The JCA appreciates the opportunity given to us in *The Australian* on 28 February 2020 to air concerns it has about the tenor of the debate surrounding the High Court decision in the aliens power case. It is important for issues arising from that case to be publicly debated in an informed and thoughtful fashion, devoid of the hysteria generated by the case in some sections of the media and the political landscape. Chris Merritt’s column is an important contributor to that informed debate.

There are, however, matters in Chris Merritt’s accompanying article on 28 February that I would like to respond to, in the spirit of furthering that debate.

Chris Merritt wrote:

“The big issue that arises from the court’s decision in the aliens case is not what the nature of particular governments says about certain judges, but what the performance of certain judges says about the vetting procedures of the governments that appointed them.”

Mr Merritt is unarguably correct to point out that governments are accountable to the parliament, and ultimately to the electorate, for appointments they make to the High Court. However, that particular criticism is apt to suggest that judicial appointments to the High Court should be made on the basis of some attempt to divine the candidates’ political philosophy or position on various political issues. In this country we have largely and fortunately avoided the approach adopted in the United States in which appointments to the Supreme Court are made on that basis. That should remain the case.

Some commentators have described the approach to constitutional interpretation adopted by the majority justices variously as “novel”, “judicial activism” and “impressionistic”. The chief purpose of those descriptors is to signify that such an approach is somehow political, while the alternative is not. Characterising the approach of the majority as “impressionistic” and that of the minority as “legal conservatism”, and equating “legal conservatism” with merit, as constitutional lawyer Greg Craven does in the extract quoted in Chris Merritt’s article, is itself a political position.

Further, the suggestion that governments should be assiduous in selecting judges who fit the description of “legal conservative” does not address the question of how any government is supposed to go about this. No doubt all of the members of what came to be known as the "Mason Court" would have been considered to fit that description at the time of appointment, but together they discerned a raft of previously undiscovered implications in the *Constitution*.

Similarly, when the widely and rightly applauded appointments of each of the four judges in the majority in the aliens power case were announced, no-one could have predicted that they would, in the near future, be denounced as “impressionistic” or “activist” interpreters of the *Constitution*. Attempts to make appointments on the basis of perceived “conservatism” are damaging to the integrity of the courts and ultimately futile.

The Judicial Conference of Australia (JCA) does not intend to make any comment about the perceived merits of the decision itself or the correctness or otherwise of commentators’ characterisation of the different approaches of the minority and the majority in the decision. That is because it is not part of the JCA’s objectives to engage in political debate. Our concern is to advocate that appointments to judicial office in Australia continue to be made solely on the basis of the professional criteria of expertise, intellectual and analytical ability, and a demonstrated capacity and willingness for sustained hard work; and the personal qualities of integrity, fairness, independence, impartiality, sound temperament and good character.

Justice Judith Kelly

President

Judicial Conference of Australia

The Judicial Conference of Australia is the professional association of judges and magistrates in Australia.