

A Plague on Parliament: Australia's Citizenship Crisis

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"You know, when you nominate for Parliament, there is actually a question, you've got to address that section 44 question."- Australian Deputy Prime Minister, Barnaby Joyce

It is proving to be a toxic gift that continues to give with increasing regularity. The latest potential victim of section 44 of the Australian Constitution, one barring a member of parliament from having an allegiance, obedience or adherence to a foreign country, is the Australian Deputy Prime Minister, Barnaby Joyce.

On Monday, the same politician who made world headlines threatening to place the undeclared dogs of Johnny Depp and Amber Heard on death row after entering Australia, had his own moment of unrelished revelation: he was a New Zealand citizen.

This inconvenient fact came to Joyce's attention on Thursday via advice received from the NZ High Commissioner, Chris Seed. The punch in the advice was even greater, given the Deputy PM's string of previous announcements that he could not possibly have a citizenship connection with the country where his father was born.

While previous politicians leapt over the ridge on discovering their ineligibility (the Greens Senators Scott Ludlam and Larissa Waters being the debutants in this bloodletting), others have been attempting to clog the High Court of Australia. Perhaps the two Senators had been too hasty.

One government Senator and now resigned cabinet member, Matt Canavan, smells a whiff of potential legal victory before the bench of the High Court, using the "blame my mother" defence in acquiring, unwittingly, Italian citizenship, or what is deemed Italian residency abroad.

But Joyce's case provides far less room to manoeuvre, one that looks more like the cases of Ludlam and Waters. Both of those cases involved a misreading, or misperception, about the respective laws of New Zealand and Canada on nationals.

No matter, claims the government Solicitor-General, Stephen Donaghue, deciding that sun filled hope mattered over worn legal experience. Joyce could remain not only as Deputy PM but as the Member for New England while the High Court considers the case. There would be no glorious immolation, no sacrifice to the sacred text of constitutional law. Furthermore, there would be no risk, at least for the moment, that this minority government might be extinguished by a textual nicety, given the government's one seat majority.

Desperate to repel this political doomsday scenario, Prime Minister Malcolm Turnbull has

been edging close to a dangerous declaration in parliament: that the High Court will find in favour of the government and hold that Joyce can remain.

This is very much high in the wishful stakes. What the government is banking upon, along with One Nation Senator Malcolm Roberts, is a modern interpretation of section 44, one that moves away from the fact that mere entitlement to a foreign power's good graces would disqualify.

As for the Solicitor-General's advice, Joyce satisfies all four contrived tests, though this banks on an updated reading of the section that clips its very broad wings.[1] The Deputy PM was not, for instance, born overseas. Nor was he on a list of citizens of another state. He never applied for the citizenship of another country nor swore, at any point, any oath or allegiance to the other country.

Sensible points, in of themselves, but the law is not alien to absurdity. If, suggests Sydney University Law School's Anne Twomey, a distinction can be drawn between citizenship by descent and other forms, Joyce may well survive.

"Or [the High Court] could say the purpose of the provision is to prevent dual allegiance - and if you didn't know [you were a foreign citizen] you were not breaching the purpose." [2]

The opposition attorney-general, Mark Dreyfus, suggested that Turnbull might have been skirting against the separation of powers, coming "perilously close to directing the High Court." [3] Not so, shot back Senator George Brandis. Turnbull, he explained on Radio National, knows a thing or two about the High Court, having presented cases before them.

Ambushed yet again, the government's latest tactic smacks of a retro approach, those bad old days when major parties would purposely use the disqualifying provisions of section 44 to eliminate an independent politician or a member of a minor party. Show us, ventures the coalition, the paperwork of Justine Keay, Susan Lamb, Brendan O'Connor, Maria Vamvakinou and Tony Zappia.

All those Labor MPs are said to have renounced their foreign allegiances, though the party has, as yet, to move on producing any relevant paperwork. Labor's own response is a line so standard as to be worrying. In refusing an offer from Turnbull that their own dubious cases be bundled up in the same government package for the High Court, Bill Shorten climbed the mountain of confidence.

"The Labor Party," penned Shorten in his note of refusal to the PM, "has the strictest procedures in place to ensure all candidates are compliant with the Constitution prior to their nomination for election. Therefore, I politely decline your offer." [4]

More fun, it seems, for the constitutional diggers.

Time and again since this constitutional crisis unfolded, the concept of strict procedures has itself been challenged. The application of due diligence, these episodes show, is an entirely relative matter, one often giving way to pure hope. But ignorance, in these cases, is proving far from blissful. Politically, it is even proving fatal.

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Notes

[1] <http://theconversation.com/new-zealand-claims-barnaby-joyce-as-one-of-its-own-in-new-dramatic-citizenship-turmoil-82463>

[2] <http://theconversation.com/new-zealand-claims-barnaby-joyce-as-one-of-its-own-in-new-dramatic-citizenship-turmoil-82463>

[3] <http://www.abc.net.au/news/2017-08-15/turnbull-close-to-interfering-with-high-court-labor-says/8806072>

[4] <http://www.news.com.au/finance/work/leaders/citizenship-scandals-to-hit-labor-with-governments-sighs-set-on-five-mps/news-story/9107606d3cedbc87a40cb4f75cc09e23>

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