

JD Heydon | February 2018

# ENCLAVES AND EXCLAVES

Limits and Exceptions to the Doctrine of  
Judicial Review

---

A Policy Exchange Judicial Power Project Paper

## About the Author

**Dyson Heydon AC QC** is a former Justice of the High Court of Australia and currently a visiting professor at the University of Oxford. A former Rhodes Scholar for New South Wales, he graduated as Master of Arts and Bachelor of Civil Law from Oxford University. He has published a number of legal texts, including his first book, *The Restraint of Trade Doctrine*, in 1971. Justice Heydon was appointed a Companion in the General Division of the Order of Australia in 2004.

## About the Judicial Power Project

This project examines the role of judicial power within the constitution. There is rising concern that judicial overreach has the potential to undermine the rule of law and to impair effective, democratic government. The project considers the ways in which the judiciary's place in the constitution has been changing, and might change in the future. If we are to maintain the separation of judicial and political authority, we must restate, in the context of modern times and modern problems, the nature and limits of judicial power within our constitutional tradition and the related scope of proper legislative and executive authority.

[policyexchange.org.uk/judicialpowerproject](http://policyexchange.org.uk/judicialpowerproject)

## Policy Exchange

**Policy Exchange** is the UK's leading think tank. We are an independent, non-partisan educational charity whose mission is to develop and promote new policy ideas that will deliver better public services, a stronger society and a more dynamic economy.

Policy Exchange is committed to an evidence-based approach to policy development and retains copyright and full editorial control over all its written research. We work in partnership with academics and other experts and commission major studies involving thorough empirical research of alternative policy outcomes. We believe that the policy experience of other countries offers important lessons for government in the UK. We also believe that government has much to learn from business and the voluntary sector.

Registered charity no: 1096300.

### Trustees

Diana Berry, Andrew Feldman, Candida Gertler, Greta Jones, Edward Lee, Charlotte Metcalf, Roger Orf, Krishna Rao, Andrew Roberts, George Robinson, Robert Rosenkranz, Peter Wall.

## Introduction\*

It is a great honour to have been invited to deliver this lecture. The Judicial Power Project is a welcome initiative by Policy Exchange. The power of the courts in recent decades has expanded dramatically. This expansion has been accompanied by growing confidence on the part of at least some judges as to the topics upon which they are competent to adjudicate. This fuels still further growth in their jurisdiction – often a self-conferred jurisdiction. The phenomenon requires public debate and scrutiny. Supporters of the present role of the courts can only value reasoned and objective assessments of where we presently stand – if only to allow later developments to stand upon a firmer footing. For critics of the present trends, the Judicial Power Project can help ensure that this silent revolution, carried out largely without parliamentary sanction or the votes of any elector, receives the attention, scrutiny and criticism that such a substantial change in how we are governed deserves.

This speech will first examine the jurisdiction of the courts to effect judicial review. Isolated exceptions to this general rule of the unchecked advance of judicial power – “enclaves” in a hostile province – namely those relating to foreign affairs, defence and national security will be considered. Another enclave is Parliament’s traditional prerogative of “exclusive cognisance” in respect of its internal affairs. This parliamentary privilege can be assessed by reference to the legal battles of Eddie Obeid, a former member of the New South Wales Parliament. This speech concludes by raising a question whether it may not be wiser in some circumstances for the courts not to exercise their jurisdiction in fields where the legislature also has jurisdiction over its members.

A critic may see the rise of judicial review as being simply an illustration of a very common judicial desire – to increase the power of the particular section of the judiciary in question at the expense of other institutions in the state – other courts or the legislature, or the executive. After all, it has long been a maxim that it is a good thing for a court to expand its jurisdiction. Thus trial judges enjoy expressing adherence to their position of advantage, particularly in relation to questions of demeanour-based credibility. Intermediate appellate courts deprecate that preferred position. They stress instead the importance of achieving a correct result independent of any immunity of trial judges from reversal. For their part, intermediate appellate courts also stress the importance of arriving at correct conclusions of law, based on their own earlier decisions or

those of foreign ultimate appellate courts, whatever the local ultimate appellate court has said. Of this the leading exemplar was Lord Denning MR. And the ultimate appellate court often expresses a striving to keep lower courts within their proper roles.

A cynic might say that this all reveals a certain institutional self-interest. Each level of the courts desires to increase its own jurisdiction at the expense of other levels and acts accordingly.

But courts can also seek to increase their collective jurisdiction. In places where the courts can invalidate legislation as going beyond constitutional power, it is possible for the courts to move into a position of pre-eminence over the legislature. And all courts sometimes act on Bishop Hoadly's perception that those who have authority to interpret laws given by others are, by that authority, the true law givers.

This paper opens by touching on a particular battlefield which has grown in significance in recent decades. The battle is between the courts and the executive. For the former have power to weaken the latter by compelling it to act within jurisdiction and invalidating its conduct if it does not.

## **Marbury v Madison and the Origins of Judicial Review**

In *Marbury v Madison*,<sup>1</sup> Marshall CJ asserted that the courts had power to strike down statutes inconsistent with the United States Constitution. The courts thus had power to impose their view of the Constitution upon the other branches of government. In his day – 215 years ago – that was far from being an inevitable conclusion.<sup>2</sup> Even after *Marbury v Madison*, for decades state judges rejected equivalent powers under equivalent constitutional enactments.<sup>3</sup> Even those judges (before and after *Marbury v Madison*) who assumed powers that we would now term judicial review conceived of their role in very different terms from their modern counterparts, deferring in large measure to the popular will and regarding judicial review as an exceptional expedient.<sup>4</sup>

The notion that the Supreme Court could impose its interpretation of the Constitution upon the Congress and the executive, and that the constitutional interpretations of other branches of government were subordinate and had to

give way to those of the courts, was not the obvious result of the constitutional text.<sup>5</sup> Nor was it the only view in the decades after the Constitution's enactment. As Mark Tushnet has observed, "[f]or perhaps a century the nature of judicial review in the United States was uncertain".<sup>6</sup> It is not self-evident that *Marbury v Madison* was an example of "strong-form review" – that is, a form of judicial review permitting the invalidation of statutes viewed as inconsistent with the Constitution. The decision could, for example, have been read narrowly as confined to the courts' capacity to examine the constitutionality of statutes bearing upon their jurisdiction.<sup>7</sup>

The view of *Marbury v Madison* which eventually prevailed had first to overcome a powerful rival articulated by James Bradley Thayer. From 1811 there is evidence of it, although there were precursors of it even before then. It did not deny the legitimacy of judicial review of legislation on constitutional grounds, but it significantly qualified it. It held that legislation should not be declared void unless there was no room for reasonable doubt about its unconstitutionality. This line of thought rested on the idea that while the judiciary had the primary role of deciding questions of law, the legislature had the role of initiating and enacting legislation. The question was not whether the courts thought an Act unconstitutional, but what judgment the courts should allow to another department of government which had been given the responsibility under the Constitution of making the relevant Act. Thayer said:<sup>8</sup>

This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; and in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.

Later Thayer continued:<sup>9</sup>

While [judicial review] is a mere judicial function, it involves, owing to the subject-matter with which it deals, taking a part, a secondary part, in the political conduct of government. If that be so, then the judges apply methods and principles that

behave their task. In such work there can be no permanent or fitting *modus vivendi* between the different departments unless each is sure of the full co-operation of the others, so long as its own action conforms to any reasonable and fairly permissible view of its constitutional power.

This approach has not been adopted in relation to modern judicial review of whether statutes are constitutionally valid. Something like it operates in American administrative law when considering non-constitutional invalidity. But that last approach does not seem to operate in other common law jurisdictions.

The doctrine of judicial review attributed to Marshall CJ as it has developed has proven exceptionally influential in relation to subsequent constitutions – both in their design and in their judicial interpretation. It is a decision that has become “emblematic, reaching far beyond the scope of what was actually discussed and decided by the Supreme Court.”<sup>10</sup> It is “firmly enshrined as the dramatic founding moment of the doctrine of judicial review”.<sup>11</sup>

*Marbury v Madison* is important for another reason for present purposes. As Gordon S Wood has asserted, “voiding legislation is only the most prominent part of a broader manipulative power that courts exercise over wide areas of American life”.<sup>12</sup> And American conceptions of the role and importance of the courts have influenced their counterparts in other nations, whether by virtue of the importation of American ideas into written constitutions or because of a wider influence. Many of the limits on executive power that have grown up do not involve “judicial review” in the sense of invalidating statutes on constitutional grounds. But they do involve review of the legal validity of executive conduct. The adventure embarked on in *Marbury v Madison* was later backed by sufficient energy to legitimise a strong extension of judicial review of executive action.

These developments have been supported by a much more liberal approach on the part of the judiciary in administrative law since *Ridge v Baldwin* in relation both to the decisions reviewable and to the question of standing to review them,<sup>13</sup> in refugee law, in human rights law, in terrorism law and in new fields like environmental law. Some of these trends stem from the judiciary. Others turn more on statutory change. Almost all of them correspond with the particular interests of some segments of public opinion. One dangerous factor is

a tendency for the blurring or wiping out of what was traditionally thought to be a crucial line. It is the line between permissible review on the ground that a body lacks jurisdiction to decide a matter and impermissible intervention based on the merits of a decision which was within the body's jurisdiction to decide. In traditional administrative law, under the *Wednesbury* doctrine, a decision could be set aside if it was so unreasonable that no reasonable decision-maker could have made it, for an inference is drawn that even though the absence of jurisdiction does not appear on the face of the decision, the decision-maker must have committed some error rendering the decision one which lacked jurisdiction. There is a danger which sometimes comes to pass that the court decides for itself what a reasonable decision would be, and overturns any decision which the court thinks does not correspond with its personal view of what that reasonable decision would be.

## The Flood: The Growth of Judicial Review

Since *Marbury v Madison*, the "province and duty" of the courts to review and adjudicate upon the functions of the legislature and executive alike has grown beyond all bounds. There are fields that might otherwise or in previous ages have been the subject of parliamentary or executive discretion, or have been regarded as topics of political contest ultimately controllable by Parliamentary questioning and criticism of responsible Ministers, their forced resignations, condemnation by the media and the public, votes of no confidence leading to the fall of the government and consequential general elections rather than legal adjudication. These fields are coming to be regarded as legitimate areas for intervention by means of judicial review.

This expansion had many causes. Judicial review came to be recognised and employed by opposition politicians to stall or embarrass governments or by campaigners on a particular issue and – often as a separate group entirely – by those directly affected by government decisions.<sup>14</sup> This use of judicial review has been fuelled by the expansion of grounds for review beyond traditional common law grounds – both through statutory innovations<sup>15</sup> and by adventurous departures made by judges from the traditional grounds of judicial review or developments of them, notably *Wednesbury* unreasonableness.<sup>16</sup> Even if these innovations are received and applied with caution by subsequent judges, the fact that they exist at all, and the fact that they are often expressed in ringing

rhetorical terms by the judicial innovators who promulgate them, encourage litigants, whether driven by political motives or otherwise, to try their luck.

This use of judicial review as a tool of political combat, whether between partisan adversaries or between different groups advocating different views of the ideal society, has been further fostered by the enactment of bills of rights in Westminster democracies previously wedded to stronger ideals of parliamentary supremacy. In this, popular perceptions of the roles of the courts, and judicial perceptions of the courts' role in public life, have followed the American path. New statutory jurisdictions for the courts, as in environmental protection, have also created an expanded role for judges in particular fields and have blurred traditional distinctions between judicial and non-judicial functions.

But the growth of the judicial function, as perceived by public and judges alike, cannot be traced solely to the tactics of litigants or the explicit conferral of powers upon the courts. It is the product of an age of increased cynicism about elected representatives and the political process. Politicians are seen as self-interested, short-sighted, provincial, insular, feeble, corrupt, intellectually dishonest and irrationally prejudiced. Their policies, even where adopted with a keen eye towards popular opinion and the limits of administrative machinery, are tarred with the same brush. The public despises the untidy, even sordid, compromises necessary to make the legislative process work. The courts are perceived, and some courts perceive themselves, as being "outside" or "above" politics, capable of reviewing the complex policy decisions of government by reference to objective criteria. There has been a shift to disguising substantive concerns in the rhetoric of procedural legality.

This phenomenon has drawn scholarly attention in India in particular. There the seizure of sweeping policy oversight and responsibility by the courts accompanied a collapse of popular faith in politicians and a broader "crisis of confidence" in public life.<sup>17</sup> This process is cyclical. Indian judges have tried to win popular favour through populist reinterpretations of the law.<sup>18</sup> They have presented the Supreme Court as a benevolent guardian of the popular interest against sectional political agendas.<sup>19</sup> They have thereby weakened the popular standing of politicians still further. This expansion of the judicial role has been accompanied by a decline in reasoned, consistent judicial explanations as to the state and extent of the courts' jurisdiction. It has been accompanied by unwise interventions into fields the courts do not understand and into "polycentric"



disputes not susceptible to adjudication. It has been accompanied by a remarkable decline in the role of the parties themselves in the resolution of matters supposedly brought in their name.<sup>20</sup> At its peak the Supreme Court of India's rejection of its adjudicative role has led the Court to fashion itself as, it has been said, "a combination of constitutional ombudsman and inquisitorial examining magistrate".<sup>21</sup> One may query whether a body of this kind still resembles in any substantive sense a "court" in the common law tradition. Yet the Supreme Court of India is unquestionably one of the most trusted institutions in the entire country.

The Indian judiciary has intruded into fields of public policy and governance to an exceptional extent. But the popular and judicial attitudes that have driven this shift are not confined to India. Equivalent examples can be remarked upon across the common law world. They have led the courts to regard a far broader sweep of public life as falling potentially within their jurisdiction to review and to remake.

## A Traditional Limit to Judicial Review

The Crown (ie. the executive) may be said to have three kinds of power. The first is that conferred by legislation. The second is that conferred by the common law. Powers in this second category are called "prerogative powers". Traditionally these were thought to be immune from judicial review, but the immunity is undergoing challenge. The third category involves instances where the Crown, as a legal person, has the same powers as any other legal person – for example, subject to any necessary money being appropriated by Parliament, the power to contract.<sup>22</sup> There has been a dispute between Dicey and Blackstone about this taxonomy. Dicey considered that there was no barrier between the second and third categories. He saw the prerogative as the residue of the authority in the hands of the Crown to carry out any lawful act.<sup>23</sup> But Blackstone considered "prerogative" powers were those unique to the Crown and not shared with other legal persons.<sup>24</sup> Each view has judicial support. It is one aspect of the second category which is to be noted here. Sometimes a separate subcategory is recognised within the second category. It includes powers to summon, prorogue and dissolve Parliament, to assent to bills and to appoint ministers and judges. Sometimes these powers are sourced in constitutions or statutes, in which case they fall outside the second category. There have been fewer attempts to invoke judicial review in this subcategory than elsewhere. Examples within the balance

of the second category include the power to institute criminal proceedings by *ex officio* indictment or to terminate them by entering a *nolle prosequi*, the prerogative of mercy, the treaty-making prerogative, the prerogative to control the use of the armed forces, the power to consent to relator proceedings, and the power to grant honours.

At one stage it was thought that the common law prerogatives were immune from judicial review, at least in most circumstances.<sup>25</sup> This view is not now accepted.<sup>26</sup> The modern view is that the mere fact that a power is a prerogative power does not give it any immunity from judicial review; but that particular powers may be immune for some other reason, or that while there is strictly no immunity, in relation to particular powers the claimant faces considerable difficulties as a matter of discretion and practice. In fact the courts have weakened the former immunities and narrowed their scope. The justifications for the former rule that there could be no judicial review of common law prerogatives were various. One was that a sufficient check on the use of power lay on the individual and collective responsibility of ministers to Parliament. Another was that “the King can do no wrong”. Another view was that, in the words of Dixon J, the “counsels of the Crown are secret”.<sup>27</sup> Other justifications were that the prerogatives involved matters of political judgment, or related to a peculiar subject matter justifying immunity from review, or lacked the limitations in scope, purpose and criteria derivable from construction of the statutes creating statutory powers which made those powers easier to control by judicial review. At least some elements in this last group of justifications have survived as grounds for confining immunity to particular prerogatives, or for exercising restraint in review. The others have not survived. This has paralleled the rejection of equivalent arguments in cases involving review of statute-based powers.

The overturn of the supposed immunity of prerogative decisions from review for that reason alone and the perception that some of the arguments formerly used to justify it are not felt now to be satisfactory have meant that the prospects of judicial review are now greater than before.

There have been, then, certain spheres of executive activity which were traditionally thought to be beyond judicial review. They can be viewed as islands of executive power. Or they can be viewed as enclaves in the “judicial province”. They are regions under the exclusive or predominant control of the executive.

But they are surrounded on all sides by territory which has, by conquest or cession, become subject to judicial review.

One such sphere is the conduct by the executive of foreign affairs, defence and intelligence work.<sup>28</sup> Thus in 1971 Lord Denning MR dismissed Raymond Blackburn's application for an injunction to restrain the accession of the United Kingdom to the Treaty of Rome. He did so on the ground that an exercise of the prerogative power of the Crown to make treaties "cannot be challenged or questioned in these courts."<sup>29</sup> Similarly, in 1985 Lord Roskill said "The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed of in a particular manner."<sup>30</sup> Those statements reflected the received conventional wisdom.

The care which the courts traditionally took not to intrude on the conduct of foreign policy by the executive can be illustrated by routine examples. Whether a particular entity was a sovereign state and who its ruler was were questions determined conclusively by a statement or certificate from the relevant Minister. It was not open to the parties to call evidence or present argument to the contrary.<sup>31</sup> The same regime applied to among other issues: whether the country of the forum had recognised a foreign state,<sup>32</sup> what the boundaries of a foreign state were,<sup>33</sup> what the dominions of a foreign state were,<sup>34</sup> what the extent of foreign territorial waters was,<sup>35</sup> and whether a state of war between the forum state and another state continued.<sup>36</sup>

Then there has been deference to executive views on state-related subjects. One example is whether the goods which the government wishes to requisition are urgently required for use in connection with the defence of the realm, for prosecution of a war, or other matters involving national security.<sup>37</sup> Lord Parker of Waddington said that the statements of officials on the matter should be treated as "conclusive of the fact".

In modern times a less absolute approach has been taken. It illustrates a weakening in the former immunities. Thus Simon Brown LJ said the courts "must give great weight to the views of the executive on matters of national security", such as the view that a declaration concerning the meaning of United Nations Security Council Resolution 1441 would be damaging to national interests.<sup>38</sup> To give something great weight involves some deference, but it is of course not to treat it as conclusive.

There was heavy reliance on the view of an official that a formal request by the British government to the United States government for the return of persons detained at Guantanamo Bay would be ineffective and counterproductive.<sup>39</sup> On the other hand, sometimes doubts about or suggestions of contradictions in government evidence are expressed.<sup>40</sup> These moves from complete acceptance of the executive's position to a willingness, more or less qualified, to question it are matched by a tendency in recent decades to move from viewing foreign affairs as being a field of absolute immunity from review. Instead, the court conducts an inquiry into whether, in the particular case, the court ought to decline to review the decision because it is ill-equipped to do so or because, though there is no immunity from judicial review as such, the challenged decisions "cannot sensibly be scrutinised by the courts on grounds relating to their factual merits."<sup>41</sup> Review has come to depend on compliance with tests based on "subject matter and suitability in the particular case."<sup>42</sup> In short, the chance of review of decisions once automatically immune is now greater. Whether the court will or will not consider intervention depends on the circumstances.

What, then, are the reasons why the conduct of foreign affairs and defence to some degree retain practical immunity from judicial review? One reason which the courts repeatedly stress is the significance of the greater access which the executive possesses to experience and expertise,<sup>43</sup> and to relevant information and local knowledge.<sup>44</sup>

A related consideration is the complexity of the policy questions involved.

Another argument is that the policy merits of making treaties in the general interest are not comparable with the attention to individual circumstances characteristic of common law litigation: that is, the decision is a political one, not a decision about individualised justice. This has led to distinctions labelled in this and other areas as distinctions between "policy decisions" and "individualised decisions" or between "political views" and "determinative issues".

Similar reasoning has been employed in relation to defence questions. Decisions to declare war or seek peace, and decisions as to the use of the armed forces in war or in peacetime, are policy or political decisions. Individual interests must inevitably be affected in attempts to ensure the survival of the state but it is seen as inappropriate for the judiciary to intervene to attack the reasoning of the

executive in relation to them. Further, attempts by judges to control the declaring and waging of war would probably do more harm than good.

Defence policy is closely related to foreign policy both in relation to its more overt manifestations and in relation to intelligence gathering. Communications with foreign governments and intelligence work call for a need of secrecy which collides with wide modern ideas of disclosure before litigation, the hearing of litigation in public and the importance of morality in the making of decisions by the state. Woodrow Wilson's demand for "open covenants openly arrived at" is enjoying a new lease of life. But as Lord Sumption has said, "[r]elations between states necessarily involve a measure of compromise between different and sometimes opposing values, even when one is dealing with countries that are both democracies and allies ... Law is animated by a combination of abstract reasoning and moral value judgment, a heady mixture which seems a great deal more attractive and more honourable than the messy compromises that are in practice necessary to maintain relations with foreign states."<sup>45</sup> The same is true of the enlightened but sometimes brutal self-interest underpinning defence and intelligence policy. One of the problems with using judicial power to ensure that members of the executive remain within their jurisdiction is that it very easily slips into merits review.

Judicial review operates on the theory, as Laws J said, that "all public power [must] be lawfully conferred and exercised." On the other hand, he said, there cannot be "a merits review of any honest decision of government upon matters of national policy ... [T]he court is unequipped to judge such merits or demerits ... The graver a matter of State and the more widespread its possible effects, the more respect will be given to a democracy to decide its outcome ... There is not, and cannot be, any expectation that the unelected judiciary play any role in such questions, remotely comparable to that of government."<sup>46</sup>

In a similar vein, Lord Hoffmann saw judicial reticence in relation to national security as turning not only on the greater expertise of politicians, but on the serious political results of the decisions as requiring a legitimacy to be found in responsibility of politicians to the Parliament and to the people through the democratic process.<sup>47</sup> In another case he justified judicial reticence because the case concerned not only the interests of the realm and international diplomacy, but also the use of public funds.<sup>48</sup>

While to some extent the view that the legality of a decision to declare war either is unreviewable or ought only to be reviewed with caution survives,<sup>49</sup> it is under increasing pressure.

The processing of claims to asylum can affect a nation's foreign policy. To grant asylum can be an "expressive" act by which a nation "directs condemnation towards other states for having egregiously mistreated ... refugees."<sup>50</sup> The mistreatment may be in the form of direct abuses. Or it may be in the form of a failure to provide sufficient protection to an individual against mistreatment because of that individual's race, religion, nationality, membership of a particular social group or political opinion.<sup>51</sup> Criticisms along these lines can cause deep offence to the allegedly persecuting state. That state may be a nation with otherwise friendly ties to the state granting asylum. The grant of asylum can be very disruptive to the cordiality of the relationship. As Lord Wilberforce said in another context, it creates the "possibility of embarrassment in our foreign relations."<sup>52</sup> It is true that it is not a court which actually grants asylum. It is an official within the executive who does that. But the courts have to review the decisions of the officials. The courts are not themselves responsible for unduly inflammatory remarks by officials within the executive. But judicial review of decisions made by officials within the executive can involve expression by the court of an apparent measure of agreement with the critical verdict of the official. From this point of view, review must be exercised with care. But unlike instances where the courts are invited to review decisions acting on foreign policy choices, the claims of the individual for asylum from persecution, if made out, are powerful. They must be upheld, but in a way creating the fewest possible difficulties for the executive in its role of conducting the relations of the state with other states.

In short, the conduct of "foreign affairs" classically defined has not proven subject to the same degree of judicial scrutiny as domestic administrative decision-making. As earlier indicated, the dealings of governments about their dealings with foreign states are ideally subject to scrutiny by Parliament or the court of public opinion, rather than by courts of law.<sup>53</sup> To an increasing extent, however, the courts are intervening.

## The Privilege of Members of Parliament

A second sphere of state activity traditionally outside judicial review relates to the traditional privileges and prerogatives of Parliament to govern its internal affairs and proceedings. These powers include Parliament's power to punish for contempt and to impose sanctions on its members for misconduct in office. Parliaments in the British tradition have traditionally enjoyed "exclusive cognisance" in respect of these internal affairs, save where qualified by statutory or constitutional provisions<sup>54</sup> and subject to the longstanding rule that the courts may determine the existence and extent of parliamentary privilege.<sup>55</sup>

One of the doctrines out of which exclusive cognisance is said to have arisen was "the premise that the High Court of Parliament had its own peculiar law which was not known to the courts".<sup>56</sup> That premise is the product of another age. Incursions have been made upon exclusive cognisance through the laws of contract and tort, as well as explicit statutory abrogation.<sup>57</sup> The relevant test for the invocation of Parliament's privileges in this regard has sometimes been framed in narrow terms. In Canada, for example, for a matter to fall within Parliament's "privileged sphere of activity"<sup>58</sup> (and hence within that body's exclusive cognisance) required demonstration that that matter "is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency".<sup>59</sup> And yet the doctrine endures, within limited bounds. An elucidation of those bounds took place in *Obeid v R*.

## **Obeid v R: A Limit Under Siege**

Edward Moses Obeid was elected to the New South Wales Legislative Council, the upper house of the Parliament of New South Wales, in 1991. For the next twenty years he served in that body. He served as the New South Wales Minister for Fisheries from 1999 until 2003. But Obeid's fame or notoriety in New South Wales did not arise from his brief stint as a minister. It was instead the product of his influence and reach within the New South Wales Branch of the Australian Labor Party, and his dominant role in a leading subfaction of that party's "Right" faction, during the Labor Party's four successive terms in office in New South Wales from 1995 until 2011. The methods leading to this outcome, and their merits, are very hard for anyone to understand who is not a member of the Right Wing of the New South Wales Branch of the Australian Labor Party. It

is beyond the scope of this paper to discuss Obeid's rise, reign and fall. These topics, and Obeid's alleged use of political power and influence to enrich himself, his family, and his allies, have been extensively covered in the Australian press and other literature,<sup>60</sup> and in investigations by the New South Wales Independent Commission Against Corruption (ICAC). These investigations ultimately exposed Obeid to criminal prosecution.

On 8 May 2015 Obeid was arraigned in the Supreme Court of New South Wales on a charge of having committed a common law crime – wilfully misconducting himself in a public office. The indictment charged that Obeid, while holding public office as a Member of the Legislative Council, had made representations to a senior public servant in order to secure an outcome favourable to his family and personal interests in properties at Sydney's Circular Quay.<sup>61</sup>

Obeid's lawyers resisted this charge as an impermissible infringement upon matters falling within the "exclusive cognisance" of Parliament. They first raised these matters in an application before the trial judge, Beech-Jones J.<sup>62</sup> They appealed against the dismissal of this application to the Court of Criminal Appeal.<sup>63</sup> And following the conviction and sentencing of Obeid to a five year gaol term,<sup>64</sup> they appealed on a related ground, again to the Court of Criminal Appeal.<sup>65</sup> On each occasion, the arguments of Obeid's counsel as to the character of Parliament's privileges in this respect were rejected. These decisions by the courts of New South Wales are illustrative of how far contemporary courts go in judging the use or misuse of parliamentary office.

At first instance, it was argued that the New South Wales Legislative Council had exclusive jurisdiction over the subject matter of the charge against Obeid – "misconduct as an MLC in the course of discharging his functions".<sup>66</sup> Beech-Jones J rejected this contention. He held that the powers and privileges of the Legislative Council in this respect were not equivalent to those of the House of Commons. And he held that the powers and privileges of the House of Commons did not go so far as was asserted.<sup>67</sup> This second finding is of greater interest. After extensive resort to the UK Supreme Court's decision in *R v Chaytor*,<sup>68</sup> Beech-Jones J held that the crime of wilful misconduct in public office was not "the discharge of a function incidental to the office of an MLC," was an "ordinary" crime, and hence was not "quintessentially a matter appropriate for the Legislative Council to determine".<sup>69</sup> In rejecting this contention that the crimes with which Obeid was charged were anything but "ordinary", Beech-



Jones J found (applying *R v Chaytor*) that Obeid's conduct did not affect the internal administration of the House, occur within the precincts of Parliament, or relate in any way to the legislative or deliberate processes of the House or its members.<sup>70</sup>

On appeal from Beech-Jones J's dismissal of this application, it was again argued both that the powers and privileges of the Legislative Council were comparable to those of the House of Commons<sup>71</sup> and that the Court lacked jurisdiction by virtue of Parliament's exclusive cognisance in respect of Obeid's alleged offences. Both contentions were rejected by the Court of Criminal Appeal. That Court said that even if Obeid had managed to establish that the Legislative Council possessed *powers* in this regard, that would not of itself have proven decisive as to the *jurisdiction* of the Supreme Court.<sup>72</sup> The Court observed in this regard that it does not follow that, if the Legislative Council had power to discipline a former member for misconduct, "a court has no jurisdiction merely because a chamber *might* choose to exercise a power".<sup>73</sup> Applying *R v Chaytor*, the Court said that the existence of an overlap between the criminal jurisdiction of the courts and that of the House of Commons did not mean that only Parliament could (and must) consider whether or not to pursue matters within that jurisdiction.<sup>74</sup> The jurisdiction of the House of Commons, in short, was not exclusive.

Obeid's eventual appeal against conviction and sentence to the Court of Criminal Appeal involved, among other grounds, a related point. Seemingly in response to the treatment of his arguments at previous stages, Obeid's counsel submitted at this stage that "what was involved was not a question of jurisdiction but rather ... a principle of non-intervention, namely, [that] the courts will not intervene on matters falling within the exclusive cognisance".<sup>75</sup> Among other matters, Obeid's counsel argued that a charge involving assessment of the standards, responsibilities and obligations of a Member of Parliament would lie within the exclusive cognisance of Parliament, to be examined by reference to rules, regulations and informal protocols of Parliament governing those standards.<sup>76</sup>

Obeid's contentions as to exclusive cognisance were again rejected. The notion that the Court should exercise a "self-denying ordinance" and decline to exercise jurisdiction was rejected, both by virtue of the way in which the case was advanced and through reliance on and reassertion of the Court of Criminal

Appeal's previous ruling in the previous appeal. Bathurst CJ said again that, where "the conduct questioned would constitute an offence under the ordinary criminal law", the courts should decline to exercise jurisdiction only within narrow, recognised exceptions.<sup>77</sup> The exceptions were where the existence of a parliamentary privilege prevented a just determination of the issues, and where the proceedings interfered with the freedom of Parliament to conduct its business without interference from the court.

The unusual features of this case, involving a body of lesser powers than the House of Commons and offences with a remote relationship to parliamentary proceedings,<sup>78</sup> may render it an unappealing vehicle for examining the exclusivity of parliamentary power more generally. There was no sign that the Legislative Council had considered or would consider the issue of whether it should exercise jurisdiction against Obeid. Nor was there any sign that it had considered or would consider the issue of whether it opposed the courts exercising jurisdiction against Obeid.

And yet the arguments advanced by Obeid's counsel, which are too detailed to describe here, as to why the courts were an inappropriate forum for the adjudication of Obeid's offences, in light of the historical privileges and functions of Parliament, deserve careful consideration. In particular, the contention that questions of exclusive cognisance should be considered to turn upon "a principle of non-intervention", rather than a question of jurisdiction, raises important questions as to the exercise of self-restraint on the part of courts. Those questions are similar to those raised by some of prerogatives discussed earlier. What can the courts do safely and confidently? What it is that they cannot do safely and confidently?

## In Defence of Enclaves and Exclaves

The actual or threatened growth of judicial power into fields traditionally regarded as sole provinces of the executive have been accompanied by an unprecedented segregation of these institutions. Some institutions have been abolished, like the Judicial Committee of the House of Lords. Some have been transformed, like the office of Lord Chancellor. The composition and functions of those institutions once blurred the boundaries between the exercise of distinct forms of power.<sup>79</sup> But there is a factual aspect of the segregation. There has been a decline of the once "well-trodden route"<sup>80</sup> from the bar to politics to

judicial office. There is a related segregation of the practice of politics from the practice of law. It was once common for barristers to retain busy practices while simultaneously serving as MPs. But this has become very rare.<sup>81</sup> Parliaments and congresses are increasingly populated by those who have chosen politics not as a vocation but as a career.<sup>82</sup> There have been tough politicians who ended up in ultimate appellate courts. In the United Kingdom, for example, the class included almost all pre-2005 Lord Chancellors. In Australia, the class included the first five members of the High Court of Australia, and quite a few thereafter. In the United States the class included Charles Evans Hughes and John Marshall himself.<sup>83</sup> But in the United Kingdom,<sup>84</sup> in the United States,<sup>85</sup> in Australia,<sup>86</sup> and elsewhere in the common law world,<sup>87</sup> appointments of politicians to the courts have become increasingly uncommon, and have ceased entirely in some final appellate courts.

This segregation is significant. Unlike judges of an earlier era, contemporary judges are unlikely to have run for office, to have experienced extensive contact with constituents or lobbyists, or to have been involved firsthand in policy formation. Yet to an extent unmatched by their predecessors, modern judges have assumed for themselves by degrees a jurisdiction inquiring into how nations are and ought to be run, how civil servants make and ought to make decisions, and how elected officials comport or ought to comport themselves. And they have done so in spite – or even as a result – of their considerable insulation from such matters over the course of their own careers.

Recent practical expansions of jurisdiction stem from judicial self-confidence. How warranted is that self-confidence? Judges may undoubtedly hold strong personal views on matters of policy, broadly defined – ranging from how their nation relates or should relate to other states to the manner in which members of the legislature exercise their functions. But these personal views are not necessarily accompanied by any special experience or competence which is relevant to weighing one policy consideration against another, or to determining which ideals are capable of translation into policy and which should remain at the level of aspirations.

Obeid's career raises the question whether parliamentary procedures, parliamentary debate and the interaction of parliamentarians with those who elect them render legislatures better equipped to examine these issues than courts. Of course, legislative trials and punishments can be unjust. When the

Long Parliament found that it lacked the evidence to justify passing an Act impeaching Thomas Wentworth, Earl of Strafford, it simply passed an Act of Attainder for which evidence was not required. And legislative inaction can leave crimes committed by politicians less punished than crimes committed by non-politicians. A party possessing a large and tightly-whipped Parliamentary majority might unjustly pick off its enemies or protect its friends, not on the merits, but by using the weight of numbers.

In contrast, courts are not biased. They apply the traditional protections of a criminal trial. Their proceedings are likely to be much fairer than any legislative witch hunt. And legislative inaction may stem not from an informed judgment but from reliance on the maxim that “dog doesn’t bite dog”.

On the other hand, decisions to proceed against an alleged wrongdoer can depend on value judgments underlying the question “how should politicians conduct themselves in modern life?” A failure by Parliament to pursue alleged offenders may reflect a recognition that the matter is best addressed by the people. The people can take up the opportunity afforded by elections to drive from office those politicians who fall short of ethical standards in public life and by voting for those of greater virtue. Should the courts’ exercise of their “concurrent” jurisdiction give due regard to the choices of Parliament in this respect, having regard to the legislature’s greater competence to resolve issues of this kind? Should there be a “self-denying ordinance” of the character urged by counsel in the *Obeid* proceedings? Since an appeal by Mr Obeid to the High Court of Australia remains pending, it would not be right to offer dogmatic answers to these questions now. But the arguments of his counsel, at least if tailored to more borderline circumstances, do provoke thought.

## Endnotes

\* I am indebted to Douglas McDonald-Norman for his invaluable assistance in preparing this lecture.

<sup>1</sup> 5 US 137 (1803).

<sup>2</sup> Attempts have been made to identify antecedents of the decision in prior decisions of the courts of Virginia (Otis H Stephens Jr, "John Marshall and the Confluence of Law and Politics" (2004) 71 *Tennessee Law Review* 241 at 241-244).

<sup>3</sup> James B Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law" (1893) 7 *Harvard Law Review* 129 at 131-134.

<sup>4</sup> William E Nelson, "Marbury v. Madison, Democracy, and the Rule of Law" (2004) 71 *Tennessee Law Review* 217 at 238 ("Early nineteenth-century courts, unlike our own, still sought to leave, and in fact succeeded in leaving, to legislatures the resolution of conflicts between organized social interest groups"). Gordon S Wood attributes to *Marbury v Madison* a key role in normalising judicial review and allowing it to become accepted "as an aspect of ordinary judicial activity": "The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less" (1999) 56 *Washington & Lee Law Review* 787 at 799.

<sup>5</sup> Ronald Sackville, "The changing character of judicial review in Australia: The legacy of *Marbury v Madison*?" (2014) 25(4) *Public Law Review* 245 at 251.

<sup>6</sup> Mark Tushnet, "Alternative Forms of Judicial Review" (2003) 101 *Michigan Law Review* 2781 at 2782.

<sup>7</sup> Mark Tushnet, "Marbury v. Madison Around the World" (2004) 71 *Tennessee Law Review* 251 at 262.

<sup>8</sup> "The Origin and Scope of the American Doctrine of Constitutional Law" (1893) 7 *Harvard Law Review* 129 at 144.

<sup>9</sup> "The Origin and Scope of the American Doctrine of Constitutional Law" (1893) 7 *Harvard Law Review* 129 at 152.

<sup>10</sup> James Crawford, "Marbury v. Madison at the International Level" (2005) 36 *George Washington International Law Review* 505 at 505.

<sup>11</sup> Jack N Rakove, "The Origins of Judicial Review: A Plea for New Contexts" (1997) 49 *Stanford Law Review* 1032 at 1035.

<sup>12</sup> Gordon S Wood, "The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less" (1999) 56 *Washington & Lee Law Review* 787 at 787.

<sup>13</sup> [1964] AC 40. This was much assisted by strong academic advocacy, for example, by HWR Wade.

<sup>14</sup> David Feldman, "Beginning at the Beginning: The Relationships between Politics and Law" in David Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing, 2015), p 9.

- <sup>15</sup> See, for example, *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1).
- <sup>16</sup> *Dunsmuir v New Brunswick* [2008] 1 SCR 190 (Canada); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18.
- <sup>17</sup> S P Sathe, *Judicial Activism in India* (Oxford University Press, 2003), pp 283-284.
- <sup>18</sup> Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" (1985) 4 *Third World Legal Studies* 107 at 111-113.
- <sup>19</sup> Shylashri Shankar, *Scaling Justice: India's Supreme Court, Anti-Terror Laws, and Social Rights* (Oxford University Press, 2009), p 129.
- <sup>20</sup> See, for example, Gautam Bhatia, "ICLP Book Discussion: Anuj Bhuwania's 'Courting the People' - I: A Radical Revision", *Indian Constitutional Law and Philosophy*, 20 January 2017.
- <sup>21</sup> Burt Neuborne, "Constitutional Court Profile: The Supreme Court of India" (2003) 1 *International Journal of Constitutional Law* 476 at 488.
- <sup>22</sup> On the question of whether judicial review should be available, in whole or in part in this category, see F Wheeler, "Judicial Review of Prerogative Power in Australia: Issues and Prospects" (1992) 14 *Sydney Law Review* 432 at 443-448.
- <sup>23</sup> AV Dicey, *Introduction to the Study of the Constitution* (5<sup>th</sup> ed, 1897), pp 354-355.
- <sup>24</sup> W Blackstone, *Commentaries on the Laws of England* (1783) vol 1 p 239.
- <sup>25</sup> See the authorities cited in F Wheeler, "Judicial Review of Prerogative Power in Australia: Issues and Prospects" (1992) 14 *Sydney Law Review* 432 at 433-435.
- <sup>26</sup> *Council of Civil Service Unions v Minister of Civil Service* [1985] AC 374 at 407, 410 and 417.
- <sup>27</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 179.
- <sup>28</sup> For a detailed analysis of the government's prerogatives in this regard see R Moosavian, "Judges and High Prerogative: The Enduring Influence of Expertise and Legal Purity" [2012] *Public Law* 725. See also Lord Sumption, "Foreign Affairs in the English Courts since 9/11" (Lecture at the Department of Government, London School of Economics, 14 May 2012).
- <sup>29</sup> *Blackburn v Attorney-General* [1971] 2 All ER 1380 at 1382.
- <sup>30</sup> *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 at 398. See also *Johnson v Eisentrager* 339 US 763 at 789 (1950).
- <sup>31</sup> *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797 at 805-806.
- <sup>32</sup> *Taylor v Barclay* (1828) 2 Sim 213 at 220-221; 57 ER 769 at 771.
- <sup>33</sup> *Foster v Globe Venture Syndicate Ltd* [1900] 1 Ch 811.
- <sup>34</sup> *Frost v Stevenson* (1937) 58 CLR 528 at 549.
- <sup>35</sup> *The Fagernes* [1927] P 311.
- <sup>36</sup> *R v Bottrill; ex p Kuechenmeister* [1947] KB 41.
- <sup>37</sup> *The Zamora (No 1)* [1916] 2 AC 77 at 106-107. See also *Re Petition of Right* [1915] 3 KB 649 at 666; *Crown of Leon (Owners) v Lords Commissioners of the Admiralty* [1920] 1 KB 595 at 607 and 610.

<sup>38</sup> *R (On the Application of the Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin) at [42].

<sup>39</sup> *R (On the Application of Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 972 (admin) at [33]-[41] and (on appeal) [2008] QB 289 at [32]-[36], [38], [44], [47], [49], [51] and [55]-[56].

<sup>40</sup> *R (On the Application of Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2008] QB 289 at [26]-[27] and [51]. See also the dissents in *R (On the Application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453 at [72], [163]-[168], [176] and [183].

<sup>41</sup> *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 at [85] per Laws LJ.

<sup>42</sup> *R (On the Application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 at [85] per Lord Phillips. See also *R (On the Application of Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 972 (admin) at [90] (“entitled to intervene” unless special factors suggest otherwise).

<sup>43</sup> *R (On the Application of the Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin) at [42]; *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 at [85] and [87]; *R (On the Application of Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 972 (admin) at [39]-[40], [92], [96] and [97].

<sup>44</sup> *R (On the Application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 at [37].

<sup>45</sup> “Foreign Affairs and the English Courts since 9/11” (Lecture at Department of Government, London School of Economics, 14 May 2012), pp 1-2.

<sup>46</sup> *Marchiori v Environment Agency* [2002] EuLR 225 at [38].

<sup>47</sup> *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 at [62].

<sup>48</sup> *R (On the Application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453 at [52] and [58].

<sup>49</sup> For example, *R (On the Application of the Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (non-justiciable); *R v Jones* [2007] 1 AC 136 at [36] (“very slow to adjudicate”).

<sup>50</sup> Matthew E Price, *Rethinking Asylum: History, Purpose and Limits* (Cambridge University Press, 2009), p 70.

<sup>51</sup> *R v Secretary of State for the Home Department; ex p Shah* [1999] 2 AC 629; *Minister for Immigration v Khawar* (2002) 210 CLR 1; [2002] HCA 14.

<sup>52</sup> *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888 at [46].

<sup>53</sup> See the dissenting judgment in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144; [2011] HCA 32 at [163]. The views of the majority in that case represent another exception to this general rule.

<sup>54</sup> Rosemary Laing, “Exclusive Cognisance: Is it a Relevant Concept in the 21st Century?” (2015) 30 *Australasian Parliamentary Review* 58 at 62-64. This is not necessarily a one-way street; in Australia, for example, the *Parliamentary*

*Privileges Act 1987* (Cth) has given explicit protection to otherwise-implicit privileges.

<sup>55</sup> *Stockdale v Hansard* (1839) 9 Ad & E 1; 112 ER 1112;

<sup>56</sup> *R v Chaytor* [2011] 1 AC 684 at [64].

<sup>57</sup> *R v Chaytor* [2011] 1 AC 684 at [78]-[79].

<sup>58</sup> *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at [4].

<sup>59</sup> *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at [46].

<sup>60</sup> See, for example, Kate McClymont and Linton Besser, *He Who Must Be Obeid: The Untold Story* (Vintage Books Australia, 2014).

<sup>61</sup> *R v Obeid (No 2)* [2015] NSWSC 1380 at [14].

<sup>62</sup> *R v Obeid (No 2)* [2015] NSWSC 1380.

<sup>63</sup> *Obeid v R* (2015) 91 NSWLR 226; [2015] NSWCCA 309.

<sup>64</sup> *R v Obeid (No 12)* [2016] NSWSC 1815.

<sup>65</sup> *Obeid v R* [2017] NSWCCA 221.

<sup>66</sup> *R v Obeid* [2015] NSWSC 1380 at [122] and [135].

<sup>67</sup> *R v Obeid* [2015] NSWSC 1380 at [136].

<sup>68</sup> [2011] 1 AC 684 at [64], discussed in *R v Obeid* [2015] NSWSC 1380 at [143]-[144].

<sup>69</sup> *R v Obeid* [2015] NSWSC 1380 at [146].

<sup>70</sup> *R v Obeid* [2015] NSWSC 1380 at [146].

<sup>71</sup> *Obeid v R* (2015) 91 NSWLR 226; [2015] NSWCCA 309 at [11].

<sup>72</sup> *Obeid v R* (2015) 91 NSWLR 226; [2015] NSWCCA 309 at [19].

<sup>73</sup> *Obeid v R* (2015) 91 NSWLR 226; [2015] NSWCCA 309 at [37].

<sup>74</sup> *Obeid v R* (2015) 91 NSWLR 226; [2015] NSWCCA 309 at [37]-[41], citing *R v Chaytor* [2011] 1 AC 684 at [83] per Lord Phillips and [108] per Lord Rodger.

<sup>75</sup> *Obeid v R* [2017] NSWCCA 221 at [98] per Bathurst CJ; see also [317] per Leeming JA.

<sup>76</sup> *Obeid v R* [2017] NSWCCA 221 at [112]-[116].

<sup>77</sup> *Obeid v R* [2017] NSWCCA 221 at [135] per Bathurst CJ.

<sup>78</sup> *R v Obeid* [2015] NSWSC 1380 at [133]; *Obeid v R* [2017] NSWCCA 221 at [321].

<sup>79</sup> This has not solely been a UK development. See, for example, Stephen McDonald, “‘Defining Characteristics’ and the Forgotten ‘Court’” (2016) 38 *Sydney Law Review* 207.

<sup>80</sup> Ross Cranston, “Lawyers, MPs and Judges” in David Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing, 2015), p 27.

<sup>81</sup> Ross Cranston, “Lawyers, MPs and Judges” in David Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing, 2015), pp 20-22.

<sup>82</sup> For this phenomenon in the United Kingdom, see David Howarth, “Lawyers in the House of Commons” in David Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing, 2015), pp 46-47. For this phenomenon in Australia, see Rodney Cavalier, “Could Chifley Win Labor Preselection Today?” in Barry Jones (ed), *Coming to the Party* (Melbourne University Press, 2006), p 57.



<sup>83</sup> Otis H Stephens Jr, "John Marshall and the Confluence of Law and Politics" (2004) 71 *Tennessee Law Review* 241 at 244. This was consistent with the character of the American bench in that era: Gordon S Wood, "The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less" (1999) 56 *Washington and Lee Law Review* 787 at 803-804.

<sup>84</sup> Ross Cranston, "Lawyers, MPs and Judges" in David Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing, 2015) pp 26-30.

<sup>85</sup> Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan* (Yale University Press, 1997), pp 352-355; Garrison Nelson, *Pathways to the US Supreme Court* (Palgrave Macmillan, 2013), p 5.

<sup>86</sup> Douglas McDonald, "Worlds Apart: The Appointment of Former Politicians as Judges" (2016) 41(1) *Alternative Law Journal* 17.

<sup>87</sup> The last former politician to have been appointed to the Supreme Court of Canada was Douglas Abbott (appointed in 1954). The adverse reaction to his appointment may have contributed to governments' aversion to future appointments of this kind: James G Snell and Frederick Vaughan, *The Supreme Court of Canada* (University of Toronto Press, 1985), pp 199-200. The last former member of the Parliament of India to have been appointed to that nation's Supreme Court was Baharul Islam (appointed in 1980). The last ex-politicians to have been appointed to the High Court of Australia were Sir Garfield Barwick and Lionel Murphy. The career of the former ended in controversy. That of the latter ended in disgrace.