

## MAINTAINING THE TRADITION OF JUDICIAL IMPARTIALITY

### The Honourable Justice David Ipp AO\*

The image used to portray the ideal of justice is ubiquitous in the western world. Themis, the goddess of justice, is shown as blindfolded, with scales and a sword.<sup>1</sup> The scales reflect even-handedness. The sword is a symbol of power that executes decisions without sympathy or compromise. The origin of the blindfold is obscure. Historical research appears to indicate that blindfolded justice first began to appear with any regularity as an image during the 16th century.<sup>2</sup> The inclusion of the blindfold in justice imagery at that time coincided with the establishment of professional, independent judges. These judges stood apart from the king or emperor and did not simply act on the orders and instructions of the executive power.

The goddess of justice is blindfolded so that she cannot read the orders and instructions or even the signals a sovereign might send on how to decide a case.<sup>3</sup> The blindfold represents the idea that political views, ideology, sympathy and even compassion are very bad guides to judgment. A blindfolded justice cannot see who comes before her, and hence cannot be impressed by powerful litigants (such as government)) who might seek to intimidate her, or persuade her by appealing to her emotions. Thus, the blindfold represents impartiality, neutrality and freedom from the influence of the senses. The blindfolded goddess acts solely on grounds of principle and reason. Intellectual rigor and a deep knowledge of the law is her guide. These are the ideals to which justice in the western world aspires.

In Australia, as a general proposition, government expects judges to be impartial. This is only a “general proposition” because government frequently expresses displeasure at judicial decisions that are contrary to government rulings or policy, and varying degrees of antagonism towards judges who make them. Government

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<sup>1</sup> See the general discussion in D A Ipp, “Judicial impartiality and judicial neutrality: is there a difference?” (2000) *19 Aust Bar Rev* 212

<sup>2</sup> Curtis & Resnik, “Images of Justice” (1987) *96 Yale LJ* 1727 at 1757.

<sup>3</sup> *Ibid.*

interests that may be affected by judicial decisions are almost infinite in number. Questions of state security are a glaring example. But matters involving far more mundane issues can attract government interest. Some examples are rights to land, taxation, town planning, conservation and the environment, the use of alcohol, sentencing and even negligence. In criticising a particular case, government officers, at times, direct their remarks solely at the judicial reasoning deployed. But many criticisms involve attacks on the judge personally, and some are simply abusive. “Daft and delusional” is a recent example of a State Attorney-General’s description of a judicial officer’s decision. Very often, notwithstanding the form of the criticism, in substance it is grounded on the fact that the decision is perceived to be contrary to government interests. Government does not like judicial interference with their decision-making powers and the implementation of their policies.

Nevertheless, the Australian judiciary is safe from the kind of interference that one finds in some other countries. In Australia, there is no communication outside open court between government and judges concerning the result or the details of any decision a judge may be required to make. Government does not attempt to influence judicial decisions, as is the case in many other countries. Judges do not telephone the Prime Minister or members of the Cabinet, or senior government officials, to ascertain whether a proposed judgment is politically acceptable, and government does not privately communicate to judges the nature of the decisions they require the judge to hand down. We know that conduct of this kind has happened in many countries throughout the world and still happens. But Australia is immune from that. We take that for granted, but judicial independence of this kind is a fragile thing. If it is to continue to last, it must be buttressed and reinforced.

Why are Australian judges immune from this kind of government interference? I would say firstly (and primarily) because at a basic grass-roots level, the Australian people require their judges to be so immune. The people would be outraged were the situation to be otherwise. They have been conditioned to believe in the essential goodness of judicial impartiality; and that conditioning and that belief runs deep in the basic currents of Australian life. Government in Australia is acutely aware of the people’s demand for judicial independence of this kind. It understands full well that, were it to become known that government was attempting to interfere with judicial

decision-making, there would be a terrible outcry which could be fatal to an individual politician's continuation in power, or even that of the government itself. Heads would roll.

Secondly, the judiciary, itself, is conditioned to believe that to act other than impartially is essentially evil and inimical to a code of conduct that has been instilled in each individual judge since the time he or she began to practise the law. The importance of this conditioning of judges should not be underestimated. It is in this area that practice at the Bar plays such an important part. Independence is required of a successful barrister and the ethics and customs of the Bar underline this. Life at the Bar is such that it is soon known if a particular individual is ready to kow-tow to particular solicitors, or a particular interest group. That is why it is so important that judges continue to be drawn largely from the ranks of successful practising barristers.

It should not be thought that this happy state of affairs has always existed in the common law world. There have been many instances of serious suspicions of injustice through pro-government judicial bias. The example of Roger Casement is often cited as a trial where judicial propriety was open to question. Casement was hanged in 1916 and at that time British opinion was inflamed against persons alleged to be traitors. Many have believed that Casement's judges were determined to have him found guilty, irrespective of the merits of the case. In some quarters he is still regarded as a martyr to Irish nationalism.

Judges have been suspected of pro-government bias even when it has not been thought that the security of the State was at risk. The case of Cochrane, one of Britain's most successful captains in the Napoleonic Wars (and the model for novelist Patrick O'Brian's Jack Aubrey, the man who Russell Crowe portrayed in *Master and Commander*), is an example. There are historians who say that the judge in Cochrane's trial put the political interests of the naval and aristocratic establishment above his duty of impartiality (and, indeed, above State security - as Cochrane's resulting incarceration deprived Britain of the services of perhaps her greatest naval commander of the time).

In 1814 Cochrane was one of Britain's foremost national heroes, a skilled and fearless sailor, but he was also a popular parliamentarian, a political radical who had attacked the establishment on many fronts. His continued presence as a naval leader against the Napoleonic fleet was very much in Britain's national interest. On the other hand, as a member of parliament, Cochrane had offended the government by exposing myriad injustices within the navy and by championing the ordinary seaman.

Despite his many daring successes at sea, Cochrane was charged with stock exchange fraud. It has long been contended that powerful political enemies manufactured the case against him. According to a recent biography,<sup>4</sup> those behind the prosecution trial carefully selected the trial judge. They chose none other than the renowned Lord Chief Justice Ellenborough, described by the biographer as the ruling clique's "fiercest hound".

After 13 hours of evidence at the trial, with only brief adjournments for refreshment, the prosecution case closed at 10:00 pm. The defence sought an adjournment to the next day so that it could present its case while the jury was fresh. To general astonishment, Lord Ellenborough insisted that the defence begin its case. He said that key witnesses would be absent the next day. That was not true. The following day, most attended. The defence did what it could, ploughing on into the night for another 5 hours until 3:00 am. Many members of the jury slept while several defence witnesses testified. The next day, according to Cochrane's biographer, "Lord Ellenborough summed up in one of the most loaded and devastating speeches ever uttered by a supposedly impartial trial judge, which was to become the subject of major controversy for the rest of the century."

The jury found Cochrane guilty. The Chief Justice sentenced him to a year in prison, a fine of one thousand pounds (a very large sum in those days) and required England's hero to spend an hour in the stocks opposite the stock exchange. He was the last person in England sentenced to be pilloried. It has been said that this was a sentence passed by a biased judge, anxious to serve the interests of government; a

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<sup>4</sup>Robert Harvey, *Cochrane: The Life and Exploits of a Fighting Captain*, (Robinson: 2000).

judge who was the instrument whereby those in power took their revenge on a sailor who had, with great personal courage and skill, devoted his life to the national cause.

After serving his time in jail, Cochrane sought fame and fortune in Chile, where he became admiral and chief of the Chilean navy. Much later, in 1846, when there was a new sovereign (Queen Victoria, an ardent admirer of Cochrane) and a major shift in the British government, Cochrane was rehabilitated. Lord Ellenborough, the son of the former Chief Justice, was one of his sponsors.

Knowledge of Cochrane's case helped me to answer the most difficult question I have ever been asked in front of a public audience. In 2004 I was delivering a lecture to about 50 middle-ranking Chinese judges in Shanghai. The lecture was on judicial independence and I delivered the kind of paper that any Australian lawyer would expect. It was filled with admonitions that every trial should be conducted by an independent and impartial judge and I gave many examples as to how a judge should bring an impartial mind to bear when deciding the issues before the court. I recall showing them a slide of the great painting, *The Judgment of Cambyses*, by Gerard David, the 15<sup>th</sup> century Flemish painter. According to Herodotus, Sisamnes was a royal judge in Persia under the reign of King Cambyses II. Sisamnes accepted a bribe from a party in a lawsuit, and rendered an unjust judgment. Cambyses learned of the bribe and arrested him. Sisamnes was sentenced to death, but before the execution, his skin was flayed off (portrayed in graphic detail by David). Cambyses used the skin to string and cover the chair on which Sisamnes had sat when delivering his verdicts. To replace Sisamnes, Cambyses appointed Sisamnes's son, Otanes, as the new judge. Cambyses admonished Otanes to bear in mind the source of the leather of the chair upon which he would sit as a judge. Cambyses's instruction as to the need for judicial impartiality, emphasised as it was by the reupholstered chair, must have left a lingering impression on his new judge. I perceived that this story also impressed the Chinese judges. It had certainly impressed me when I had read it and again, recently, when I saw the original of David's painting in Bruges.

When I had finished my paper, I invited questions. One of the judges stood up. She explained that she was a judge in X, a "small" city of 5 million people about 2000

kilometres from Shanghai; in other words, deep in the provinces. She said that she was idealistic about her work and always tried hard to do her job properly. Her endeavours had been recognised and, as a reward, from time to time she was sent to Shanghai to attend lectures by visiting judges from all over the western world, including Britain, the USA, Scandinavia, Britain, Germany, Australia and others. That very week, she said, she had listened every day to foreign judges talking about judicial impartiality. They, apparently, had told the Chinese judges more or less what I had said in my paper. One would not expect anything different (although I do not think they showed a slide of the corrupt Sisamnes being flayed alive).

Then the judge came to her point. She said that understood very well the theory as it had been expounded. But she was interested in the application, in practice, of these ideals of which the western judges spoke so easily. She explained that, usually, she had no trouble from the government, or people in power. But, three or four times a year she would receive a telephone call from a person who was very important politically in the city (in other words, one or other of the political bosses). She would be reminded that the next day she would be hearing some particular case which the man would identify. The man would tell her that the case concerned one of his family members or friends or business or political associates. He would say that this person must win the case. When the judge protested, the man would warn her. He would say: "If this person doesn't win the case, not only will you never be promoted but we know all about your child, your only child. If this person doesn't win the case, your child - who is presently in primary school - will never get into the stream to go to university. He will be a labourer all his life. Your child will never receive a proper education. He will have to leave school at 15 years of age and go and work in the fields."

The judge gave me a piercing look and said: "What do you western judges say I must do in these circumstances"?

Now, you must admit that this question posed a challenge. How was it to be answered? I noticed that many of the other Chinese judges in the audience were nodding their heads in agreement with the speaker. They were all looking at me, some with sardonic expressions on their faces, waiting for me to reply.

I remembered the case of Cochrane. I replied in the following manner: “I would not presume to tell you how to behave in those circumstances. I have no personal experience of them. I do not know how I would behave in such an awful situation. It is easy for me and my colleagues because this situation would never happen in my country. That is not because we are better people. It is because we are conditioned to behave impartially, and the Australian people and members of the government, including political bosses, are conditioned to leave judges alone, and not to try and influence them. Politicians in Australia know that if they try to pressurise judges into making particular decisions, they could go to jail and their party would suffer serious consequences. So we are free to do our job properly. If we end up like Sisamnes, it will be our fault alone.”

I reminded them that China had only had its present western-style judicial system for about 20 years. I pointed out that the common law system had its roots in a history and tradition hundreds of years old. I told them that even in the 19<sup>th</sup> and 20<sup>th</sup> century, some western judges favoured government and pro-government individuals unfairly. I said that it had taken hundreds of years of judges trying to do their best that had developed a society where it was expected that judges would act impartially in litigation involving government.

I said: “You too, can only do your best, and it is for each one of you to decide, in accordance with your own conscience, what you should do when this kind of pressure is brought to bear. You are pioneers, educating the people in the benefits of an independent judiciary. You have to experience – as all pioneers do, – the terrors of the unknown jungle. It is only if and when, as a result of your efforts, and those of your successors, the Chinese people expect judges to be impartial, and want judges to be impartial, and will punish government for trying to influence judicial decisions, that your life will become easier and you will not have to face telephone calls of this kind.”

This seemed to satisfy the audience, but I should say that it has not satisfied one of two of my colleagues to whom I have told this story. They believe that I should have recommended that the judge should sacrifice her child’s interests in the furtherance

of the highest judicial ideals of independence. Of course, sacrifices of that kind are heroic, but not always practical. In 1963, as a young lawyer visiting Paris for the first time, I was inspired by the statue on the steps of the Conciergerie (the forbidding prison where Marie Antoinette was incarcerated). The statue is of the lawyer who defended the queen at her trial. The Committee of Public Safety warned him that, should he proceed to represent her, he too would meet the guillotine. Notwithstanding this threat, he did so, and was shortly thereafter executed. You may think that this is an extreme example of the cab rank rule. It was a demonstration of great courage and self-sacrifice. But, whatever I thought in 1963, for my part I was not prepared to recommend to the Chinese judge and mother that she should sacrifice the education and prospects of her child in the cause in which I so deeply believed.

There are some egregious examples of judicial propensity to side with government. German judges prior to 1930 enjoyed a fine reputation. But the judges under the Nazi regime are today excoriated. Often the United States Supreme Court has resolved cases by a majority of five to four based, apparently, on ideology rather than the law.<sup>5</sup> Divisions in political philosophy have given rise to great rancour on the United States bench. This has become particularly apparent in cases involving capital punishment, race discrimination, sexual privacy, abortion, rights of the poor, of criminal defendants, and of religious minorities. The overriding importance of the personal political views of the court was particularly apparent in the great case involving the disputed electoral returns in the 2000 United States presidential election.<sup>6</sup>

Apart from detracting from the general reputation of the judiciary, subjective judicial decision-making based on political or social or philosophical beliefs leads to unpredictable and arbitrary results. When the well-known liberal justice of the US Supreme Court, William Brennan, retired in 1990, the journal, *The New Republic*, editorialised:

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<sup>5</sup> See Edward Lazarus, *Closed Chambers* (Penguin Books, 1999).

<sup>6</sup> *Bush v Gore* 531 U.S. 98 (2000).

"[Brennan's] passionate judicial activism was unafraid, in a pinch, to leave constitutional text, history, and structure behind. When liberals like Brennan held sway in the courts, judicial activism often led to liberal results; now that 'conservatives' are the ones ignoring legislative history and congressional intentions, Brennan's legacy makes it harder for liberals to cry foul."<sup>7</sup>

According to an American commentator:<sup>8</sup>

"From the perspective of the more liberal [judges] and their supporters, today's Supreme Court has been engaged in a sustained and evil counter-revolution, undermining or destroying the civil rights and civil liberties that the previous Court properly championed. In curtailing affirmative action and civil rights enforcement, in limiting the right to abortion and enhancing the power of police and prosecutors, in rushing executions and curbing the power of the federal government, including the judiciary, today's Court, it is said, has been turning back the clock on social progress and retreating from the institution's own duty to enforce the constitutional promises of liberty and equality. On the other hand, conservatives, both within and without the Court, approach the innovations of the previous era from the opposite corner. In their view, the previous Court's exaltation of egalitarianism, criminals' rights and sexual freedom was a prime factor in creating the legal and moral decay of the current age. And, to them, most, if not all, of the rights revolution was illegitimate from the outset, a judicial coup d'etat that established the Court as a 'super legislature,' overturning with no constitutional authority the judgments of elected representatives. In light of such pervasive and continuing internal division, the question for the Court, as for the rest of the government, has been whether the institution's own integrity can withstand the corrupting force of bitter disagreement ..."

Maintenance of the judiciary's reputation and integrity requires the rigorous application of impartiality and objectivity. United States judges have not always been known for these characteristics.

After the political change occurred in South Africa, the South African Truth and Reconciliation Commission investigated the conduct of the judiciary during the apartheid regime. The judges mounted a strong defence of themselves. Sir Sydney Kentridge QC, the great barrister, supported them. He wrote:<sup>9</sup>

"During the apartheid years in South Africa many people helped keep alive the idea that the individual had rights and liberties which the state is not

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<sup>7</sup> "What Brennan Wrought" , *The New Republic*, August 13 1990 at 7, quoted in Glendon, Nation Under Lawyers (Farrar, Straus and Giroux, 1994).

<sup>8</sup> Lazarus, above n 5 at 7-8.

<sup>9</sup> *Counsel* (a journal published by the General Council of the South African Bar) September/October edition 1994.

entitled to infringe. But there are not many organised institutions of which this could be said. Among them were certainly the Bar and the Supreme Court."

He remarked:

"Throughout the period the South African Supreme Court as a whole remained an independent court which in an appreciable number of cases provided some protection against the excesses of the executive ... Government hopes that their appointees would take their side were frequently disappointed."

Nevertheless, many commentators have severely criticised the conduct of many of the judges of the old South African courts.<sup>10</sup> According to one<sup>11</sup> it was only a handful of judges (who sat on the provincial benches) who maintained fundamental rights and to whom the new legal order now owes a great deal.

Friedman JP,<sup>12</sup> one of the old order judges who had done much to uphold the rule of law, accepted that "the courts' record as an upholder of the rights of the individual in the application of security legislation, cannot, with obvious exceptions, be defended". Friedman JP nevertheless described the dilemma for the South African courts in terms that I think Australian judges would well understand. He said:<sup>13</sup>

"The detainee would testify how he was assaulted. The police or security force members, on the other hand, would go into the witness box and deny these allegations. In this they would be corroborated by the district surgeon [a State medical officer] who would testify that no evidence of any assault was found on the detainee. One knows now from the evidence which has emerged at hearings of the [Truth and Reconciliation] Commission that many of these witnesses were prepared to lie to the Court. Despite cross-examination it was very often impossible to find that their testimony was untruthful since the court has, in each case, to make its findings on the evidence which is placed before it. That evidence included the testimony of the magistrate or police official who took down the confession, that the person making it had no visible signs of recent injuries. It must, however, be pointed out that in a number of cases evidence of a confession was in fact rejected. The fact that it was commonplace for detainees to allege that they had been tortured, did not entitle the court, in any particular instance, to depart from the principle that each case must be decided on its own facts."

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<sup>10</sup> See for example David Dyzenhaus, *Judging the Judges, Judging Ourselves* (Hart Publishing, 1998) Chapter 2.

<sup>11</sup> Dyzenhaus, *ibid* at 52.

<sup>12</sup> "JP" is the abbreviation for Judge-President

<sup>13</sup> Dyzenhaus *ibid* at 63-64.

Today, the principal criticisms of the South African judges are that they failed to give a liberal interpretation to statutes where there was ambiguity and they construed statutes to give effect to government policy and not human freedoms. The criticism that was stifled in the past has now become very loud indeed.

Nowadays, many western countries have adopted far-reaching security legislation. Such legislation has existed for years in Northern Ireland and similar criticisms have been made about the judiciary there. In the USA, the criticisms of the judiciary in regard to the conduct of cases involving black people in the southern states prior to 1970 is well known. The legislation that has given rise to the detention in Guantanamo Bay is open to serious question and so is the reaction of the American judiciary to what has there occurred. Australia and New Zealand have now also legislated for detention without trial and have introduced other novel statutory provisions designed to shore up the security of the State.

There are many lessons to be learned from the South African experience. Principally, it should be recognised that the erosion of human rights can happen gradually and indeed, at times, imperceptibly. Inexorably, however, fidelity to the letter of the law overcomes personal and moral impulse. The decision to apply the letter of the law as opposed to protecting fundamental human rights becomes easier as judges persuade themselves of the force of their duty to the positive law and government policy. The court can become a chamber legitimising oppression. The correct balance is not easy to strike.

The challenge to prevent such a state of affairs occurring in this country is still to come for both the government and the judiciary. When the really difficult times arise, and most believe that they will, one hopes that the great institutions of this country (government, the judiciary, academia, and the media) will be ready. At this stage, there is, I think, a need for the virtues of judicial impartiality to be properly understood and emphasised, and for judges to be allowed to make unpopular decisions without being exposed to vitriolic personal attacks and abuse. This requires maturity and understanding on the part of government and those who influence public opinion. Whether these qualities will prevail is a matter for doubt. Many seem to have no understanding of what they are doing when they revel in the

process of judge bashing. It will of course be a sad day for Australia when the foundations that allow judges to be impartial are weakened and dispersed. Undoubtedly, those responsible for the weakening will be the first to suffer the consequences.

In responding to the challenge, government has to be extremely careful about the criteria for appointing judges. By necessity this also involves the processes whereby judges are appointed. In recent times much has been written and said about these issues. Many of the commentators have no experience of the law or have particular axes to grind. There is a strong movement to have judges appointed by a committee; often with laypersons being part of the committee. There is a strong movement to have judges who are “representative of the community” and there is a push for “diversity” on the bench. There have been reports of lay members of such committees focusing on the work that candidates for judicial appointment have done outside the law, for the community, and on the degree of compassion that the candidates generally display. This is presumably motivated by the notion that good judges require these qualities.

Australia has a great tradition, more than one hundred years old, of outstanding, independently minded, high quality judges, whose judgments, generally, are noteworthy for their fairness and high intellectual standard. If this tradition is to be maintained, there can be no room for discrimination, reverse discrimination or affirmative action in the appointment process.

Judicial compassion and responsiveness to individual interests are not adequate substitutes for the ideal of impartiality. In the early years of the 20th century, most judges were extremely tender hearted towards big business, while showing little compassion for women and children working long hours in factories. Other judges were strongly in favour of landlords and employers and seldom upheld the claims of workers and tenants. They were merely demonstrating judicial compassion and responsiveness for the ruling establishment at the time. This illustrates the danger of using sympathy and feelings as a basis for making decisions.

The notion of diversity and a representative judiciary should not be a mechanism for lowering standards. One is reminded of President's Nixon's unsuccessful nomination of Judge George Harrold Carswell to the U.S. Supreme Court. There was strong opposition to his appointment, both on political and professional grounds. It was said that he was a mediocre lawyer and a mediocre judge. The Republican senator, Roman Hruska, who was floor manager for the nomination, responded (with refreshing candour, it must be said) that even the mediocre are "entitled to a little representation."

The prime qualities for good judges are not dependent on their ethnic heritage, or whether they give generously to charity, or are members of Rotary or similar organisations, or whether they spend time as volunteers, or whether they are of a particular gender. At the outset, a high degree of moral integrity and strength of character is surely essential. Another fundamental requirement is a deep knowledge of the law and a feel for its principles. Yet another is innate wisdom and a sense of justice. A proved willingness continually to work long hours, to be able to make decisions reasonably quickly, and a facility for expressing oneself lucidly, are all necessary qualities. Above all, the new judge must be steeped in the notion of judicial independence.

And how are these qualities to be discerned by a committee interview? The clichéd calls for "transparency" make no allowance for transparency in the motivation of each individual committee member and in the precise mechanics of each selection. Whatever complaints have been made of the selection process in the past, they will not be cured by the introduction of a selection committee. The same defects apply, except multiplied by a factor equal to the number of people on the committee. What makes it worse is the importance that now appears to be attributed to the interview process. I suggest that is a hopeless mechanism for attempting to establish whether the candidate has the qualities of the kind I have mentioned. One cannot discern these things reliably in a committee interview of an hour or so.

Another problem with the selection committee is the dynamics of committee selection. Take the instance of a candidate who in his youth, or even later, was a card-carrying member of the Communist Party. The appointment to the bench of

such a person might in some western countries be regarded as unacceptable. Even if such a candidate filled all other criteria superbly, the prospects of a committee appointing him or her to the bench would be remote; there would be at least some strong opposition and a compromise candidate would be appointed. But under the present method, a government might be persuaded to take the risk. This is not an imaginary situation (I am not speaking of Australia, but another common law country). Such a person was appointed under the traditional system and has become an outstanding and renowned judge. Appointments by committee take the same form as other committee decisions. They are essentially compromises<sup>14</sup>.

A successful practice at the bar demands deep knowledge of the law and intellectual discipline. It inculcates a wide experience of virtually all forms of human behaviour. It requires sensitivity to human nature as well as the ability to react swiftly to changing situations and to withstand powerful pressure from opposing lawyers, clients and solicitors, and judicial officers. It involves working for and against the government and the establishment. In short, it is the ideal training ground for future judges. One explanation for the fundamental difference in approach between the United States judges and the House of Lords in dealing with security legislation and terrorist trials is that the United States judges do not come from an independent Bar.

The best (albeit not infallible) pointer to whether a person is well qualified to be a judge is the nature of the candidate's career at the bar, the candidate's proven ability as a barrister, and the candidate's reputation amongst his or her barrister peers. Choice of persons outside the reservoir of the Bar does not mean that the person will not be a good judge. There are several examples of excellent judges being appointed from the ranks of solicitors and academics, but the general rule should always be borne in mind.

With the vastly increased importance of administrative law and administrative law cases, the government and the judiciary are coming into more and more conflict. The conflicts are endemic in our system of governance. And there are those who feed off them. There was a time when many of the most successful lawyers were

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<sup>14</sup> See generally JJ Spigelman AC, Judicial appointments and judicial independence, address delivered at the Rule of Law Conference, Brisbane, 31 August 2007

politicians and vice versa. But those times have gone. With their disappearance the understanding (and, I think, some of the respect) that used to exist between these two institutions has been reduced significantly. The difficulties that have arisen in consequence can and need to be resolved. Education and restraint are required, not only by politicians and judges, but by those who influence public attitudes. Reinforcement of the notion of judicial impartiality is a task for all who have the health of our society at heart.

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