by Tony Abbott. Tentatively, this supports our hypothesis that personal – rather than political – loyalty is the more compelling form of judicial-executive tie in the Australian context.

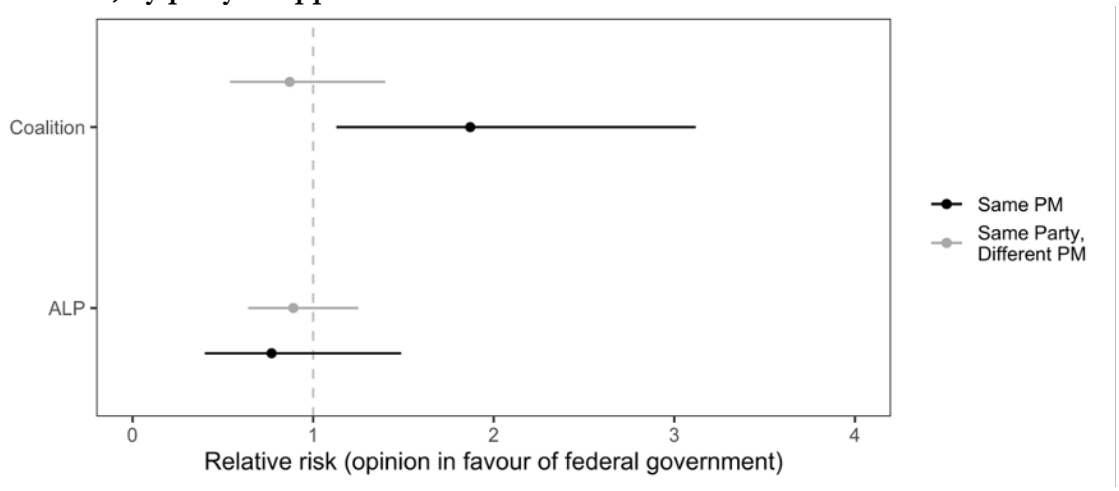
When including controls, our findings for the effect of Same Prime Minister remain significant, with a slight attenuation in predicting the change in likelihood of voting for the federal government. Adjusted for additional covariates, Justices are approximately 50 percent (central estimate: 1.51; 95% CIs: 1.04 – 2.21) more likely to vote in favour of their appointing Prime Minister than other Prime Ministers.

Turning to the effects of the controls first, we do not find any freshman effect. The relevant period for increased loyalty to the federal government appears to be the remaining tenure of the appointing Prime Minister, rather than the first year of a Justice's tenure.

Secondly, we find that the Justices are more than twice as likely (central estimate: 2.2; 95% CIs: 1.9, 2.8) to vote for the federal government when the government is appealing a lower court ruling than responding to one. We note that adjusting for whether the government is the appellant or respondent makes very little substantive change to the personal loyalty effect. Third, we note that the inclusion of Newspoll, a measure of contemporaneous government popularity, does not appear to correlate with the decisions of the High Court.

Finally, our case type indicator variables show mixed results. While original jurisdiction and refugee cases are likely to be higher profile than the typical case, they appear not to affect the way that the court decides cases regarding the federal government. However, in cases pertaining to constitutional law and the scope of Commonwealth power, the Court is around twice as likely to find in favour of the government (central estimate: 2.4; 95% CIs: 1.9, 2.9). This suggests that, where the Court is concerned, public profile is markedly less important than its potential implications for policy, where a small "c" conservatism against judicial activism prevails.

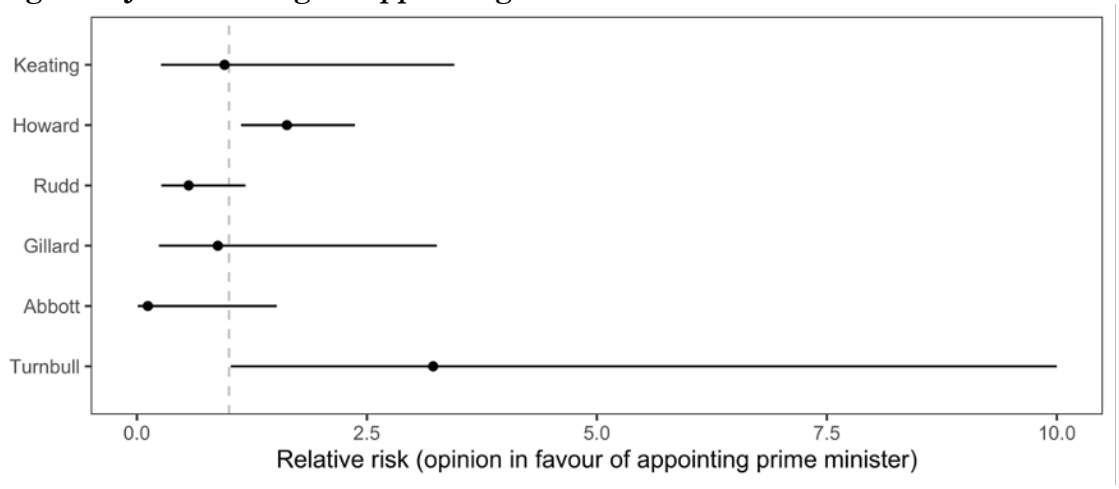
Figure 2. Voting for the federal government by relationship with the appointing Prime Minister, by party of appointment.



Note: exponentiated coefficients give the proportional change in the probability of voting for the federal government, when compared with other Prime Ministers (defined at the dashed line at 1).

In Model 3, we condition our findings on the party of the appointing Prime Minister. Since conditional logits cannot estimate coefficients that are invariant within a group (a Justice once appointed by a Coalition government will remain so), we divide our regression analysis into two parts: the effect of changes in one's relationship with the federal government for Coalition appointees, and the same effect for ALP appointees. We find very different results for appointees of each party. Coalition appointees are nearly twice as likely (central estimate: 1.9; 95% CIs: 1.1, 3.1) to vote in favour of their appointing Prime Minister than other Prime Ministers, while we find no significant personal loyalty from Labor appointees. We illustrate the findings of Model 3 in Figure 2, including the non-significant finding for partisan loyalty for appointees of both parties.

Figure 3. Justice voting for appointing Prime Minister.



Note: exponentiated coefficients give the proportional change in the probability of voting for the appointing Prime Minister, when compared with other Prime Ministers (defined at the dashed line at 1).

Model 4 examines whether the findings for increased personal loyalty among Coalition Prime Ministers apply for all Coalition Prime Ministers, applying a similar logic to the previous model, but conditioning the personal loyalty effect on the appointing Prime Ministers themselves. Since we find no evidence for partisan loyalty in the first three models, we omit the variable Same Party. Our findings suggest considerable heterogeneity among Prime Ministers in their ability to command personal loyalty among their appointed Justices. Figure 3 indicates that the appointees of two coalition Prime Ministers (Howard and Turnbull) were considerably more likely to vote for their appointing Prime Ministers than other Prime Ministers. Howard's appointees were around 60 per cent more likely to vote in favour of Howard than other Prime Ministers (central estimate: 1.63; 95% CIs: 1.13 – 2.37), while Turnbull's appointees were more than three times (central estimate: 3.22; 95% CIs: 1.02% – 10.13%) more likely to vote in favour of Turnbull than Morrison. We suspect that coherent loyalty effects may have been recovered for other Prime Ministers with more data, but, as we note above, appointees of some Prime Ministers, such as Keating, do not appear for sufficiently long periods of time in our dataset (see Table 2) and others did not appoint Justices until late in their tenure as Prime Minister (for example Gillard and Abbott), limiting the cases with which to make viable comparisons.

What might explain the loyalty effects for Howard and Turnbull? There are certainly some relevant similarities between the careers of Howard and Turnbull. Both were conservative lawyers who graduated from University of Sydney Law School. Their connections with the legal establishment alone may be enough to justify their relative success, since they would have been better able to assess how likely candidates were to share the Government's position on matters likely to come to litigation. However, as discussed in the previous section, there are some important differences between the two in terms of what we think caused the loyalty effect. While it is clear that Howard appointed Justices with whom he had considerable personal acquaintance – fitting the 'patronage' model of judicial appointments (Epstein & Posner, 2016), we suspect that Turnbull's affinity for federal litigation, when compared with Morrison, is the driving factor behind his loyalty effect. This, in one sense, is a limitation of our findings and of similar studies looking to show a loyalty effect because we do not account for such factors as the average 'quality' of litigation brought by different governments. While litigation quality is difficult to measure,[6] it is important studies consider, at least qualitatively, the potential impact of differences between governments in this aspect.

[6] Excepting government level measures of overall 'success rate', which are not easily disentangled from the decisions made by its appointees.

Conclusion

Our findings largely support our hypothesis that Justices are more likely to vote in favour of the Prime Minister who appoints them. We find that this only holds for two prime ministers – John Howard and Malcolm Turnbull. We are, however, cautious about reading too much into this latter result as we suspect it reflects the limitations of the data. Some Prime Ministers simply did not stay in office long enough for us to be able to effectively test the loyalty effect.

Another important result is that we do not find any evidence of partisan effects. Justice Kirby – whose reputation for ideological leftism is perhaps the strongest in the period under examination and whose tendency to vote with the federal government increased significantly after the election of Labor Prime Minister Kevin Rudd – is an exception. However, more generally, based on almost 2000 judgments given over a quarter of a century, we find no systematic evidence that Justices prefer their appointing party over the other party of government. This is distinct from positive findings from the US Supreme Court, where lasting partisan effects are shown to exist.

Future research, perhaps in a more explicitly comparative context, may reflect further upon differences in the mechanism of judicial selection and the implications that they may have for the independence of the judiciary. While the US Supreme Court appointment model fuses the personal (nomination) with the partisan (Senate confirmation) resulting in two kinds of loyalty effect, we have shown from the Australian case that a personalised selection mechanism tends to result in personalised challenges to judicial independence; no less political, but politics of a different nature. Conversely, another avenue of research would be to develop new and distinct approaches to analysing judicial loyalty. For example, it may be prudent to examine Justice decision-making based specifically on new laws challenged in the High Court. This would enable a deeper analysis of the link between the judicial appointments and outcomes on specific policy matters and potentially generate new hypotheses for the analysis of judicial loyalty in Australia and elsewhere.

Future research may also reflect upon the ethical and practical implications of Australia's model of judicial selection. Does personal patronage play too great a part in the selection of HCA Justices? Has government influence on the HCA, through its appointees, proven decisive in specific cases, allowing agendas to prevail which otherwise may have been struck down? Finally, if personal loyalty is indeed a problem for the independence of the HCA, what remedies are there to insure the minimisation of personal influence within the current constitutional framework?

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