

JUDGES AS ROYAL COMMISSIONERS

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Commentators throughout the common law world have long debated the appropriateness of appointing sitting judges to non-judicial offices, including commissions of inquiry, non-judicial tribunals and even, on occasion, ambassadorships. Opinion has been, and remains, sharply divided, although opposition to such appointments has been growing steadily, especially since the Supreme Court of Victoria opposed the practice in 1923. The Australian Institute of Judicial Administration is, therefore, to be commended for organizing a seminar on the subject in Adelaide in August 1985 at which both sides were represented: the Hon. Douglas McGregor Q.C., a retired judge of the Federal Court (significantly, from New South Wales), spoke in favour of such appointments, and the Hon. Sir Murray McInerney, a retired judge of the Supreme Court of Victoria, argued against. The Institute has now published papers based upon those presented at that seminar.¹

The two papers differ strikingly in length and, presumably, purpose. "The Case Against" appears first, and occupies almost 90% of the volume. It is a thoroughly researched analysis of debate on the appointment of judges to non-judicial offices, especially in Victoria (where, so far as Australia is concerned, judicial comment on the wisdom of the practice has been greatest), but also in other Australian jurisdictions, including the Commonwealth, and in the United Kingdom, New Zealand, Canada, and the United States. Two very useful appendices list Royal Commissions conducted by judges in Australia and New Zealand since the mid nineteenth century.

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1 G. Fraser (ed.), *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals. Two Views presented at the Fourth Annual Seminar of the Australian Institute of Judicial Administration* (1986). "The Case Against" is written by the Hon. Sir Murray McInerney Q.C. and Garrie J. Moloney; "The Case For" by the Hon. Douglas G. McGregor Q.C.

“The Case For” is very brief, and includes appendices reprinting the 1979 resolution of the judges of the Federal Court on the proper procedures to be followed when the government wishes to appoint a judge of that Court to a Royal Commission or Committee of Inquiry (reprinted also in “The Case Against”), and lists Commonwealth Royal Commissions between 1961 and July 1984. This list reveals that judges sat on all but five of the twenty two commissions listed.

I. “THE CASE AGAINST”

“The Case Against”, by Sir Murray McInerney and Garrie J. Moloney of the University of Melbourne, clearly originated in Sir Murray’s paper on “The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities”, presented at a conference of judges in January 1974, and published in revised form in the *Australian Law Journal* in October 1978.²

The authors examine Victorian practice in some detail, beginning with the famous “Irvine Memorandum” of 14 August 1923, in which the Chief Justice of Victoria informed the Attorney-General that he was unable to accede to the government’s request to nominate a judge to act as Royal Commissioner to inquire into allegations of bribery concerning Warrnambool harbourworks. Writing “after consultation with and with the full concurrence of all the Judges of the Supreme Court”, Sir William Irvine (impliedly) asserted that Victorian Supreme Court judges would confine their activities to their judicial duties and decline to sit on any non-judicial government body.

The duty of His Majesty’s Judges is to hear and determine issues of fact and of law arising between the King and the subject, or between subject and subject, presented in a form enabling judgment to be passed upon them, and when passed to be enforced by process of law. *There begins and ends the function of the judiciary.* It is mainly due to the fact that, in modern times, at least, the Judges in all British Communities have, except in rare cases, confined themselves to this function, that they have attained, and still retain, the confidence of the people [emphasis added].³

Accordingly, judges must avoid being drawn into “the region of political controversy”, which is not confined to “matters of an actual or direct political character”, but includes any matter “likely to become the subject of political debate”. That was certainly the case with the Warrnambool Harbour inquiry, because even “questions of fact of a purely non-political colour” could not be disentangled from “subjects of parliamentary controversy”.

The principles of the Irvine Memorandum were accepted by the Premier of the time as “firm and reasonable”,⁴ and have been reiterated on several occasions by the Supreme Court of Victoria. With one or two exceptions, they have governed the practice of that Court ever since.

2 (1978) 52 ALJ 540.

3 Note 1 *supra*, 11.

4 *Ibid.*

Their New South Wales counterparts, by contrast, have shown little reluctance to sit on either State or Federal inquiries. Indeed, in 1974, at the height of the Whitlam Administration's "government by inquiry", fully 25% of the judges of the Supreme Court of New South Wales were engaged in such activities.⁵ It is difficult to believe that the Court's judicial work — its *real* work — did not suffer, assuming that the Court was not vastly over-staffed to begin with.

Nevertheless, while not adhering to Victorian standards of abstinence, the present Chief Justice of New South Wales, at least, believes that "[t]here are occasions on which the services of a Judge are sought in a capacity which is inappropriate to be filled by a Judge."⁶ He clearly thought that the appointment of Mr Justice Stewart as Chairman of the National Crime Authority was one such occasion, and fought the appointment tenaciously, and with ultimate success. Sir Murray and Mr Moloney relate the fascinating details of this battle, which pitted Sir Laurence and most of his colleagues, the New South Wales Bar Association and Law Society, and the Law Council of Australia on one side against Justices Stewart and Enderby and the New South Wales Society of Labor Lawyers on the other. Sir Laurence even wrote to the Governor-General on the matter. The dispute was ultimately resolved six weeks after Mr Justice Stewart's appointment as Chairman of the N.C.A. when he announced his intention to resign from the Supreme Court of New South Wales and, pursuant to specially-passed Commonwealth legislation, was given "the same designation, rank, status and precedence" as a Judge of the Australian Capital Territory Supreme Court,⁷ which seems not to have pleased the Chief Justice of that Court.⁸ As Sir Murray and Mr Moloney conclude,

[t]he National Crime Authority case indicates that the problem of judges accepting appointments on Royal Commissions and other non-judicial inquiries raises not merely issues of incompatibility but also issues of unjustified inroads into the constitution of a court.⁹

The authors also examine the Erebus Royal Commission saga in New Zealand, which led to the resignation of a highly respected Supreme Court judge after his finding of dishonesty and deception by Air New Zealand was successfully challenged in the New Zealand Court of Appeal on the ground of denial of natural justice. Justice Mahon resigned, indeed, in order to appeal to the Privy Council (in the event, unsuccessfully) when the government appeared uninterested in doing so (although it paid his costs). The authors focus on this case because "it highlights in the starkest possible terms one of the unwanted consequences involved in judges acting as Royal Commissioners to inquire into politically and socially sensitive matters."¹⁰

5 *Id.*, 10.

6 Letter from Acting Chief Justice Sir Laurence Street to the Attorney-General, 3 June 1974, *id.*, 21.

7 National Crime Authority (Status and Rights of Chairman) Act 1984 (Cth) s.5.

8 See note 1 *supra*, 26.

9 *Id.*, 30.

10 *Id.*, 42-43. See also T. Black, "Judges and Royal Commissions" [1982] *NZLJ* 37.

Noting separation of power concerns in protecting the independence, impartiality, and integrity of the judiciary by keeping it separate from the political branches of government and avoiding political controversy, and the need to conserve scarce judicial resources for *judicial* work, the authors generally endorse the stand taken by the Supreme Court of Victoria. However, with respect, their conclusions could have been stated more tightly. Thus, they endorse Canon 5 Rule G of the American Bar Association's Code of Judicial Conduct, under which judges should not accept appointment to committees of inquiry "concerned with issues of fact or policy" unless the matter involves "the improvement of the law, the legal system, or the administration of justice".¹¹ However, some pages later they state their conclusion in more absolute terms:

[w]hen all the arguments ... are properly weighed, we consider that the only acceptable conclusion is that, save in exceptional cases of national importance, judges should not be asked to act as Royal Commissioners or as members of Boards of Inquiry and if asked, should not accept.¹²

This conclusion, slightly more liberal than the unanimous resolution of Victorian Supreme Court judges of 20 October 1952 (which confined the exception to matters of "national importance *arising in times of national emergencies*" [emphasis added]),¹³ is clearly designed to take account of the wartime Royal Commissions conducted by Mr Justice Lowe of the Supreme Court of Victoria¹⁴ and, perhaps, the diplomatic and other wartime duties of justices of the High Court of Australia. But the authors appear unhappy with even this concession, and conclude their paper with the observation that

experience shows that to admit exceptions is to erode the rule. Every case is presented as being 'exceptional', or of 'extreme public importance', or as 'involving national security' ... In the end so many inroads, by way of 'special' or 'exceptional' instances, will have been made into the principles of the Irvine Memorandum that those principles will have ceased to have had any worthwhile meaning. In those circumstances, it is proper that those principles should be, *at all times*, maintained [emphasis added].¹⁵

So, in the end, the authors' exact conclusion is unclear, as is their opinion on the question whether a judge is obliged to accede to a request to conduct an inquiry by *Parliament*, not merely the executive. Their discussion of the Victorian Royal Commissions on the Communist Party in Victoria (Mr Justice Lowe, 1949) and on the Collapse of the West Gate Bridge (Mr Justice Barber, 1970), each of which was established pursuant to a specific Act of the Victorian Parliament, suggests that they concede that judges must comply with such legislation.¹⁶

11 Note 1 *supra*, 50.

12 *Id.*, 59.

13 See *id.*, 17.

14 As to which, see N. Rosenthal, *Sir Charles Lowe: A Biographical Memoir* (1968) 95-126.

15 Note 1 *supra*, 60.

16 See *id.*, 13-14, 18-19. The appointment of Mr Justice Barber was influenced by the exceptional circumstance that he had conducted a Royal Commission into the collapse of the King Street Bridge while serving on the County Court in 1962.

II. "THE CASE FOR"

Mr McGregor's paper is a succinct statement of the principal arguments usually proffered to support the proposition that some Royal Commissions or commissions of inquiry should be conducted by a judge; not, as the Salmon Commission in the United Kingdom argued (with respect to Tribunals of Inquiry), that every commission of inquiry should be headed by a judge.¹⁷ These arguments can be stated briefly.

First, some Royal Commissions involve complex issues of law and fact which require resolution by a highly skilled practising lawyer, especially a judge, who is experienced in resolving conflicts of evidence, assessing the credibility of witnesses, and so on.

This is, indeed, one of the strongest arguments for appointing judicially experienced persons to head Royal Commissions involving the sort of issues, especially questions of fact, which arise in litigation. Examples include inquiries into human or natural disasters, such as the collapse of a bridge, a football stadium fire or riot, or the sinking of a ship.¹⁸ An excellent recent example of another kind is the Royal Commission into the Chamberlain Convictions, conducted by Mr Justice Morling of the Federal Court. His conclusion was that

if the evidence before the Commission had been given at the trial, the trial judge would have been *obliged* to direct the jury to acquit the Chamberlains on the ground that the evidence could not justify their conviction [emphasis added].¹⁹

The fact that this determination was reached by a respected judge undoubtedly added greatly to its weight, giving it greater impact than if it had been reached by an eminent Queens Counsel or a Professor of Criminal Law. Yet the Morling Royal Commission, like the earlier Erebus Royal Commission in New Zealand, also illustrated one of the hazards involved in appointing judges as Royal Commissioners when the defence counsel at Mrs Chamberlain's murder trial, feeling aggrieved by certain remarks in the

17 See Royal Commission on Tribunals of Inquiry 1966 (U.K.), *Report of the Commission under the Chairmanship of The Rt Hon. Lord Justice Salmon* (Cmnd. 3121), para. 72, quoted by McInerney and Moloney, *id.*, 38-39. Mr McGregor recognized specifically that he "[did] not suggest that every Royal Commissioner should be a judge": *id.*, 100.

18 *E.g.*, the Royal Commissions into the collapse of the King Street Bridge (Chairman: Judge Barber, 1962) and the West Gate Bridge (Chairman: Mr Justice Barber, 1970) in Victoria; the Committee of Inquiry into Crowd Safety and Control at Sports Grounds: *Final Report* (Cmnd. 9710, 1986) (Chairman: Mr Justice Poplewell), and the inquiry into the sinking of the Herald of Free Enterprise (Chairman: Mr Justice Sheen, July 1987) in the United Kingdom; the Royal Commission on H.M.A.S. Voyager (Chairman: Sir John Spicer, 1964) in the Commonwealth. Somewhat surprisingly, the British Government did not appoint a High Court judge to chair the inquiry into the November 1987 fire at King's Cross Underground Station in London. The Chairman is Mr Desmond Fennell Q.C. (who sits as a Crown Court recorder and a judge of the Court of Appeal of Jersey and Guernsey): *Times* (London) 24 November 1987, 2.

19 Royal Commission of Inquiry into Chamberlain Convictions, *Report of the Commissioner The Hon. Mr Justice T.R. Morling* (Commonwealth Parliamentary Paper No. 192/1987) 342.

report, issued proceedings to quash these so-called “decisions” on the ground that they had been denied natural justice.²⁰

Since Australia has no shortage of active retired judges, there is no need to appoint sitting judges to head even those inquiries requiring judicial skills. Appointment of retired judges would provide not only the benefits of long judicial experience and recognized impartiality but also, presumably, an assured absence of ambition for promotion, at least in the judicial branch. In other words, it would offer the benefits and avoid the disadvantages of appointing sitting judges. The outstanding recent example of such an appointment is the Parliamentary Commission of Inquiry appointed to consider whether Mr Justice Murphy of the High Court had been guilty of “proved misbehaviour” within s.72(ii) of the Constitution. The inquiry raised complex legal and constitutional, and perhaps (the material will not be made public for at least thirty years) factual, issues, and appropriately consisted of retired judges of the Supreme Courts of Victoria, South Australia and the Australian Capital Territory.²¹ At an earlier stage in the Murphy saga, two other retired judges had acted as Commissioners Assisting a Senate Select Committee inquiring into the judge’s conduct.²²

Secondly, in some instances public opinion supposedly demands that the Royal Commissioner be a judge: “in some circumstances the selection of an inquirer other than a judge may not satisfy the Australian people”.²³ No evidence is offered to support this assertion, which Mr McGregor illustrates by nominating five examples of circumstances which “more *obviously* call for the appointment of a judge as Commissioner” [emphasis added].²⁴ These essentially involve matters of security and defence, and organized crime. This is a remarkable (and, again, unproven) list because, although an inquiry into organized crime may benefit from legal knowledge and experience, especially in order to protect the civil liberties of witnesses and suspects, it is very difficult to see which judicial skills might be especially relevant to an inquiry into security and defence. Such an inquiry would hardly be analogous to a criminal or civil trial and, as is noted below, certainly should not be conducted like one.

20 See “Royal Commissions ‘a danger’ for judges” *Canberra Times* 4 August 1987, 8. The proceedings under the Administrative Decisions (Judicial Review) Act 1977 (Cth) were discontinued before trial after a document was read out in open court whereby Mr Justice Morling denied that he had, or had intended, to criticize the applicants, or that his report contained any “decisions” affecting them. The applicants accepted that no criticism of them had been intended and, accordingly, saw no reason to persist with their claim. There was no order for costs. (The writer is grateful to Mr Justice Morling for supplying this information.) See also “Legal trio settles its differences” *Canberra Times* 29 August 1987, 10.

21 See Parliamentary Commission of Inquiry, *Special Reports* (Commonwealth Parliamentary Paper No. 443/1986). (Commissioners: Sir George Lush, Sir Richard Blackburn and Andrew Wells Q.C.)

22 See Senate Select Committee on Allegations Concerning a Judge, *Report to the Senate* (Commonwealth Parliamentary Paper No. 271/1984). (Commissioners: J.L.C. Wickham Q.C. and F.X. Connor Q.C.)

23 Note 1 *supra*, 101.

24 *Ibid.*

A further argument of “The Case For” is that security of judicial tenure ensures that judges are less likely than others to be “susceptible or appear to be susceptible of gaining further preferment”.²⁵ This is, undoubtedly, true although, strictly speaking, only the Chief Justice of the High Court can be presumed to be completely free from any ambition for “further preferment”, at least within the judicial branch.

Finally, Mr McGregor notes that senior judges throughout the (British) Commonwealth have been prepared to act as Royal Commissioners, and that very eminent lawyers, including Sir John Latham, Sir Douglas Menzies, and Mr Justice Brennan, have argued that “in appropriate circumstances judges *should* undertake Royal Commissions” [emphasis added].²⁶ While undoubtedly true of Menzies and Brennan, with respect this somewhat overstates Sir John Latham’s position. Having noted, as Mr McGregor mentions, that many judges had rendered very valuable service as Royal Commissioners and that, when Attorney-General of the Commonwealth, he himself had appointed a judge as Royal Commissioner, Sir John, in the 1955 comment referred to by Mr McGregor, merely declined to adopt any “hard and fast rules” and remarked that judges should not be required to “avoid an unpleasant assignment because of the possibility of criticism”.²⁷

However, it is worth recalling that Sir John adopted a much stronger position against the Irvine Memorandum in a rather forgotten letter of 22 May 1928 to Sir Adrian Knox, Chief Justice of the High Court. Latham, who was Commonwealth Attorney-General, had requested Knox to make a High Court judge available to inquire into an allegation that a member of the House of Representatives “had been induced to retire ... apparently in favour of another person”. Knox had declined, citing the Irvine Memorandum with approval. In a remarkably forceful, impatient, almost angry, letter, suggesting no great respect for Knox,²⁸ Latham rejected the Irvine Memorandum’s definition of the proper functions of the judiciary as “too narrow a view of the services which Judges can properly render to the community”, and argued that

there are occasions properly described by Sir William Irvine as rare cases, in which a Judge can properly not only render, but *be glad to be in a position to render*, other services to the community than that of deciding matters which come before him in the ordinary routine of the Courts [emphasis added].

Latham reminded the Chief Justice of the many judges both in the United Kingdom and Australia (including Knox himself!) who had rendered extra-judicial government service without damage to the judiciary, and

²⁵ *Id.*, 103.

²⁶ *Id.*, 102.

²⁷ Comment (1955) 29 *ALJ* 268.

²⁸ Latham no doubt also felt publicly humiliated by Knox’s refusal because, as his letter reveals, he had publicly announced his request to Knox.

argued that the subject of his request was “eminently a matter which, by reason of its character and of its undeniable public importance, is a fit subject for a judicial investigation, preferably by a Commonwealth Judge”.²⁹

Since Sir Douglas Menzies (prior to his appointment to the High Court) and Mr Justice Brennan have been the strongest recent proponents of judicial service on Royal Commissions, it is appropriate briefly to take note of their reasons.

Sir Douglas Menzies’ view was that

there are occasions when it is *necessary* that those who occupy the highest positions, who have the greatest reputation for impartiality, *should* undertake investigations both to the advantage of those being investigated and to the public generally, and that those investigations can be undertaken by judges without damage to the judiciary or to the reputation of judges [emphasis added].³⁰

Although, of course, a Victorian, Sir Douglas rejected the concern of that State’s Supreme Court that public confidence in the judiciary and its impartiality might be shaken by judicial service on Royal Commissions by arguing that “the facts” suggested the contrary, and asserting rather grandly (again, without laying any factual foundation) that the reputation of our judges was so high that criticism need not trouble them.³¹ He had no doubt as to the competence of judges to undertake these duties:

many inquiries are into matters of such importance that those whose conduct is the subject of inquiry, as well as the community, are entitled to have as Commissioners those who are *best equipped* and are known beyond doubt to be beyond fear, favour or affection [emphasis added].³²

McInerney and Moloney remarked, appropriately, that this was “at best an overstatement of the usefulness of judicial skills in carrying out inquisitorial tasks”,³³ and commented diplomatically that, while Sir Douglas’ confidence in the reputation of the judges may have been justified in 1955, “it may not be quite the case today!”³⁴

While still on the Federal Court and President of the Administrative Appeals Tribunal, Mr Justice Brennan argued that judges were invited to sit on non-judicial bodies because the government sought thereby to “acquire the benefit of judicial skills” — which he identified as the ability to reason “syllogistically”, requiring “industry, learning, impartiality and rationality” — or at least the reputation judges enjoy through possessing them.³⁵ Because

29 The letter, a copy of which Sir John Latham sent to Mr Justice Lowe upon his undertaking the (Victorian) Royal Commission on the Communist Party in Victoria, is reprinted in Rosenthal, note 14 *supra*, 92-94. Knox had refused similar requests in 1919, 1921 and 1923: see J.M. Bennett, *Keystone of the Federal Arch* (1980) 44-45.

30 Comment (1955) 29 *ALJ* 264.

31 *Id.*, 266.

32 *Id.*, 267.

33 Note 1 *supra*, 58.

34 *Id.*, 57.

35 F.G. Brennan, “Limits on the Use of Judges” (1978) 9 *F L Rev* 1, 4. See also P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (1987) 12-13.

they possess these skills, judges ought to accept the invitation unless they would be required “to depart so substantially from the traditional judicial function that the departure carries an unacceptable risk of loss of confidence”.³⁶ In his opinion, the Irvine Memorandum confines the judiciary in “too narrow an area of activity”.³⁷ However, Mr Justice Brennan’s conclusion appears to be based not only on the public interest, but also on the consideration that “[a]n undue timorousness in drawing upon judicial skills leads to ... a sense that the judiciary is unduly irrelevant to many issues of community concern”.³⁸ Apart from its questionable accuracy, with all respect it is submitted that apprehension of judicial “irrelevance” is not a proper consideration in this context. Yet, remarkably, Mr Justice Brennan goes so far as to argue that it can outweigh, and even justify, running the risk of public controversy:

[c]aution is needed in moving into the non-traditional area, measuring the risks by the yard-stick of traditional function, and there will be some unwished-for controversies on the way. *But the risks must be run, or the institution of the judiciary may lose its relevance* or, at the least, fall short of discharging fully the functions which the community would commit to it [emphasis added].³⁹

Surprisingly, both papers referred to these remarks of Mr Justice Brennan without rejecting apprehension of judicial “irrelevance” as itself an irrelevant concern.

III. EVALUATION

“The Case Against” is clearly more persuasive, if only because it discusses practice in several common law jurisdictions in some detail and addresses contrary arguments, which the opposing case fails to do. Indeed, “The Case For” is rather superficial — reflecting, one wonders, its author’s view that there is not much to be said for it(?). Strangely, no mention is made of its author’s practical experience in 1978 as a Royal Commissioner investigating the politically-charged subject of allegations of impropriety in the course of an electoral redistribution — a Royal Commission former Senator Reg Withers is unlikely to forget!⁴⁰ — although one would have thought that he might have derived relevant insights from it. Sir Owen Dixon, and Justices Robert Jackson, Felix Frankfurter and Owen Roberts of the United States Supreme Court all believed, in retrospect, that they had been unwise to undertake

36 Brennan, *id.*, 11. Accord, *id.*, 13-14.

37 *Id.*, 14.

38 *Id.*, 3.

39 *Id.*, 14.

40 Royal Commission of Inquiry into Matters in Relation to Electoral Redistribution in Queensland 1977, *Report* (Commonwealth Parliamentary Paper No. 263/1978) (Commissioner: Mr Justice D.G. McGregor). Senator Withers was dismissed from the Fraser Ministry in consequence of this report.

extra-judicial duties,⁴¹ but Mr McGregor's paper suggests that he had no second thoughts on the wisdom of undertaking such work.

In the end, however, perhaps the greatest weakness of "The Case For" is its failure to consider whether most of the benefits of appointing judges as Royal Commissioners could not be achieved, while avoiding the pitfalls, by appointing retired judges to conduct Royal Commissions requiring the skills, and/or reputation for impartiality and independence, of the judiciary.

Virtually every commentator has recognized that some Royal Commissions or Commissions of Inquiry are unsuited to be chaired by a judge, or even by a retired judge or eminent lawyer. The Salmon Committee's view, already noted, that the Tribunals of Inquiry (Evidence) Act 1921 (U.K.) "should be amended so that the chairman of any Tribunal set up under the Act shall be a person holding high judicial office"⁴² referred, for example, only to tribunals established under that Act, which had usually (although not exclusively) inquired into allegations of misconduct by government officials,⁴³ and certainly did not include all governmental inquiries.⁴⁴

Inquiries best suited to be chaired or solely conducted by an eminent lawyer, including a judge or retired judge, are obviously those raising issues analogous to those arising in civil or criminal trials.⁴⁵ Such inquiries include not only investigations into natural or human disasters, but also inquiries into governmental misconduct, including corruption, and inquiries to establish contested facts, especially where individual reputations may be at stake, and the civil liberties of witnesses or suspects need protection.⁴⁶ Where technical

41 See Sir Owen Dixon, Comment (1955) 29 *ALJ* 272 (wartime extra-judicial duties: Minister to the United States, Chairman of the Central Wool Committee, the Australian Shipping Board, the Marine War Risks Insurance Board, and the Allied Consultative Shipping Council in Australia); A.T. Mason, "Extra-Judicial Work for Judges: The Views of Chief Justice Stone" (1953) 67 *Harv L Rev* 193, 211 note 54, regarding Jackson, United States Prosecutor at the Nuremberg War Crimes Trial; L.L. Jaffe, "Professors and Judges as Advisors to Government: Reflections on the Roosevelt-Frankfurter Relationship" (1969) 83 *Harv L Rev* 366, 374, regarding Frankfurter, who gave private advice to President Franklin Roosevelt; O.J. Roberts, "Now Is the Time: Fortifying the Supreme Court's Independence" (1949) 35 *ABAJ* 1,2, regretting his participation on the German-American Mixed Claims Commission and the Pearl Harbor Commission. (But see J.J. McCloy, "Owen J. Roberts' Extra Curiam Activities" (1955) 104 *U Pa L Rev* 350, 350.) Dean Acheson remarked that "[t]he intimate and notorious friendship of one of my closest friends, Justice Frankfurter, with President Roosevelt did harm to the public reputation of both the Court and the Justice." (D. Acheson, "Removing the Shadow Cast on the Courts" (1969) 55 *ABAJ* 919, 921.)

42 See Salmon Report, note 17 *supra*, para.72.

43 For a list of such inquiries up to 1966, see *id.*, Appendix C, 53-54.

44 For the various types of governmental inquiry in the United Kingdom in 1966, see *id.*, para. 33.

45 Cf. M. Sexton, "Royal Commissions and the Australian Political Process" (unpublished paper presented at Conference on Commissions, Contempts and Civil Liberties, Australian National University, Canberra, 25-26 February 1984) 2-3; L.A. Hallett, *Royal Commissions and Boards of Inquiry* (1982) 73.

46 See letter from Attorney-General Latham to Chief Justice Sir Adrian Knox, reprinted in Rosenthal, note 14 *supra*, 94. For a good discussion of some of these civil liberty concerns, see R. Sackville, "Royal Commissions in Australia: What Price Truth?" (1984) 60 *Current Affairs Bulletin* No. 12, 3.

expertise is necessary, the inquiry panel should obviously include members possessing relevant qualifications, as is the case, for example, in the inquiry into the November 1987 fire at London's King's Cross Underground station.⁴⁷

But since such inquiries, even those investigating disasters, are rarely free from political controversy — if only because they are usually established in response to allegations of governmental misconduct or incompetence — judges should resist involvement even in these inquiries, notwithstanding the relevance of “judicial skills” to their conduct.⁴⁸ They should be left to others possessing those skills, such as eminent counsel or retired judges.

The hazards of judicial involvement, even on essentially “fact-finding” commissions, are well illustrated by two World War II inquiries into defence preparedness, each headed by a Supreme Court judge, one in Canada, the other in the United States.⁴⁹

Mr Justice Owen Roberts of the United States Supreme Court chaired a Presidential Commission inquiring into the Japanese attack on Pearl Harbour in December 1941 which exonerated the President and found some commanding officers in Hawaii derelict in their duty. These findings caused such political controversy, including a congressional investigation of the Commission's work, that some years later Mr Justice Roberts declared that he had

every reason to regret [his acceptance of the invitation to chair the Commission]. I do not think it was good for my position as a justice nor do I think it was a good thing for the Court.⁵⁰

Even worse was the experience of Chief Justice Sir Lyman Duff of Canada, who acceded in early 1942 to Prime Minister Mackenzie King's request to act as sole Royal Commissioner to inquire into the dispatch of Canadian troops to Hong Kong in late October 1941. Following the fall of Hong Kong on Christmas Day 1941, the opposition Conservative Party alleged government incompetence in dispatching poorly trained and equipped troops to a zone of imminent war, and opened a campaign for conscription. The Prime Minister, thereupon, requested Duff to investigate, claiming that “no one would give the same sense of security, of impartiality and of wisdom, in a matter of this kind as the chief justice of Canada”.⁵¹ In fact, the Prime Minister's motives

47 See *Times* (London) 24 November 1987, 2; *Times* (London) 3 December 1987, 1, 20.

48 *E.g.*, “within hours of his appointment”, the chairman of the King's Cross Station Underground fire inquiry (Mr Desmond Fennell Q.C.) was “urged by Labour M.P.s to root out those responsible and ‘feel ministers’ collars’ if necessary”. His political impartiality was questioned by some Labour M.P.s because he was president of a Conservative Party division: see *Times* (London) 25 November 1987, 1, 24.

49 *Cf.* Mr Justice Lowe's 1942 (Commonwealth) Commission of Inquiry into the Japanese Aircraft Attack on Darwin, which seems to have avoided the controversy of the American and Canadian inquiries: see Rosenthal, note 14 *supra*, 102-117.

50 Roberts, note 41 *supra*, 2. Chief Justice Stone had reached the same conclusion even before the Roberts Commission reported: Mason, note 41 *supra*, 199.

51 J.G. Snell and F. Vaughan, *The Supreme Court of Canada: History of the Institution* (1985) 157.

were probably more cynical: Duff had earlier advised him against introducing conscription⁵² and, moreover, was indebted to the government for having extended his term of office for three years beyond the mandatory retirement age, which Duff had reached in 1940.⁵³ Duff is widely conceded not to have conducted the inquiry in a thorough or impartial manner. As his recent biographer comments,

[t]he later conduct of the hearings, as well as the evidence of Duff's partiality, also encourage the inference that King expected Duff to absolve the government and Duff knew King expected him to.⁵⁴

The report did, indeed, absolve the government of blame, but was severely attacked by the Opposition, who some months later (unsuccessfully) opposed a further one-year extension of Duff's term.⁵⁵ Indeed, the Chief Justice's extra-ordinary behaviour continued beyond the completion of his report, for he counselled the government on how to respond to the Opposition attacks.⁵⁶ Duff's biographer reports that the controversy, which was revived by the publication of a British report after the war,⁵⁷ "made any reference to the Hong Kong affair painful to Duff for as long as he lived",⁵⁸ and added that "it shows in acute form the risks judges face when they accept such appointments".⁵⁹ The institutional damage is noted in a recent history of the Canadian Supreme Court.

Duff's role in this commission, predictably, brought him (and with him the Supreme Court) into the direct firing line between the Conservative and Liberal parties. Once again the Court and its members could be seen as a political instrument to be used without apparent constraints in partisan controversies.⁶⁰

There is, of course, even less justification for appointing judges to commissions of inquiry which go beyond "fact-finding" and concern matters of policy.⁶¹ One objection to the use of judges for such tasks is that their natural tendency to conduct proceedings according to an adversarial format analogous to that of a court, in which they act as impartial arbitrator, is inappropriate for such inquiries because it not only wastes time and money, but, more fundamentally, is simply an unsuitable method for analysing issues

52 *Id.*, 159; D.R. Williams, *Duff: A Life in the Law* (1984) 94-95.

53 Snell and Vaughan, note 51 *supra*, 151-152.

54 Williams, note 52 *supra*, 224. See also *id.*, 231.

55 Snell and Vaughan, note 51 *supra*, 152, 157.

56 Williams, note 52 *supra*, 234-235.

57 *Id.*, 255-261. Williams has doubts about Duff's behaviour in 1948 as well.

58 *Id.*, 239.

59 *Id.*, 237.

60 Snell and Vaughan, note 51 *supra*, 157.

61 See Sir Garfield Barwick, "The State of the Australian Judicature" (1979) 53 *ALJ* 487, 490; Sexton, note 45 *supra*, 3, 7ff.

of policy, many of which are likely to be politically contentious.⁶² Moreover, judges and lawyers in general, are usually unqualified to undertake such tasks. As the present Chief Justice of Canada has noted,

judges may not have the necessary qualifications to determine what are really socio-economic questions. Historically, and even today to a large extent, the expertise possessed by judges is in the *ex post facto* application of law, as determined, to the facts, as determined; to resolve questions as to the existence of rights and obligations. How appropriate is the application of this traditional judicial methodology in the formulation of decisions in which a huge mass of conflicting socio-economic data must be digested, weighed, and considered? As one commentator has put it — our courts are held in high repute because judges usually stay within their area of competence.⁶³

IV. CONCLUSION

It is submitted that the arguments in favour of the Victorian Supreme Court's view, that judges should generally decline to undertake extra-judicial governmental duties, are overwhelming. That attitude, which probably resulted from the political controversy following two Victorian Royal Commissions, in 1915 and 1919,⁶⁴ has been endorsed by the High Court of Australia, most recently by Chief Justice Barwick,⁶⁵ and by eminent jurists in other common law jurisdictions, including Chief Justice Stone in the United States,⁶⁶ and Lord Esher M.R., Lord Sankey L.C. and Lord Hailsham L.C. in the United Kingdom.⁶⁷ The principal objection to the employment of judges for extra-judicial duties is that it can endanger public confidence in the independence, impartiality and competence of the judiciary.⁶⁸ This can,

62 See Barwick, *id.*, 491; Sexton, *id.*, 8-10. But see, *contra*, McGregor in note 1 *supra*, 103 ("A judge's ability and habit of recognizing, narrowing and resolving issues will tend to shorten the proceedings thereby reducing overall expense and ensuring a quicker result."); *Royal Commissions and Commissions of Inquiry* (New Zealand Government, 1974) 14 ("It seems generally desirable that a commission should be presided over by a lawyer, particularly when the matter ... is one of wide public interest... [T]he public expects that the matter will be approached in a broadly judicial way and that the procedure adopted will show that a fair hearing is being given to all points of view... People often tend to think that if a lawyer is to preside the proceedings will be rendered too formal and will be unnecessarily prolonged; but experience shows that a lawyer can usually get at the root of a problem just as quickly as a technical or a business man and that his presence will ensure that justice will be 'seen to be done'.") With respect, this writer lacks that commentator's faith in the ability of lawyers, as well as his familiarity with public opinion.

63 Justice Brian Dickson, "The Role and Function of Judges" (1980) 14 *Law Society of Upper Canada Gazette* 138, 162-163 (Justice Dickson did not name the commentator referred to). Accord G. Zellick, Comment [1972] *Public Law* 1, 2.

64 See Hallett, note 45 *supra*, 69-70.

65 See Barwick, note 61 *supra*, 490.

66 See Mason, note 41 *supra*, *passim*. For other American criticism, see Senate Judiciary Committee, "Independence of Judges: Should They Be Used for Non-Judicial Work?" (1947) 33 *ABAJ* 792; Comment, "Separation of Powers and Judicial Service on Presidential Commissions" (1986) 53 *U Chi L Rev* 993, 998 and notes.

67 See note 1 *supra*, 39-41.

68 See Senate Judiciary Committee, note 66 *supra* 793, 795. *Cf. Hobson v. Hansen* (1967) 265 F. Supp. 902, 923 *per* Skelly Wright J., dissenting (D.D.C.); Comment, note 66 *supra*, 1011-1019.

obviously, occur through judges becoming enmeshed, no doubt involuntarily, in political controversy as a result of their extra-judicial work, but the risk is present even when political controversy is avoided. As a recent Canadian report recognized,

[w]hen judges are too frequently seen to be working with the government, even if merely as commissioners, there will be a natural tendency for the public to see judges as not completely independent of the government.⁶⁹

V. CODA : CONSTITUTIONAL ISSUES

It is appropriate to consider briefly some of the constitutional issues raised by the appointment of judges to Commonwealth Royal Commissions or commissions of inquiry, although that subject is not dealt with by either case in the Australian Institute of Judicial Administration report.⁷⁰

State appointment of State judges to commissions of inquiry raises no constitutional issue, and there would also appear to be no constitutional impediment to their appointment on a consensual basis by the Commonwealth to a Commonwealth commission of inquiry.⁷¹ But any Commonwealth attempt to *compel* a State judge to undertake such a Commonwealth function might well breach the implied prohibitions which protect the federal system by prohibiting the Commonwealth discriminating against a State or States, or impairing its capacity to function as a government.⁷²

However, the appointment of federal judges to either Commonwealth or State commissions of inquiry is more complicated. Simply stated, the constitutional difficulty is that commissions of inquiry do not exercise judicial power.⁷³ (They would usually be exercising executive power,⁷⁴ but inquiries established by Parliament or either House to conduct investigations ancillary to its functions, such as the inquiries into Justice Lionel Murphy's alleged "misbehaviour",⁷⁵ would be exercising the legislative power of the

69 *Report of the Canadian Bar Association Committee on the Independence of the Judiciary in Canada* (20 August 1985) 43-44.

70 Note 1 *supra*.

71 This is certainly true if the State judges are appointed in their individual capacities: see *Hilton v. Wells* (1985) 157 CLR 57, 68 (quoted *infra*, text accompanying note 85); E. Campbell, "The Choice Between Judicial and Administrative Tribunals and the Separation of Powers" (1981) 12 *FL Rev* 24, 54. However, it may not be necessary to rely on the *persona designata* doctrine here: see G. Winterton, *Parliament, the Executive and the Governor-General* (1983) 290-291 note 103.

72 See *Melbourne Corporation v. Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v. Commonwealth* (1985) 159 CLR 192; *State Chamber of Commerce and Industry v. Commonwealth* (1987) 73 ALR 161. See also Winterton, *ibid*.

73 *Lockwood v. Commonwealth* (1954) 90 CLR 177, 181 *per* Fullagar J.

74 "Despite the fact that Royal Commissions are often headed by judges, they are not exercising judicial power. They are exercising executive power.": Mr Justice L.K. Murphy, *Transcript of National Press Club Speech* (unpublished), Canberra, 17 August 1983, 7.

75 See notes 21 and 22 *supra*.

Commonwealth, or power incidental thereto.) But the principle of the *Boilermakers* case⁷⁶ prohibits

the use of courts established by or under Chap. III for the discharge of functions which are not in themselves part of the judicial power and are not auxiliary or incidental thereto.⁷⁷

Hence, conferral of non-judicial functions upon federal judges would appear to fall foul of that principle.

The courts have managed, however, to by-pass the *Boilermakers* principle by applying the *persona designata* doctrine, which holds the principle applicable only to the vesting of non-judicial power in the court as an institution, and not to the conferral of such power upon federal judges as *individuals* who happen to be judges (that is, as designated persons), with their consent.⁷⁸ It is this doctrine which enables judges of the Federal Court to sit on the Administrative Appeals Tribunal,⁷⁹ and, presumably, it was this doctrine which allowed Sir John Latham and Sir Owen Dixon to accept diplomatic posts while serving on the High Court,⁸⁰ and has allowed federal judges, including High Court justices, to sit on governmental commissions.⁸¹ Its most recent application was in *Hilton v. Wells*,⁸² where a majority of the High Court applied the doctrine to uphold Commonwealth legislation⁸³ which empowered "a Judge" of the Federal Court to issue a warrant authorizing the interception of telecommunications, a power which was neither judicial nor ancillary or incidental thereto.⁸⁴

Although the Parliament cannot confer non-judicial powers on a federal court, or invest a State court with non-judicial power, there is no necessary constitutional impediment which prevents it from conferring non-judicial power on a particular individual who happens to be a member of a court... [W]e conclude that s.20 confers no power on the *Federal Court* and does not infringe the rule laid down in the *Boilermakers' Case*... The section *designates the judges as individuals* particularly well qualified to fulfil the sensitive role that the section envisages... [emphasis added].⁸⁵

76 *R. v. Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, affirmed *sub nom. An.-Gen. for Australia v R.* [1957] AC 288 (hereinafter *Boilermakers*).

77 *Id.*, 94 CLR 254, 271-272, affirmed [1957] AC 288, 318. State judicial power can probably validly be vested (by a State with the consent of the Commonwealth) in federal courts: see Professor Leslie Zines, Opinion on Integrated Courts Scheme (23 August 1984) in Australian Constitutional Convention, Judicature Sub-committee, *Report to Standing Committee on An Integrated System of Courts* (October 1984) Appendix, 27-32. But see Constitutional Commission, Australian Judicial System Advisory Committee, *Report* (22 May 1987) para. 3.114.

78 See *Boilermakers* note 76 *supra*, 94 CLR 254, 329-330 *per* Webb J., dissenting (but not on this point); L. Zines, *The High Court and the Constitution* (2nd ed. 1987) 192-194.

79 *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 413 *per* Bowen C.J. and Deane J. Smithers J. concurred: *id.* 423. Special leave to appeal to the High Court was refused ((1979) 2 ALD 60 note *). This holding in *Drake* was approved by the High Court in *Hilton v. Wells* (1985) 157 CLR 57, 68-69, 81 (*semble*) (hereinafter *Hilton*).

80 *Cf.* the United States, where Chief Justice John Jay served as envoy to Great Britain (1794), and Chief Justice Oliver Ellsworth as envoy to France (1799-1800).

81 For some details, see note 1 *supra*, 32-34.

82 (1985) 157 CLR 57. A majority of the High Court declined to reconsider this decision in *Jones v. Commonwealth* (1987) 71 ALR 497, largely because it turned on a question of statutory interpretation, and the relevant provision had been substantially amended (*id.*, 498-499).

83 The Telecommunications (Interception) Act 1979 (Cth) s.20.

84 *Hilton*, note 79 *supra*, 67, 78.

85 *Id.*, 68, 73-74.

Justices Mason and Deane dissented on the ground that the non-judicial function was “*imposed* upon the judges of the Federal Court not as designated individuals but as a function to be performed by them *as judges of that Court in their capacity as such*” [emphasis added].⁸⁶ But, although arguing that it should be applied “strictly”,⁸⁷ they too endorsed the *persona designata* doctrine.

The ability of Parliament to confer non-judicial power on a judge of a Ch. III court, as distinct from the court to which he belongs, has the potential, if it is not kept within precise limits, to undermine the doctrine in the *Boilermakers' Case*. One may ask: what is the point of our insisting, in conformity with the dictates of the *Boilermakers' Case*, that non-judicial functions shall not be given to a Ch. III court, if it is legitimate for Parliament to adopt the expedient of entrusting these functions to judges personally in lieu of pursuing the proscribed alternative of giving the functions to the court to which the judges belong? The answer is that the independence of the federal judiciary which is protected by the *Boilermakers' Case* will be preserved in a substantial way if ... we continue to acknowledge that Parliament may confer non-judicial functions on a federal judge only where there is a clear expression of legislative intention that the functions are to be exercised by him *in his personal capacity, detached from the court of which he is a member* [emphasis added].⁸⁸

The American law on this subject is of interest here because closely parallel separation of judicial power principles apply. Although authority is remarkably sparse (especially by American standards), the American position appears broadly similar to the Australian: non-judicial functions cannot generally be conferred upon federal courts,⁸⁹ although, as in Australia, this has been modified by the *persona designata* doctrine.⁹⁰ Many Supreme Court justices have engaged in a wide range of non-judicial governmental activities on this basis.⁹¹ However, in the few recent decisions, American courts appear to be divided between the “formalists”, on the one hand, who are content simply to apply the *persona designata* doctrine,⁹² and those judges, on the other, who essentially disregard the *persona designata*

86 *Id.*, 86.

87 *Id.*, 81, 83.

88 *Id.*, 81-82.

89 *Hayburn's Case* (1792) 2 US (2 Dall) 409 (all three Circuit Courts); *United States v. Todd* (1794) 54 US (13 How) 52, 53; *Hobson v. Hansen* (1967) 265 F Supp 902, 922 *per* Skelly Wright J., dissenting (D.D.C.). But see *id.*, 915 (majority opinion), criticized by Skelly Wright J., *id.*, 922 note 8.

90 *Hayburn's Case* (1792) 2 US (2 Dall) 409, 410, 413 (Circuit Courts for New York and North Carolina); *United States v. Ferreira* (1851) 54 US (13 How) 40, 47, 49-51; *In the Matter of the President's Commission on Organized Crime, Subpoena of Scarfo* (1986) 783 F 2d 370, 376-378 (3d Cir.) (hereinafter *Scarfo*); *In re Application of the President's Commission on Organized Crime, Subpoena of Scaduto* (1985) 763 F 2d 1191, 1202 *ff. per* Roney J. (11th Cir.) (hereinafter *Scaduto*); S. Slonim, “Extrajudicial Activities and the Principle of the Separation of Powers” (1975) 49 *Conn Bar J* 391, 403 *ff.* But see *Hobson v. Hansen* (1967) 265 F Supp 902, 925 *per* Skelly Wright J., dissenting (D.D.C.), questioning the *persona designata* doctrine.

91 For a brief summary of these activities, see R.B. McKay, “The Judiciary and Nonjudicial Activities” (1970) 35 *Law & Contemp Prob* 9, 27 *ff.* For general discussion, see McKay, *id.*, *passim.*; Note, “Extrajudicial Activity of Supreme Court Justices” (1970) 22 *Stan L Rev* 587; R. Wheeler, “Extrajudicial Activities of the Early Supreme Court” [1973] *Sup Ct Rev* 123.

92 See the references to *Scarfo* and *Scaduto*, note 90 *supra*.

doctrine, and apply the general separation of powers “functional test”,⁹³ namely

does the imposition of powers traditionally associated with one branch of government on officials of another branch interfere with their ability to perform their constitutionally-required duties in the branch of which they are a part?⁹⁴

The policy underlying the *Boilermakers* principle is that the independence and impartiality of the federal judiciary, which ultimately determines the boundaries of power between the Commonwealth and the States, could be compromised, or at least be perceived to be by the States and the public, if federal judges were to become entangled with the national government.⁹⁵ The great weakness of the *persona designata* doctrine is that these concerns apply to *personal* entanglements by federal judges, just as they do to those involving federal judges “as judges”.⁹⁶ As two leading commentators have argued,

[i]f [*Drake v. Minister for Immigration and Ethnic Affairs*] ⁹⁷ is correct then it undermines the main policy reason in [*Boilermakers*] for separation of the judicial power. If contact with non-judicial functions is likely to undermine the impartiality and independence of the judiciary, that influence will be no less if the judge voluntarily undertakes the function in his ‘personal capacity’ than if he does so ex officio.⁹⁸

Geoffrey Sawer has, similarly, noted that

[t]he policy basis of the judicial isolation doctrine is the desirability of complete judicial independence and impartiality, which may be prejudiced if judges are brought into close working associations with other branches of government, and this peril is no less if the association is voluntary. However, the position is in the hands of the judges themselves, and they may well, in familiar judicial fashion, conveniently forget the policy which begat the doctrine and reason only from the doctrine, in order to sustain voluntary personal intermixtures of function.⁹⁹

In the same vein, Leslie Zines has remarked bluntly that “[i]f one relied on the policy reasons given in the *Boilermakers’* case,” the employment of federal judges for extra-judicial government work would be “unconstitutional”.¹⁰⁰

Of course, even judges applying the *persona designata* doctrine have recognized that a judge, even when acting in a personal capacity, cannot be viewed in complete isolation from his or her court. Thus, in *Hilton v. Wells*,¹⁰¹ the majority added a caveat to their application of the *persona designata* doctrine:

93 See *Scaduto*, note 90 *supra*, 1197-1198. Cf. *Scarfo*, note 90 *supra*, 380-381.

94 *Scaduto*, *id.*, 1196-1197. But see *contra*, *id.*, 1204 *per* Roney J.

95 See *Boilermakers*, note 76 *supra*, 94 CLR 254, 267-268, 276; [1957] AC 288, 315.

96 Cf. Comment, note 66 *supra*, 1009.

97 (1979) 46 FLR 409.

98 L. Zines and G.J. Lindell, *Sawer’s Australian Constitutional Cases* (4th ed. 1982) 613.

99 G. Sawer, *Australian Federalism in the Courts* (1967) 165-166. See also G. Sawer, “The Separation of Powers in Australian Federalism” (1961) 35 *ALJ* 177, 180-182.

100 Zines, note 78 *supra*, 192.

101 (1985) 157 CLR 57.

[i]f the nature or extent of the functions cast upon judges were such as to prejudice their independence or to conflict with the proper performance of their judicial functions, the principle underlying the *Boilermakers' Case* would doubtless render the legislation invalid.¹⁰²

The dissenters, Justices Mason and Deane, likewise recognized that the *persona designata* doctrine is

no doubt subject to the general qualification that what is entrusted to a judge in his individual capacity is not inconsistent with the essence of the judicial function and the proper performance by the judiciary of its responsibilities for the exercise of judicial power.¹⁰³

Subsequently, in *Jones v. Commonwealth*,¹⁰⁴ Justice Gaudron (dissenting) attached such importance to this qualification of the *persona designata* doctrine that she would have granted leave for the earlier decision to be re-argued on the ground that the applicability of this qualification had not been considered there.¹⁰⁵

If it be accepted that a “court” consists simply of the judges who comprise it, who cannot, therefore, be considered in isolation from it, even when acting in a so-called “personal capacity”, the *persona designata* doctrine, even as qualified, surely collapses. Rationally, then, the choice is between a strict application of the *Boilermakers* case, forbidding all non-judicial governmental functions to federal judges, or, in effect, extending the *persona designata* doctrine, as qualified, to embrace all conferrals of non-judicial power upon federal judges, whether “as individuals” or “as judges”. In other words, the alternatives essentially are, on the one hand, the principle of the *Boilermakers* case, without qualification, and, on the other, the position prior to that case, essentially embodied in the dissenting judgment of Justice Williams in *Boilermakers* itself. That principle, which closely parallels the qualified *persona designata* doctrine, would allow non-judicial power to be vested in federal courts, even if not incidental or ancillary to the exercise of judicial power, unless the functions could not be performed “consistently with the judicial process”.¹⁰⁶

In 1974 two justices of the High Court appeared to suggest that the *Boilermakers* case should be reconsidered,¹⁰⁷ and one of them (Chief Justice Barwick) argued that its

principal conclusion ... was unnecessary ... for the effective working of the Australian Constitution or for the maintenance of the separation of the judicial power of the Commonwealth or for the protection of the independence of courts exercising that power. The decision leads to excessive subtlety and technicality in the operation of the Constitution without ... any compensating benefit.¹⁰⁸

102 *Id.*, 73-74 per Gibbs C.J., Wilson and Dawson JJ.

103 *Id.*, 83. Cf. *Scarfo*, note 90 *supra*, 379.

104 (1987) 71 ALR 497.

105 *Id.*, 499.

106 *Boilermakers*, note 76 *supra*, 94 CLR 254, 315 per Williams J., dissenting.

107 *R. v. Joske, ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87, 90, 102 per Barwick C.J. and Mason J., respectively.

108 *Id.*, 90.

Nonetheless, Chief Justice Barwick prevaricated as to whether the decision should be overruled,¹⁰⁹ and the High Court has continually avoided the issue ever since.¹¹⁰

It would be inappropriate here to enter into a detailed discussion of that question, upon which commentators are divided.¹¹¹ For present purposes, it must suffice to say that, for reasons expounded elsewhere, the writer believes that the case should be overruled, and that a position similar to that of Justice Williams (dissenting therein) should be adopted.¹¹²

109 *Ibid.*

110 See *R. v. Joske; ex parte Shop Distributive and Allied Employees' Association* (1976) 135 CLR 194, 201 (*per* Barwick C.J.), 202 (*per* Gibbs and Jacobs JJ.), 222 (*per* Mason and Murphy JJ.); *Hilton*, note 79 *supra*, 67, 86.

111 The Constitutional Commission's Advisory Committee on the Australian Judicial System believed that the *Boilermakers* principle should remain unchanged: *Report*, note 77 *supra*, para. 5.7. Critics of the *Boilermakers* case include A.R. Blackshield, "Judicial Innovation as a Democratic Process" in *Future Questions in Australian Politics* (1979 Meredith Memorial Lectures, La Trobe University) 35, 47; C. Howard, *Australian Federal Constitutional Law* (3rd ed. 1985) 248; M. Coper, *Encounters with the Australian Constitution* (1987) 93-95.

112 See Winterton, note 71 *supra*, 61-64. *Cf.* Campbell, note 71 *supra*, 60-61.