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## **A Delicate Balance: the Accidental Genius of Australian Politics\***

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When it was suggested that I offer some reflections today on the Commonwealth Parliament as I have begun to learn about it, I was happy to agree. As my time in Canberra begins to approach an end, today's program gives me an opportunity and incentive to sort through some of my impressions and to step back from the trees to look at the forest. Inescapably, my interpretations and evaluations of the Australian political system are reflected through the prism of my experiences in Washington, especially as those experiences have shaped my understandings of how political institutions work and what motivates politicians. Let us stipulate that.

I shall begin by foreshadowing my general conclusion. In much of what I have read about Australian government and politics, the Senate is depicted, either explicitly or implicitly, as a problem. Sometimes the Senate is portrayed as a conceptual problem—as an institution that does not quite fit into Australia's intended constitutional design. Often it is presented as posing a continuing practical problem for the government of the day, especially when the Senate interferes with the government's ability to fulfil its self-proclaimed electoral mandate by enacting its legislative program. My perspective is a contrary one. For me, the Senate is not the problem, it is the solution—or, perhaps I should say, the Senate is the potential solution for a problem that already is serious, but could become much more serious. Now let me try to explain what I mean.

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\* The basis for this paper was a lecture presented in the Department of the Senate Occasional Lecture Series at Parliament House on 28 February 2003. The lecture has been revised and expanded for publication in *Papers on Parliament*.

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For more than 30 years, I earned my salary by worrying about the United States Congress, which was, I assure you, a full-time job. And for more than 20 years, my office in Washington was in the James Madison building. Madison, as many of you may know, often has been proclaimed as the ‘father’ of the United States Constitution. He also was one of the authors of *The Federalist Papers* which, to my mind, remain the most compelling example of practical political theory since Machiavelli, and unquestionably a compelling piece of political advocacy, which was their essential purpose.

In the 51<sup>st</sup> of those essays, Madison offered a rationale for the US Constitution and, in the process, revealed a posture toward power and the powerful that continues to resonate in American political thought. It is an attitude that many Americans continue to share, even if they would not phrase it so felicitously. Here is how Madison begins his defence of the separation of powers as we know it in America:

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

Those ‘auxiliary precautions’ take the form of a set of checks and balances imbedded in a system of separation of powers. I fear that phrase, the separation of powers, is being claimed, and distorted, by defenders of such different constitutional systems that it is in danger of losing any real meaning. So let me make clear that I use it in the sense that was explicated in a classic of American political science, *Presidential Power* by Richard Neustadt,<sup>1</sup> which was published at just about the time John Kennedy was elected President. Neustadt’s book probably is best known today for two insights. One is his understanding of presidential power, which was roughly this: that the power of the President is the power to persuade others that what he wants them to do is what they should want to do in their own interests—in other words, that the most persuasive way for anyone, not just the President, to elicit the support of others is to shape their own sense of their own self-interest. You will notice that this conception is entirely compatible with Madison’s doubts about the essentially altruistic nature of humanity.

More to the point is Neustadt’s other insight, which is that the American political system is *not* one in which each of the different authorities of government is neatly and clearly assigned to one of the different institutions of government: the legislative power to the Congress, the executive power to the President, and the adjudicative power to the courts. Instead, as Neustadt explained, the American regime is characterised by a separation of institutions that share the authority of government. The core of legislative authority is assigned to the Congress, but it is shared with the President, primarily through his enormously potent veto power. The core of executive authority is assigned to the President, but it is shared with the Congress that must approve the organisation, procedures, and most senior personnel of the executive departments, just as executive

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<sup>1</sup> New York, John Wiley & Sons, 1960.

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authority also is shared with the courts that have the authority to invalidate executive actions that are inconsistent with the law or the supreme law of the land, the Constitution. And adjudicative authority is centred in the courts, but it also is shared with the President who chooses all federal judges, and with the Congress which must approve those choices and which, through legislation that is subject to the President's veto, controls the organisation, resources, and budgets of the courts, even the Supreme Court. It is in this complex sharing of government authority that are to be found the checks and balances that provide many of the 'auxiliary precautions' to which Madison referred.<sup>2</sup>

But Madison then extends his argument in a way that, from today's perspective, is striking for both its lack of prescience and its lack of application to the Commonwealth Parliament today. First he explains that the protection of individual rights ultimately lies in the competition for power that the Constitution creates between institutions that share the legislative, executive, or judicial authority. Those who serve in any one of these institutions have an incentive to preserve its institutional power not for reasons of abstract principle, but in order to protect their own influence—so that 'the private interest of every individual may be a sentinel over the public rights.' Then he continues:

But it is not possible to give to each department an equal power of self-defence. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency [legislative dominance, that is] is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.

Here, then, is a theoretical rationale for the Senate of the United States, and, if you choose, for the Commonwealth Senate as well: to protect against the uncontrolled exercise of power by a naturally predominant legislature. And here also is a world-class example of one of a skilled politician's most valuable traits—the ability to transform a necessity into a virtue, to discover a principled reason for doing what self-interest and necessity dictate. We will never know if Madison would have found such compelling

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<sup>2</sup> The concept of checks and balances is distinguishable from beliefs about the appropriate range and scale of governmental activity. Some authors of the Constitution certainly preferred the most limited government, and especially the most limited central government, that was practical. However, I believe that Geoffrey Sawer was partly mistaken in asserting that ' "checks and balances" is an eighteenth-century American notion based on a suspicion of all government, and a desire to ensure that governments performed the minimum of functions.' (*Federation Under Strain; Australia 1972-1975*. Melbourne, Melbourne University Press, 1977, p. 139, emphasis added) The challenge to modern democratic life, as Sawer recognised, is posed by the widespread belief that twenty-first century governments need to be much more powerful, and have a far broader reach, than eighteenth century governments. This does not mean, however, that the notion of 'checks and balances' has become outmoded. To the contrary, they are more essential than ever before. Sawer (p. 140) argued that a modern democratic government 'committed to economic management and a multitude of other welfare services ... is not possible if the initiatives of a government based on a House of Representatives majority are to be constantly "checked" by a hostile majority in the Senate, as the American Founders expected their two Houses of Congress and President, elected separately and at different intervals, to "check" each other so that laws would be few and administrative activity negligible.' (emphasis again added) It is true that checks and balances sometimes can slow the wheels of government and certainly can require governments to make compromises that are distasteful to them. It also is true that the reach of the Australian central government may be greater than that of the American. Still, I doubt that any observer of American society would contend that the checks and balances built into the US Constitution prevented an extraordinary expansion of federal powers and activities during the twentieth century.

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virtues in bicameralism if he were not selling to the state ratification conventions the ‘Grand Compromise’ that made agreement on the US Constitution possible.

This Madisonian fear of power and suspicion of the powerful—the idea that Lord Acton may have been on to something when he posited that power tends to corrupt, though not necessarily in terms of dollars and cents—seem to me to be eminently sensible. They justify a system of government that can entail costs of government delays, sometimes inaction, and even occasionally deadlock. These costs can be high but, considering the alternative, they are well worth paying. The same emphasis on the risks created by government power also highlights the dangers of what, during our current era of post-Soviet democratization, sometimes has been called plebiscitary democracy: a system in which a government is chosen through reasonably free and fair elections, but then is able to govern without effective constraints until the next election.

This is why talk of presidential emergency powers that are justified as being inherent in the Constitution, and not grounded in statutory grants of power, tends to make many Americans nervous. And it is why I doubt that Americans ever would be very comfortable with the concept of ‘reserve powers’. Furthermore, ‘conventions’ are not a staple of American political discourse, unless we are referring to the quadrennial presidential nominating extravaganzas. The American political system, as well as its legal system, places great weight on there being knowable rules of law to govern and thereby constrain the authority of power-holders, even democratically-elected power-holders. So speak not to me of reserve powers unless you can tell me what they are. And speak not to me of unwritten conventions that stand on equal footing with the black letter of the constitution. A constitution that fails even to acknowledge some of the core institutions and relationships of government would be a source of dismay and concern, not a source of pride.

I recently read an essay about the ‘troubles’ of 1975 in which two distinguished Australian academics denigrated their Constitution as a mere ‘selection of legal rules’.<sup>3</sup> They contended that there was no ‘qualitative distinction between written and unwritten constitutions’, and argued that to give precedence to the Constitution when it conflicted with unwritten convention would be ‘to deny a democratic foundation to Australian politics.’<sup>4</sup> It is difficult to conceive of such a statement being made in the United States by analysts of comparable repute. To give the greatest weight to a convention, defined as ‘a rule of behaviour accepted by those involved in public life’ and a ‘tradition of past conduct which experience has shown to work,’ as the authors were prepared to do, strikes me as being breathtaking in its complacency.

The notion that ‘we really can’t define our conventions of parliamentary governance well enough to commit them to paper, but never mind, we all can recognise a convention when we see one, and we all know what they are’ presumes and depends on a degree of political consensus that is truly enviable. There may have been just such a consensus in the Australia of 1900, and maybe it remains today. In multicultural Australia of the twenty-first century, however, it may require an extraordinary effort, and quite possibly a futile

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<sup>3</sup> Jeffrey Archer and Graham Maddox, ‘The 1975 Constitutional Crisis in Australia,’ *Journal of Commonwealth and Comparative Politics*, vol. 14, 1976, pp. 141–157.

<sup>4</sup> In similar fashion, a New Zealand government publication even listed, as the first of the major elements of the Westminster model, that ‘important parts of the constitution remain unwritten.’ New Zealand Electoral Commission. (1996) *Voting Under MM*, GP Publications.

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effort, to maintain that consensus—a universally shared understanding of what the essential customs and practices of political life are and a universally shared agreement to accept as them as binding.

Millions of people, especially in post-Communist nations, are struggling to create for their own benefit and protection what they often call ‘rule-of-law societies’. So it is both ironic and paradoxical that Australia has flourished for more than a century, with only one truly painful hiccup in 1975, under a political regime governed by rules that have not been codified and, for that reason, perhaps cannot be enforced. If Australia ever decides to become a republic, that will require that the Constitution be amended. I understand that opening a constitution to amendment is the political equivalent of opening Pandora’s Box and that there is a wise and natural reluctance to make amendments that are not absolutely necessary. The litany of constitutional amendments defeated in Australian referenda demonstrates what seems to be an instinctive constitutional conservatism on the part of the Australian people, or a profound cynicism about the motives of Australian politicians.<sup>5</sup>

I am unpersuaded by the argument that the conventions (and reserve powers, for that matter) that are thought to be so central to responsible government are simply too complex, subtle, and nuanced to be codified. Ward reports that other parliamentary democracies have succeeded in doing so quite well, especially if the task is limited to incorporating into the Constitution those now-unwritten rules that are truly essential.<sup>6</sup> So if I may be permitted this recommendation, I think it would be more in keeping with what I have come to know and admire about Australians if the Commonwealth Constitution were amended so that, in more respects, it means what it says and says what it means.

Perhaps there is an underlying difference in the American and Australian political cultures as well as in our respective approaches to constitutional law. Perhaps Australians have a more positive view of government and a more optimistic view of human nature, so that there is less concern here than in Washington with the question of ‘who guards the guardians.’ Ian McAllister of the Australian National University wrote several years ago that, in Australia, ‘the state exists primarily in order to resolve problems and disputes, not to preserve individual liberty,’ and he quoted W.K. Hancock in 1930 to the effect that ‘Australians have come to look upon the state as a vast public utility, whose duty it is to

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<sup>5</sup> It also demonstrates the difficulty of the requirements for amending the Constitution.

<sup>6</sup> Alan J. Ward in ‘Trapped in a constitution: the Australian Republic debate’, *Australian Journal of Political Science*, vol. 35, no. 1, 2000, p. 21, argues that some of the Australian attempts to codify conventions foundered because too many practices of government were included on the lists of conventions to be codified. He reports, for example, that one such effort included among the conventions to be codified the practices that ‘the Governor-General [is] to appoint a Prime Minister he judges to have the support of a majority in the lower house,’ and that he is ‘to consult the outgoing Prime Minister about a successor.’ Surely such common-sense practices do not require or deserve constitutional standing. All that matters ultimately is whether a new Prime Minister and government enjoy the confidence of a majority in the House of Representatives. The process of forming that new government is expedited and simplified, of course, if the Governor-General has the good sense to consult with those who best understand the mind of the House and then selects the obvious candidate, but it hardly is necessary to transform such obvious practices into constitutional requirements. If the Governor-General should fail, for whatever reason, to appoint the House’s choice for a new Prime Minister, a majority in the House would have little difficulty in securing the House’s consideration and adoption of a resolution expressing its will to the Governor-General. That is just what the House did in the first hours after Whitlam’s dismissal in 1975 when the House voted to express its lack of confidence in the caretaker Fraser Government and called upon the Governor-General to ask Whitlam to form a new government.

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provide the greatest happiness for the greatest number.’<sup>7</sup> This view is consistent with the first point that Lord Bryce thought to make almost a century earlier when comparing the new Commonwealth Constitution with its American counterpart:

When that instrument [the U.S. Constitution] was enacted, the keenest suspicion and jealousy was felt of the action of the government to be established under it. It was feared that Congress might become an illiberal oligarchy and the President a new George the Third. Accordingly great pains were taken to debar Congress from doing anything which could infringe the primordial human rights of the citizen ... . The English, however, have completely forgotten these old suspicions, which, when they did exist, attached to the Crown and not to the Legislature. So when Englishmen in Canada or Australia enact new Constitutions, they take no heed of such matters, and make their legislature as like the omnipotent Parliament of Britain as they can ... Parliament was for so long a time the protector of Englishmen against an arbitrary Executive that they did not form the habit of taking precautions against the abuse of the powers of the Legislature; and their struggles for a fuller freedom took the form of making Parliament a more truly popular and representative body, not that of restricting its authority.<sup>8</sup>

This benign attitude persisted. La Nauze recounted that Sir Owen Dixon, one of Australia’s pre-eminent jurists and Chief Justice of the High Court during 1952–1964, once was asked to explain to an American audience why Australia’s Constitution lacked the protections of individual rights offered by the Bill of Rights and the Fourteenth Amendment. Dixon responded:

Why, asked the Australian democrats [and authors of the Constitution], should doubt be thrown on the wisdom and safety of entrusting to the chosen representatives of the people sitting either in the Federal Parliament or in the State Parliaments all legislative power, substantially without fetter or restrictions?<sup>9</sup>

The same attitude was reflected years later in Menzies’ statement, made after leaving office, that ‘the rights of individuals in Australia are as adequately protected as they are in any other country in the world’ because of ‘our inheritance of British institutions and the principles of Common Law.’ Menzies was quoted to this effect by Brian Galligan so it is worth taking account of Galligan’s rejoinder:

Menzies’ defence of the Australian system was seriously flawed in a number of respects. The independence of parliament, particularly the House of Representatives, had been undermined by disciplined political parties so that the prime minister and his senior ministers controlled the house and not vice versa. Whether a minister resigned depended on retaining the prime

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<sup>7</sup> Ian McAllister, ‘Political culture and national identity’ in Brian Galligan et al (eds), *New developments in Australian politics*, Melbourne, Macmillan Education Australia, 1997, p. 9.

<sup>8</sup> James Bryce, *Constitutions*. London, Oxford University Press, 1905, pp. 298–299.

<sup>9</sup> J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne, Melbourne University Press, 1972, p. 227.

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minister's and not parliament's confidence, provided the prime minister retained control of his ruling party. The growth of 'big government' served by large bureaucracies meant that government had become more pervasive with many policy decisions being taken in the executive branch outside parliamentary scrutiny. In other words, parliament was no longer a sufficient check on prime ministerial and ministerial conduct nor an adequate means of protecting rights, despite Menzies' claims.<sup>10</sup>

The formation of the Commonwealth may have been guided by a sunnier attitude toward government and governors than is to be found in the writings of Madison or other theorists of American government (or in the views of Lord Acton, for that matter). In fact, if we are to take Menzies' boast as indicative, that sunnier attitude persisted for decades. I wonder, however, if that attitude is equally widespread today. I also wonder whether Americans have ever been quite so suspicious of government and Australians quite so trusting as Madison and Menzies would lead us to expect. I would guess that the average American, if she exists, has more sympathy with the view of government as problem-solver and utility-enhancer than a reading of Madison might have us predict, just as I suspect that many Australians are more sceptical and suspicious of how governmental powers are exercised, and for whose benefit, than the 'public utility' imagery would imply.

You might think I was being coy if, at this point, I asked rhetorically what all of this implies about the Commonwealth Constitution and the Australian polity. The implications I am about to draw should not be too difficult to predict. But since I already referred in passing to Lord Acton, let me allow my argument to be introduced by Lord Hailsham, who was Lord Chancellor of the United Kingdom when he became famous, or infamous, for describing the British political system as an 'elective dictatorship.' As Harry Evans,<sup>11</sup> among others, has pointed out, what he actually had in mind is not what often has been attributed to him. It is the doctrine of parliamentary sovereignty that gives rise to elective dictatorship.

The point is not that all other nations have what is called a written constitution in the literal sense. After all, much of our own is in writing and much more could be reduced to writing if we wished without making any appreciable change. No, the point is that the powers of our own Parliament are absolute and unlimited. In this we are almost alone. All other free nations impose limitations on their representative assemblies. We impose none on ours.<sup>12</sup>

Not incidentally, he understands parliamentary sovereignty to be a defining characteristic of the 'Westminster model' of democratic government. Referring to this doctrine of parliamentary sovereignty, he concludes that

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<sup>10</sup> Brian Galligan, 'The constitutional system' in Galligan et. al (eds), *New developments in Australian Politics*, Melbourne, Macmillan Education Australia, 1997, p. 27.

<sup>11</sup> In 'Australia and the "Westminster System."' *The Table*, vol. 50, 1982.

<sup>12</sup> Lord Hailsham, *Elective Dictatorship*, London, British Broadcasting Corporation, 1976.

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There is nothing quite like it, even among nations to whom we have given independence. They believe of course that they have inherited the so-called Westminster model. In fact, the Westminster model is something which we have seldom or never exported, and, if we had tried to do so, I doubt whether any nation would have been prepared to accept it.

On this basis alone, we could dismiss contentions that the Commonwealth political system comports with this model, but we know that what most people have in mind when they speak of the 'Westminster model' is whatever they think 'responsible government' means.

What is important for our purposes here is what had come to worry the good Lord Chancellor because, after all, parliamentary sovereignty was not exactly a recent innovation. He later wrote that:

human nature being what it is, every human being and every human institution will tend to abuse its legitimate powers unless these are controlled by checks and balances, in which the holders of office are not merely encouraged but compelled to take account of interests and views which differ from their own ... . It is the absence of balance and effective checks which has destroyed established regimes by bloody revolution, which has overthrown democracies which have proved ineffective or aggressive. It was this which corrupted political societies hitherto distinguished for their success.

And this from the Lord Chancellor of the United Kingdom, who reigned but did not rule over the British Senate (perhaps his name at birth was James Madison, Jr):

the sovereignty of Parliament has increasingly become, in practice, the sovereignty of the Commons, and the sovereignty of the Commons has increasingly become the sovereignty of the government, which, in addition to its influence in Parliament, controls the party whips, the party machine, and the civil service. This means that what has always been an elective dictatorship in theory, but one in which the component parts operated in practice to control one another, has become a machine in which one of those parts has come to exercise a predominant influence over the rest.

He elaborates:

Until fairly recently influence was fairly evenly balanced between government and Opposition, and between front and back benches. Today the centre of gravity has moved decisively towards the government side of the House, and on that side to the members of the government itself. The opposition is gradually being reduced to insignificance, and the government majority, where power resides, is itself becoming a tool in the hands of the Cabinet.<sup>13</sup>

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<sup>13</sup> Lord Hailsham, 'The role of an upper chamber in a modern parliamentary democracy', *The Parliamentarian*, October 1982.



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In other words, the combined growth of government and party has produced an *elective* dictatorship (his phrase) that can be exercised by an *elected* dictatorship (my phrase). The potential for elective dictatorship has existed for as long as parliamentary sovereignty; it has been transformed into a more real threat to democratic governance by the emergence of strong political parties that, once elected, are not subject to effective checks and balances. And of course, Lord Hailsham was referring to Great Britain, where party discipline is not nearly as strict as it is in Australia.<sup>14</sup>

Principles are sometimes used to determine compromises. But this is rare. The whole point of a compromise is that two or more parties have principled reasons for their stances and modify them for no other reason than the desirability of an agreed conclusion. The (conflicting) principles are what provide the *need* for compromise rather than the compromise itself.<sup>15</sup> (emphasis in original)

By this reasoning, the absence of a unifying theory of Australian government should not be shocking. What is more interesting, and perhaps more surprising, is the inference that Sharman identifies: that ‘Australian government is thus portrayed as an imperfect structure, a mongrel, defective and without coherent justification.’<sup>16</sup> I have just acknowledged that I am among those who think the Commonwealth Constitution, in its marriage of federalism and responsibility, is conceptually incoherent. But even if the document might make Montesquieu wince, that does not necessarily mean that, for the practical purposes of democratic governance, it is imperfect or defective—‘a mongrel.’ Indeed, the refutation is inherent in the very terms of the claim. I put the matter to a professional veterinarian who later became a political scientist, and who confirmed my impression that ‘mongrels’ often are more vigorous and healthier than their pure-bred cousins. In fact, veterinarians recognise the concept of ‘hybrid vigour,’ especially in first generation hybrids. I rest my case for Australia.

That often denigrated system may be serving Australia better now, since the emergence of seemingly permanent non-government Senate majorities, than ever before, and certainly better than before the advent of proportional representation. Since Federation, we have seen democracies rise and fall in many parts of the world, and fail to take root at all in others. Now we are witnessing many nations confronting the discovery that democracy depends on both the words of their constitutions and the values of their leaders. Under these circumstances, the people of Australia should not under-value what they and their

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<sup>14</sup> See Evans, *op. cit.*

<sup>15</sup> C.J.G. Sampford, ‘Reconciling responsible government and federalism’, in M.P. Ellinghaus et al. (eds), *The Emergence of Australian Law*, Sydney, Law Book company, 1989, p. 359.

<sup>16</sup> Campbell Sharman, ‘Australia as a compound republic,’ *Politics*, vol. 25, no.1, 1990.

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chosen leaders have built, even if their construction looks less like the Old Parliament House with its modest stateliness, and more like the new Federation Square in Melbourne with its unusual and confusing design.<sup>17</sup>

The House of Representatives remains the site of responsible government and the Senate is becoming more and more the site of accountable government. It is the Senate, with its non-government majority, that is the only potential source of adequate checks and balances. Responsibility and accountability both are to be valued, and they and the two houses of Parliament can co-exist, even though their coexistence may never be truly comfortable and without its tensions.

For me, the genius of the Australian political system lies in the way in which it can combine the virtues of parliamentary government with the means to control its vices—how it is capable of combining responsible government with accountable government. As I have said, it is possible for this combination of responsibility and accountability, centred in the House and Senate respectively, to emerge from an institutional structure that, at its heart, is theoretically contradictory. The Australian polity does not readily lend itself to labels and capsule characterizations—‘a parliamentary system,’ ‘the Westminster model,’ ‘the Washminster mutation’, and so on. I prefer my emblem for the Parliament: the platypus.<sup>18</sup> It may be unusual, it may be implausible, it may be unique, but it works.

I refer to the accidental genius of the Australian political system because I do not believe that it really was intended to work this way. I doubt if the distinction I have drawn between responsibility and accountability would have resonated well at the constitutional conventions. Instead, I suspect that most of the Constitution’s authors would have argued that it is precisely by holding governments responsible that Parliament holds them accountable. I also have no difficulty accepting the judgements of scholars that the last thing on the mind of the Chifley Government in 1948 was almost to guarantee that future governments would not have ‘the numbers’ in the Senate. Finally, I doubt very much that most of those who inhabit any one of the three parts into which Parliament House is divided would fully accept my characterisation and appraisal.

This accidental genius also remains an uncertain genius because the Senate has yet to develop fully the capacities and, more important, the sense of itself that it will need if it is to provide the accountability that once was expected to accompany the relationship of formal responsibility between the lower house and the government. The Senate rightly prides itself on a more deliberative legislative process and a more energetic committee system than is to be found in the House of Representatives or, for that matter, in perhaps

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<sup>17</sup> I have been told that many Australians admire the US Constitution more than they appreciate their own, and that they may be better able to identify the drafters who met in Philadelphia than those who divided their time among Adelaide, Melbourne, and Sydney. It is undoubtedly true that, for many Americans, their Constitution has been elevated to the status of a sacred though secular text, but one that very few have read since their early school days. In the midst of the 1975 crisis, Gareth Evans wrote in *The Australian* (29 October 1975: 11) that ‘The Australian Constitution is not a blood-stirring document. Unlike its United States counterpart, it has never been much recited in schoolrooms or bar-rooms.’ I suppose he was mistaking the Constitution for the Declaration of Independence (the preamble of which I did have to recite as a schoolboy decades ago), but even in that case, I would be truly amazed—and equally disappointed—to learn that such bar-rooms actually exist.

<sup>18</sup> For an elaboration on my comparison of the Australian parliamentary system to a platypus, see my book *Platypus and Parliament: the Australian Senate in Theory and Practice*, Canberra, Department of the Senate, 2003.

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any other upper chamber that is part of what otherwise is a parliamentary regime. But my argument suggests that the Senate should begin asking not whether its glass is half-full, but whether it remains half-empty, and whether it has further to go before it is willing and able to enforce the degree of accountability that my conception of democratic governance requires.

My goal is not to transform the Australian Senate into the United States Senate, nor to move the Commonwealth toward a US-style presidential/congressional system. On the contrary, my interest is in strengthening the capacity of the Parliament so that it is better able to fulfil its part of the bargain of parliamentary government. Ward has written that ‘the potential for conflict between a government responsible to the lower house and a powerful, federal upper house ... has been ... resolved in favour of the government. The threat to responsible government by an American-style Senate has not materialised.’<sup>19</sup> I disagree on all counts. First, I disagree that the ‘potential for conflict’ has been ‘resolved’—or at least I hope that the Senate will prove him wrong in the years to come. Second, I disagree that conflict between the Senate and the House (and government) is a ‘threat to responsible government.’ To the contrary, as I have argued, an assertive Senate is necessary to prevent ‘responsible government’ from remaining or becoming little more than an empty formalism. And third, I disagree with his implication that the alternatives are an ineffectual Senate and an ‘American-style Senate.’ There is a middle ground, but finding and maintaining it may prove to be the greatest challenge of all.

I have entitled this lecture ‘a delicate balance’. By this I mean three things. First, I mean that the Australian political system is an unusual and probably unique combination of elements that do not fit together comfortably. So the balance among those elements is not necessarily a sturdy one. Second, I mean that those elements can combine to create a functioning political system that avoids some of the deficiencies of more ‘pure’ versions of both parliamentary and presidential regimes by balancing elements of one against elements of the other. But third, making the system work to its potential requires a degree of self-restraint and a tolerance for institutional complications and political inconveniences that do not come naturally and easily to impatient politicians whose instinctive interests are in maximizing their power and in subordinating concerns with government institutions and procedures to their desire to get things done—now.

Although I have come to admire the Australian regime, I doubt that I would recommend it to anyone else, precisely because of the delicate balance that it entails. Australians have made it work in Australia, however, and I now join in the benign arrogance of the Constitution’s authors by believing that Australians can make it work still better in the future. But that is most likely to happen if there is a clear understanding—so long as it is my understanding, of course—of what constitutes the problem and what constitutes the potential solution.

### **A long postscript: some modest and immodest proposals**

I came to Canberra to learn more about parliamentary government, and I have. As an American, though, it was only natural that I also paid attention to the aspects of Australia’s political system that most resemble my own, and I was not inclined to dismiss them lightly as awkward encumbrances that interfere with the smooth sailing of the parliamentary ship of state. I promised myself that I would judge the Parliament on its

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<sup>19</sup> Ward, *op. cit.*, p. 119.

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own terms, not by comparison with the Congress, which it is not and has no desire to be. Yet once I came to understand that the Senate can provide for the kinds of checks and balances that I value between the Parliament and the government, I began to think about how to make things better. We Americans do love to tinker.

The Senate has been described as the second-most powerful upper chamber in the world, and so far as I know, that is a fair assessment. The Senate's advocates are proud of their institution, as they should be, especially because their natural standards of comparison are other political systems that fall on the parliamentary side of the great democratic divide between Westminster and Washington. By this standard, the Senate's glass is half-full. Although there still may be textbooks that treat the Senate as an after-thought, any government that lacks the numbers and any public servant who appears at estimates hearings must give the Senate the attention, if not the respect, it deserves. It is said that when Prime Minister Whitlam returned from having been dismissed, he gathered his parliamentary advisors around him but, in a sin of commission or omission, failed to include the Labor Party's leaders in the Senate. I doubt that any prime minister would make such a mistake today.

If the House of Representatives is best thought of as the House of Responsibility and the Senate as the House of Accountability, then I think it also fair to say that the House is better designed and equipped to fulfil its function than is the Senate. This is not surprising because the constitutional position and functions of the Senate remain open to debate, its role continues to evolve, and I suspect that there remains some ambivalence even on the part of some of those who on the Senate side of Parliament House about how and when it is appropriate for the Senate to 'interfere' with the government's right to govern. Still, if we ask not how the Senate compares with other upper houses in the Westminster world, but whether it is as fully prepared and equipped as it might be as the House of Accountability, then I would have to say that the Senate's glass is half-empty.

So I found myself wondering how to fill that glass closer to the brim. But the more thought I gave to that problem, the more I came to appreciate the difficulties with the solutions that came to mind. This is a problem I've encountered before. The longer I had been in and around the Congress, the more I came to revel in the complexities of the status quo, and the more I saw all the reasons why proposed reforms, however well-intended, would not work because they failed to take account of all the nuances and all the complications that only the insider sophisticate—like me!—could truly appreciate.

I certainly do not consider myself a parliamentary insider or sophisticate, but I am becoming more sensitive to some of the difficulties of change. For example, I would be tempted to increase the size of the House. One effect would be to increase the number of government backbenchers who have no immediate prospects for ministerial office and who, therefore, might look for fulfilment and advancement to their work in the House itself. Another effect, thanks to the constitutional nexus, would be to increase the number of Senators available for service on committees. But how confidently could we predict the effect of such a change on the representation of minor parties in the Senate? Could we do better than the Labor Government did in 1948? Is it enough to say that there would be a smaller quota? Where would we find office space and seating in the chambers for

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additional members? If committees became more active, as I would like them to be, would additional committee rooms be needed and, if so, where could they be built? Would more active committees become more partisan and, therefore, less willing to rely entirely on the professional assistance now provided by the central Committee Office? And so on.

The reforms of today have a very bad habit of becoming the problems of tomorrow. So I think we need to approach proposals for parliamentary reform with care and caution, making the best efforts we can to anticipate and evaluate their ripple effects. Today I will share with you only four proposals.

First, though I find the tenor of Question Time to be distasteful, I recognise its value as a forum, however flawed, for accountability. If Question Time is to be an opportunity for the Opposition to challenge the government's policies and actions, and to test its ministers' knowledge, skills, and footwork, then let it be so. I suggest transporting Dorothy Dix to someplace from which she will not return. I do not believe that her presence in the House or Senate serves any useful purpose, especially since the government has other ample opportunities to make statements in explanation or defence of its policies.

Second, I commend to you the strict rules of the American Congress that no Member in debate shall question the integrity, the honesty, or the motives of another Member. Better yet, I commend to both the Senate and the House of Representatives the benefits that would flow from enforcing the rules to this effect that they already have. If a Member or Senator has evidence that a colleague has acted illegally, unethically, or in a manner that brings discredit to the House or Senate, let that evidence be submitted in writing to a bipartisan committee for study and report. Otherwise, let no elected denizens of Parliament House ever again complain about the low public standing of politicians in Australia. Instead, let them recall the words of that great American cartoon philosopher, Pogo, who said that 'We have met the enemy, and he is us.'

Third, I suggest transferring the authority to oversee the activities of government departments from the Senate's legislation committees to their sister reference committees. The Senate has pairs of committees on various realms of government activity; legislation committees have government chairs whilst reference committees have non-government chairs. I can appreciate why any government would be reluctant to put into the hands of a non-government Senator the casting vote on a committee that can be charged with reviewing government bills. I also can appreciate why any government would want to restrict the authority of reference committees that have non-government chairs and casting votes.

My goal, however, is not to ensure that the government is comfortable. The goal I have in mind is to increase the capacity and the activity of the Senate as the House of Accountability, even if that discomfits the government. In Washington, we have found that committees, when their chairmen and the President are of the same party, have a limited appetite at best for engaging in searching oversight into the effectiveness of government programs and the efficiency of government departments. I can only expect that to be even more true in Canberra. Committees are the best parliamentary forum for oversight that is intensive, thorough, and recurring, and certainly so in comparison with the hit-and-run collisions that occur in the chamber, especially during Question Time. If

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the Senate's non-government majority wants more, and more effective, scrutiny of policy and the administration of laws, let it put the management of its oversight committees in the hands of those with the political incentives to develop their capacities.

Let me mention also that more effective oversight by Senate committees will be difficult to achieve unless the Senate reconsiders the convention that Members of the House are not obliged to respond to calls to appear before Senate committees to testify in their capacity as Ministers. A Member who is a minister has two identities. I can understand why it is thought to be inappropriate for a committee of one house to inquire into the activities of a member of the other house, in her capacity as a member of the other house. I do not understand, however, why a Member should be allowed to avoid being held accountable before a Senate committee for his activities as a minister by hiding behind his seat in the House of Representatives.

Fourth, and finally, I suggest abolishing the Selection of Bills Committee in the Senate. It is this committee that proposes to the Senate which bills should be referred to committees for study and which should not, and when committees must report on the bills that are referred to them. The existence of this committee creates two presumptions: first, that a bill is not to be referred to committee unless the Selection of Bills Committee and the Senate decide otherwise; and second, that the Selection of Bills Committee and the Senate are best able to judge how long a committee needs to complete a competent inquiry.

I would suggest reversing both presumptions. Let each bill be referred for study to the standing committee that examines every other bill on the same subject and, in the process, develops specialised expertise from which the rest of the Senate can benefit. For bills that truly are non-controversial, this requirement always can be waived by leave. Moreover, if the government thinks individual bills are too urgent to allow the luxury of a committee review, let it move in the chamber to discharge the committee from further consideration of that bill, and let the government defend its desire to exempt the bill from the regular procedure of committee evaluation. If the government thinks that a committee is not completing its work on a bill quickly enough, let it go to the Chamber and impose a reporting deadline on the committee, but do it by motion. I also would suggest that the Senate experiment with giving legislation committees the explicit authority and direction to propose specific amendments to any bill referred to it, with those amendments to receive priority attention (and perhaps protection from the operation of the guillotine) when bills are subject to amendment in Committee of the Whole.

Accountability is not something that occurs only after the fact. The government needs to be held accountable not only for what it has done, but also for what it intends to do. Strengthening the capacity of the Senate to review government legislation and recommend improvements in it is, to my mind, an essential component of effective parliamentary accountability.

I recognise that my last two proposals could have unanticipated consequences, though the best way to minimize adverse consequences is to try as best we can to anticipate them before they arise. For example, if we want committees to be more active, we need to ask if there are enough Senators to do the work, which is one reason I would consider increasing the size of the House and, therefore, the Senate. If references committees become scrutiny committees, can we somehow ensure that the Opposition does not use them simply to take pot-shots at the government and devote all their time to public

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inquisitions into unsubstantiated allegations of ministerial malfeasance? Who would draft any amendments to a bill that a legislation committee wants to propose? And can the Senate's sitting schedule be adjusted to set aside more hours or days for a larger number of committee meetings?

There are probably many other questions that also require answers, but my final suggestion is that questions such as these not be used as reasons for concluding that useful changes are so impractical as to be practically impossible.

Having proposed some relatively modest reform proposals, let me offer some thoughts on a much more contentious issue: whether Australia should become a republic and, if so, what form that republic should take.

First, I tend to agree with those who believe that Australia derives no particular benefit from retaining that vestigial umbilical cord that the monarchy provides. One of my first vivid memories is watching the Queen's coronation on television. I have a certain admiration and affection for her. But if I were an Australian, I would be a republican.

Second, I instinctively prefer allowing the people to choose those who represent them; but in this case, I would prefer to have the President of Australia, if there is to be one, elected by the Parliament. I am uncomfortable with the prospect of creating a potentially competing centre of democratic legitimacy. I have seen no evidence that there is much sentiment in Australia for trading in the current political system for one that more closely resembles the French mixed system or any similar systems in which there is both a President and a Prime Minister, both directly elected and both of whom can legitimately claim to be the freely-elected choice of the people. To avoid this possibility, I would opt to have the President elected by the Parliament, perhaps by a two-thirds vote in a joint sitting of the House and Senate to ensure that the government selects someone who is not perceived in a partisan light. I would even entertain the notion of disqualifying anyone who has held elective office during the preceding five years to ensure that no prime minister is 'kicked upstairs' to the presidency.

Third, I offer the possibility of an incremental transition that would allow Australians to become comfortable with the new arrangement and assuage the unhappiness of those who oppose it, as well as allowing this transition to take place before a constitutional referendum is scheduled. Let the Parliament enact a law, tomorrow or whenever, that establishes the office of the President and let that law assign to the President ceremonial and representational responsibilities only. So long as the statutory powers of the President do not conflict with the constitutional authority of the Governor-General, I see no constitutional impediment to such a law.

I would then anticipate that the President would become increasingly visible in the public eye, playing whatever public role the Governor-General now plays, and probably a more active one than that. And I also would anticipate that the Governor-General soon would fade into obscurity, with his role reduced to satisfying the necessary constitutional formalities. Assuming that a wise government makes a popular selection for Australia's first President, I suggest that the government arrange for the President also to be named the Governor-General when the latter office next needs to be filled. The same person will wear two hats, but the British bowler will largely disappear from view, and the primary reminder of the formal constitutional connection will be the coins in Australians' pockets.

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If this transition is complete before the Queen leaves the throne, that would be an appropriate time to make the formal constitutional change which, I suspect, at that point would occur without trauma. Meanwhile, this transitional period should allow Australia's best minds to concentrate on resolving all the related issues such as the meaning and future of reserve powers and whether the Constitution should continue to assign powers in ways so very much at odds with how Australia works and what the Australian people surely would accept. I have in mind, for example, the Governor-General's absolute veto over legislation, his role as Commander-in-Chief, and his ability to force the resignation of any government by refusing to recommend appropriations necessary for the continuing operations of the Public Service.

Finally, having said all this, let me suggest that we really are considering two separate questions: first, whether Australia should be a republic; and second, who should serve as its head of state. Let me redefine the latter question by asking whether it is either desirable or necessary for Australia to have a head of state who is not also the head of government. Perhaps it is not surprising that Gough Whitlam wrote in his memoir of 1975 that 'Experience has shown that a Head of State who is anything more than an ornament is a menace.'<sup>20</sup> Although Whitlam obviously was not the most detached commentator on this matter, his contention still merits consideration.

There are three primary benefits to having a separate head of state.

First, the head of state performs various time-consuming ceremonial functions and so allows the head of government to concentrate on the job of governing. If there were no Governor-General, or if there were to be no President, it would be the Prime Minister or other government ministers who would be under pressure to attend all the various civic functions and international events that require recognition in the form of the presence of a senior representative of the nation. Yet when there is a memorial service for those who died on Bali, it was thought right that the Prime Minister himself attend, and I agree. And when there is political mileage to be gained by attending an event such as one, for example, to demonstrate support for Australia's embattled farmers or those who fought the bushfires that recently savaged Canberra, the PM does not send the head of state in his place or in place of another senior minister. So we could expect that the presence of a head of state would continue to make life somewhat easier for the Prime Minister and his Cabinet; and that may be a good reason for having a head of state, but it hardly is a sufficient one.

Second, the head of state can stand as a symbol of the nation, a figure of special legitimacy who transcends the cut and thrust of the political arena. The best example, of course, is the Queen. But an Australian President would not necessarily enjoy the same respect and deference. Imagine if the President were to be elected by the Parliament with no direct public participation in the choice—which, as I have said, would be my preference. Would the person selected automatically rise in the public's estimation to become someone accepted as the spokesperson for the nation, much less an embodiment

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<sup>20</sup> *The Truth of the Matter*, Ringwood, Vic., Penguin, 1979, p. 184.



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of all that is best about the Australian people? That would depend very much on the personal characteristics of the person chosen; his elevation to the status of national symbol, alongside the emu and the kangaroo, certainly would not be an inevitable consequence of having been chosen by Australia's most respected class, its politicians. On the other hand, imagine that the President is elected. If it is to be a meaningful election, then there must be a choice. And if it is a meaningful choice, we can expect that at least 40 percent or more of Australians will have voted for someone else. Do we expect those Australians to accept the President as speaking for and representing them, as symbolising their nation, even though they voted against him or her?

The best way to maximise the likelihood that a President will gain wide acceptance as national spokesperson is to select someone who does not come from the world of politics. A poet, perhaps. A scientist, a community leader, or—dare I even suggest it?—a sports figure. How about the prospect of President Steve Waugh? But that brings us to the third, and perhaps the most important, supposed benefit of having a head of state—having someone to act as defender of the Constitution in exceptional cases of emergency by exercising the reserve powers, on the scope or very existence of which Australia's best and brightest so far have been unable to agree.

Here is the dilemma. Although most Australians, and most Americans for that matter, might not believe it, governance is not for amateurs. The effective exercise of political power requires a knowledge of public affairs, an instinct for understanding people and their motives and intentions, an understanding of law and history, an appreciation of the importance and nuances of public rhetoric, and, among other aptitudes, the wisdom to know when to do nothing. And so, shocking as it may seem, the people best equipped to exercise those mystical reserve powers are people who have been in the political arena. It would be rash to assume that the qualities and experiences that have made someone a great poet, scientist, or striker of googlies past deep square legs will have prepared that person to exercise great power at times of national crisis. Quite the opposite, in fact. He or she is likely to make a mess of it, despite the best of intentions.

Ah, but we say, our President will have his or her advisors to offer the benefit of their knowledge, their experience, their understanding of the complex world of governance. But who are these advisors to be? Public servants or parliamentarians, or alumni of either corps, or perhaps scholars who themselves lack any direct experience of their own? What other alternatives are there? If the President is chosen from outside the world of public affairs in order to find someone widely acceptable to the nation, is it not very likely that decisions of great national moment will be made by someone who is sadly bereft of political nous, or that they will be made, in fact but not in name, by people at his or her side whom no one elected to stand there?

Taking all this into account, I suggest that Australians think some more about the concept of responsibility—not only the responsibility of the government to the Parliament, but the responsibility of government ministers and especially the Prime Minister to the nation. The ceremonial and symbolic roles of the head of state can be performed perfectly well by the head of government. I offer you Franklin Roosevelt, John Kennedy, Ronald Reagan, and even George W. Bush, as examples. You may not respect all of them; I have not respected all of them; but what matters is that most Americans respected each of them. And in this era of televised politics, a prime minister who cannot speak as

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effectively to the nation as he can speak across the dispatch boxes is unlikely to succeed at the job.

That leaves us with the issue of reserve powers—in other words, whether Australia requires a *deus ex machina* to descend from above the political stage and intervene in cases of direst emergency to resolve crises that mere mortals have created for themselves and the nation. I am inclined to answer in the negative. Perhaps I have more confidence in the good sense of politicians than most have, or maybe I have more confidence in the ability of politicians to understand what is ultimately in their own best interests. I believe that if elected politicians create a mess for themselves, as they did in 1975, they are perfectly capable of finding their way out of it, and they will do so as they continuously reassess and recalculate how they can emerge from that mess in a way that leaves them with the fewest possible stains and that maximizes their public support.

Finally, as for the need for a President or Governor-General to intervene when the government is alleged to have acted illegally or unconstitutionally, let the matter be resolved instead by the jurists on the High Court, who are almost certain to have the benefit of better training and more experience for the task. I for one would rather leave the supremacy of the rule of law to those trained for the task than put it in the hands of a President appointed or elected for entirely different reasons, even if he is a paragon of virtue and honour such as Steve Waugh.



**Question** — You seem to admire the introduction of proportional representation in the Senate, and you seem to think that the House of Representatives is not working quite the way it was intended to, regarding responsibility and accountability. What would you think if we introduced proportional representation into the House of Representatives elections, on, say, the lines of Tasmania or the ACT or the Senate?

**Stan Bach** — That's a very good question, though it is one I have a little difficulty answering, because I haven't, as an American, had personal experience of being governed under a system of proportional representation. In fact there are Americans who would consider that entirely un-American.

Some years ago President Clinton selected a law professor named Lani Guinier to occupy a position in the Justice Department. One of the reasons her nomination was eventually withdrawn was because she had had the temerity to write an article in a law review proposing proportional representation for some purposes in local elections. And I *think* it's true that President Clinton said in some context, 'Well, but that's un-American'. Now he didn't mean it in the sense of the House Un-American Activities Committee, he meant it in the sense that that's not the way we do things. So I've never had the personal experience.

It's a complicated question, though. If you try to evaluate proportional representation, it depends very much on the type of party system in which it is embedded, and the party

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system that flows from it. Do you have a threshold on the number of votes that a party must receive before it qualifies for representation in an assembly? Israel has a perfect system of proportional representation: one national constituency, a minimum 1 or 2 or 3 per cent threshold (something like that), and they have a myriad of tiny parties which hamstring the formation of coalition governments. And we've seen that happen within the last few weeks, following the last Israeli election.

Someone recently said, talking about Australia, that there are probably advantages to proportional representation, just as there are advantages to single member district systems, and what may be most advantageous is not choosing one or the other, but having the two houses using different systems creating different majorities.

**Question** — I arrived in Canberra in January 1954 to begin a four year course at Duntroon which is comparable to West Point. You mentioned the Fulbright Fellowship and research, which triggered in my mind that both of us had been a little associated with a proposal that could be said to be slightly comparable to the American White House Fellowship Program. While you may be reluctant to comment on the work of an Australian fellowship program, which might be said to be based in part on the White House Fellowship Program, I am interested in that because when I went to America I spoke with the Executive Director there in the course of some research as a Churchill Fellow in 1973. It was interesting to hear her say to me that Mr Blair had been briefed by her on the merits of the White House Fellowship system and she had also briefed the President of Finland. She hadn't yet been asked to brief the Prime Minister of Australia.

**Stan Bach** — As someone who has spent his professional career in Washington on the Congressional side of that great divide of our separation of powers, I know of the White House Fellowship Program, and I know that it is very highly regarded. This is a program that brings in scholars and people from other walks of life—for example, Colin Powell was a White House Fellow. Some were brought in from elsewhere in the government and some were brought in from the private sector, to give them some practical experience of government and its operations at the highest level of policy making.

There is a similar program in Congress—well, somewhat similar—a Congressional Fellowship program, which has been functioning since 1955, which brings in scholars, journalists and officials from other departments of the executive branch, to have a year's worth of practical experience in that strange and alien world of the United States Congress. I know more about that program because I participated in it, some 30 years ago (thank you for reminding me).

I think these programs are a wonderful idea, if for no other reason that, as a trained academic, I believe they tend to bring together people from those two worlds, and inform the kind of teaching and research that is done in ways that otherwise simply wouldn't occur. And they also inspire more interest in the study of central government institutions, whether it be the office of the Prime Minister or whether it be the House of Representatives and the Senate.

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I have been privileged while I've been here in Canberra not only to be a visiting fellow at the Australian National University also a fellow in the Department of the Senate. That has been a wonderful vantage point for me.

I have been impressed by two things, if I can use your question as an opportunity to elaborate, in the reading I was doing. One is the literacy of Australian political science compared to American political science. I could actually read and understand what Australian political scientists write, which is something that I can't always claim for my American colleagues. But the other thing I have been struck by is that it's a fairly small community of Australian scholars who have a particular interest in the Commonwealth Parliament. It didn't take too long for me to identify the usual suspects, when I came across the names of people who were writing the books and articles I was reading, so I would be all in favour of anything that would encourage more scholars in Australia to pay more attention to the Parliament.

**Question** — I think you have succeeded in giving a delicate balance between America and Australia on the matters you spoke of. I was reading this morning Michael Moore's *Stupid White Men*. It refers to the 2000 election in which George Bush was elected, and, on page 5, he says: '173 registered voters in Florida were permanently wiped off the voter rolls by Katherine Harris, the campaign director for the Bush camp. Most of those were black.' That's something that obviously couldn't happen in Australia, so my question to you as someone who has a view from Washington is, is that situation American? Or is it un-American?

**Stan Bach** — A provocateur! I would re-phrase the question. Before we can answer it, we have to answer a prior question, which is: Is that true or is that not true? Or, how much of the truth does that statement represent, and how much of the truth does it leave out?

There was a documentary on television within the last week or so on the 2000 election, and I don't know if it will surprise you or not, but I studiously avoided watching it. During those days I spent more than enough hours trying to follow what was going on in Florida and elsewhere, especially as it might ultimately have an effect on the counting of electoral votes by the House and Senate in Washington, which, under our Constitution, is where the actual selection of the President is made. And I continue to believe to this day that—through a not terribly implausible set of developments—then-Vice-President Gore could have elected himself President. It would have been a pyrrhic victory, but I think that, constitutionally and legally, he could have done just that. I'm not going to pass judgement—especially having forgotten so much of what I knew at the time—of who was responsible for what in Florida, or in other states during that election or in prior elections. I'm from Chicago originally. The slogan in Chicago is 'Vote Early, Vote Often'. And in the 1960 election there were allegations of course that Mayor Daley delayed reporting the final tally in Illinois until he knew exactly how desperately Jack Kennedy needed to carry the state of Illinois. I don't know if that's true or not. We Americans have a tendency to enjoy conspiracy theories about political life. There's enough in politics that is both bizarre and true, without looking for conspiracies that may not be true.

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I think your question raises an interesting point, and that has to do with compulsory voting, which I have encountered here in Australia for the first time. I must admit I feel slightly uncomfortable with compelling people to exercise their civic responsibility. On the other hand, if you look at the deplorably low levels of turn-out in American elections where, if we get up to 50 per cent of eligible voters turning up at the polling place for a mid-term congressional election, we would yell hosannas to the heavens. Perhaps there is something to be said for compulsory voting—but that’s a question I’m still mulling over in my own mind. I haven’t reached a decision on that one yet.

**Question** — One of the most striking differences between the Australian and the American political system is the fact that nearly all public servants in Australia, in particular the middle and upper management of the Public Service, expect to retain their positions with the change in administration, or change of government. Whereas in America, my understanding is that nearly all middle and upper management positions in the Public Service—with a notable few exceptions—change when there is a change in administration. I think when George Bush Junior won, one of the big issues was that nearly 5 000 people needed to get security clearance vetting before they could start their new jobs. What effect does that difference and that characteristic of the American political system have compared to Australia and elsewhere? Does any other country follow the American system, where nearly all the middle and upper management of the Public Service change with the change of administration? And do you think that makes a more effective and efficient or more dynamic government? There must be a huge amount of tacit knowledge that would be lost with the change of government, but there would also be some benefits as well. And would it make the Public Service more accountable?

**Stan Bach** — I don’t dispute the number, I dispute it’s significance. You have to put that number of 5 000 in the context of the size of the executive establishment in the United States. I don’t think it’s fair to say—although I know it’s a fairly widespread perception—that with a change of administration, especially a change of party control in the White House, that there is a clean sweep of middle and upper level positions within the executive. That was what we used to call the ‘spoils system’ in the nineteenth century, but it largely disappeared with the Pendleton Act in 1880, I believe. What *is* true is that political appointments percolate further down into American departments than they do in Australia.

Here in Australia there will be a minister, there may be a second level of ministers responsible for some portion of the work of a larger ministry, perhaps. But that’s about all. In the States you will have a cabinet secretary, a deputy secretary, a series of assistant secretaries, deputy assistant secretaries and so on. That’s enough, but that’s generally as deep as it goes. So you will have the first four levels of policy making positions who are political appointees, but after that the civil service remains, and is unaffected in terms of their career status and their positions by a change in administration. That is a frequent source of concern and disappointment to a new administration that comes into power after a period of years of being in the political wilderness, because there is the assumption that the permanent government is loyal to what is now the party out of power. Not because they were political appointees, but because during all those years they were the ones who had worked their way up the bureaucratic ranks into more senior positions.

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You point to a very serious problem we have, and to another one of the real comparative virtues of your system, which is the amount of time it takes to fill all of those 5 000 positions. The first year of President Bush's administration ended with a really disconcerting number and percentage of those positions remaining unfilled. The problem is much worse today than it was 20 or 30 years ago, and there are a variety of reasons contributing to it. One reason is the number of positions, another is the desire to ensure that there are no surprises in a presidential nomination that are going to come back and haunt an administration. You may recall that when Clinton took office, his first nominee for Attorney-General had to withdraw her name from consideration because she'd failed to pay social security payments for her children's nanny. Well, they had simply not asked her the right question in the right words, and she had not revealed that information. It was her fault. She knew she should have been making those payments, and she knew that she should have revealed this, because there was a very good likelihood—given the congressional committee system—that sooner or later that information would come out.

Another contributing factor is the extraordinary number of forms you have to fill out and the amount of information you have to divulge and the amount of time it takes to do that.

Yet another reason is the concern on the part of recent administrations to, as I think President Clinton said, 'Have a government that resembles America'—which means that you want to make sure that you have a diverse population of people filling these positions. So you have to make sure that the percentages of various categories of people are adequately filled.

All of this combines to make for a process which is much too slow. And one of the major concerns of political reformers in Washington today is how to expedite the presidential appointment and confirmation process.

**Question** — You spoke a lot about checks and balances, both in the Australian system of government and in yours. I have read—and you may be able to tell me if this is correct—that in the United States, if the President wants to declare war, he has to seek approval from Congress first?

**Stan Bach** — Well, it all depends. If you read the American Constitution, it says exactly that. The President is Commander-in-Chief, but the power to declare war is reserved to Congress. The last declaration of war took place on 7 December 1941. The argument is that the nature of world affairs and the pace of events—except in the case of a Pearl Harbor where there's not going to be any question about what Congress would do—has made formal declarations of war an outmoded device.

What we had in the case of the Gulf War in 1991 was a resolution passed by majority vote in both houses of Congress—the same way a declaration of war would be passed—which more or less was a grant of authority by Congress to the President to engage in war-like activities.

There's been a similar joint resolution, I believe, with regard to Iraq. The problem is that if it's not an explicit declaration of war, there can be disagreements as to what Congress intended. And in this context I refer you to the Gulf of Tonkin resolution in the mid-1960s

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in which President Johnson interpreted a Congressional resolution as constituting the equivalent of a declaration of war. Many people in Congress, in retrospect—Senator Fulbright was one of those, he always said he regretted voting for the Gulf of Tonkin resolution—thought that that was not exactly what they had in mind.

Now, in a spate of legislation to control what was then called the Imperial Presidency, Congress enacted a War Powers law in 1974–75, over the veto of President Nixon, which includes the very complex scheme by which the President can commit American forces to combat or the imminent danger of combat, but then Congress has the authority to compel them to be withdrawn within a period of time. And every once in a while the President will submit a notice to Congress in accordance with this law, but he will also accompany it with a statement saying that he is not acknowledging the constitutionality of this law.

So there's been a debate over whether or not it's constitutional. It has never been tested in the courts, and one reason for that is that, by and large, members of Congress would prefer to leave the responsibility for those life and death decisions in the hands of the President.

**Question** — The purpose of our elected institutions is to serve the will of the people. In the five months you've been here you would have picked up the disrespect that our community has for elected members. They put politicians somewhere down there with used car salesmen and child molesters. I am interested in a comparison with the American electorate, and how it respects its elected representatives. And, in giving us that comparison, could you indicate whether that difference—if it exists—in the level of respect can be referred back to the difference in the structure of our elected Congress and Parliament.

**Stan Bach** — As a matter of fact I think the level of disrespect for politicians in Australia is even greater than it is in Washington. I arrived in Australia shortly before the Aussie Rules Grand Final last September, when there was a big breakfast celebration before the game and they introduced all of the participating celebrities one by one, and the Prime Minister was among them. One of the things that struck me was that he was simply one of the celebrities who were introduced. No red carpet, no hail-to-the-chief, just: 'Here's our Prime Minister, John Howard.' And then the MC said, as the Prime Minister was coming in: 'and we will play the new Australian national anthem to accompany his entrance,' and it was an old 1960's rock tune called *I Will Follow Him*—because the Prime Minister had just returned from Washington. My mouth just fell open. Even in our worst days we wouldn't have quite that level of lese-majesty.

There are those who have said that Australians have a more benign attitude toward government than Americans do. I don't know if that's true or not, but if it is, then you manage to marry together a more benign attitude toward government with at least an equal or greater cynicism about politicians. What's the cause of that? I think there is at least one aspect of American politics which ameliorates that sense of cynicism. Americans hate politicians, but they generally are OK with their own elected representatives. That's because the relationship between our members of the House and Senate are so personal that members are really working very hard all the time to ingratiate themselves with their constituency.

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The proportional representation system in the Australian Senate doesn't create that kind of constituency bond, and, as I understand it, the way in which candidates for the House of Representatives are pre-selected—how you gain nomination and then re-nomination also—doesn't create that same kind of intense sense of 'this is our guy' (or 'our gal') representing us.

I think one of the differences is brought on by politicians themselves, but in different ways. Our politicians, our members of Congress, go home and they generally say, 'I am in Washington trying to protect the general interest, the national interest, against all of those evil special interests.' When in fact what they're doing of course is going to Washington trying to protect their *own* special interests against all those *other* competing special interests. Members of our Congress never take the risk of going home and saying, 'the world and the issues we are confronting are more complicated than you understanding them to be by just looking at them from Topeka, or Dallas or Bangor, Maine. They are more complicated than *I* thought they were before I arrived in Washington.'

There is a difference here, I think. I have been shocked by the way in which members of the Commonwealth Parliament vilify each other during debates. Again, my mouth has fallen open, listening to members accuse each other of all kinds of malefactions, from unethical conduct to illegal and even criminal conduct sometimes. I think that, unless and until both houses of Parliament adopt and enforce a rule saying 'though shalt not do that, thou shalt not question in public debate the integrity, the honesty or the intentions of thy colleagues,' then politicians here have only themselves to blame.

A long time ago, there was an American comic strip called *Pogo*, which had a characters who was a philosopher named Albert the Alligator. And I think it was Albert the Alligator who once said, 'We have met the enemy, and they is us.' So I think that perhaps our politicians only have themselves to blame.

**Question** — To get back to your original talk, did you notice the big difference that overcame the Senate when the conspiracy between Hawke and Anthony enlarged the Parliament, and each election in the Senate produced six members, not five, which made the difference and is the reason why the government can never control the Senate?

**Stan Bach** — Are you referring to 1984, when the size of the Senate was increased? As I recall, there were arguments made at the time that that increase in the size of the Senate could have had two different effects. One was to increase the likelihood of minor party and Independent candidates being elected because the size of the quota would be reduced. The contrary argument was that having an even number of senators elected at each half-senate election would increase the likelihood of the two major protagonists dividing those seats equally. I have to remind myself how impossible that is by Australian standards, because we have landslide elections in individual states, where a party will gain that percentage of the two-party vote.

It's interesting to explore the intentions and the motives and the expectations of politicians sometimes in making precisely those kinds of changes. Perhaps one of the most profoundly important changes was the institution of proportional representation in 1949, and I think that the intention of the Chifley Government in instituting proportional representation was not precisely to create a Senate controlled by minor party and



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Independent senators. So there are frequently mixed motives and unanticipated consequences. You know, today's reform is the source of tomorrow's problems, which is one reason why reforming political institutions has to be done with great care.