THE USE OF FEDERAL JUDGES TO DISCHARGE EXECUTIVE FUNCTIONS: THE JUSTICE MATHEWS CASE

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> The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.[1]

The appointment of a judge to conduct a Royal Commission or other governmental inquiry is a regular feature of Australian political life at both state and federal level. Members of the judiciary enjoy a reputation as "skilled and impartial" inquirers;[2] hence the many occasions on which Australian governments have asked judges temporarily to leave their courtrooms and discharge these non-judicial tasks.[3] The question whether judges should do so has long been a subject of debate. For example, in his 1974 Garran Oration entitled "The Ethics of Public Office", Sir John Kerr drew attention to the United States' Canons of Judicial Ethics, especially Canon Five - "[a] Judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties".[4] This Canon encompassed the specific rule that "[a] Judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice".[5] Having noted that general practice in Australia did not accord with this American precept, the Governor-General posed the question: "will practical experience and the weighing of fundamental values ultimately lead Australian judges to the position stated in Canon 5 ... "?[6] The issue was taken up just over three years later in 1978 at the forty-fourth Summer School of the Australian Institute of Political Science where Professor Gordon Reid described Sir John as having "anticipated some problems in this area".[7] Professor Reid observed that the practice of using judges to discharge a variety of executive functions was on the increase[8] and warned that to share the prestige of the judiciary in this way with the other branches of government "is fraught with dangers for a fearlessly independent Judiciary".[9] Subsequent discussion in the law journals throughout 1978 revealed a range of views among Australian judges as to the appropriate limits on their involvement in commissions of inquiry, administrative tribunals and the like.[10] The topic continues to provoke discussion and disagreement.[11]

While there exist strong views in the states on these issues,[12] the propriety of the assumption by federal judges (that is, judges of the High Court and the federal

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courts created by the Commonwealth Parliament) of non-judicial functions has always been a question, not just of the conventions or ethics of judicial office, but also of the demands of positive constitutional law. The High Court has held that the Commonwealth Constitution impliedly incorporates a doctrine of the separation of federal judicial power from legislative and executive power. This separation doctrine finds primary expression in two propositions of law which serve to promote both the rule of law and the impartial administration of justice:[13] first, that federal judicial power can only be exercised by the courts designated in s.71 of the Constitution (the High Court, federal courts created by the Commonwealth Parliament and state courts invested with federal jurisdiction)[14] and, secondly, that such courts cannot validly be invested by the Commonwealth Parliament with any other category of function - whether legislative or executive - unless incidental to the performance of their judicial functions.[15] It is this "fundamental principle of the separation of powers"[16] which lies at the heart of the recent decision of the High Court in *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs*[17] denying that Justice Jane Mathews of the Federal Court could validly be nominated under s.10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) to report on proposals to construct a bridge to Hindmarsh Island in South Australia. Although some of the themes in *Wilson* have since been further developed by the High Court in a different (albeit related) setting,[18] this commentary is specifically concerned with the *Wilson* case and its impact upon the capacity of federal judges to come to the aid of the executive in the conduct of official inquiries and other executive functions.

The Statutory Context and Background to the Case

The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) empowers the Minister for Aboriginal and Torres Strait Islander Affairs on the application of an Aboriginal or group of Aboriginals to make a declaration in relation to "a significant Aboriginal area" (s.10). Such a declaration operates to protect and preserve that area from "injury or desecration" (s.11). Under s.10(1)(c) of the Act, however, this power is conditioned upon receipt by the Minister of "a report under subsection (4) in relation to the area from a person nominated by him ...". Section 10(4) provides that such a report shall deal with the following matters:

(a) the particular significance of the area to Aboriginals;

(b) the nature and extent of the threat of injury to, or desecration of, the area;

(c) the extent of the area that should be protected;

(d) the prohibitions and restrictions to be made with respect to the area;

(e) the effects the making of a declaration may have on the proprietary or pecuniary interests of persons other than the [applicants] ...;

(f) the duration of any declaration;

(g) the extent to which the area is or may be protected by or under a law of a State or Territory, and the effectiveness of any remedies available under any such law;

(h) such other matters (if any) as are prescribed.

Justice Mathews was nominated by the Minister in January 1996 to act as a reporter in relation to what had become a highly politicized and controversial application for protection of Hindmarsh Island, it being claimed by a group of Aboriginals that proposals to construct a bridge to the Island were inimical to

Aboriginal tradition associated with the Island.[19] Justice Mathews agreed to perform this task. However, the plaintiffs (a second group of Aboriginals contesting the existence of the traditions invoked by the first group) argued that for Justice Mathews to discharge this particular non-judicial function was incompatible under the Commonwealth Constitution with her status as a Federal Court judge. The High Court (Kirby J. dissenting) agreed.

The Doctrine of Constitutional Incompatibility of Office

(a) The Pre-Wilson Legal Position

As pointed out above, the doctrine of the separation of powers prevents the conferral of executive functions on federal courts unless those functions are incidental or ancillary to the exercise of judicial power. Thus, the Commonwealth Parliament could not validly empower a federal court, or a judge of a federal court *acting as such*, to conduct a governmental inquiry. Nonetheless, the High Court has recognized a qualification to this principle of separation - that non-judicial functions can validly be conferred on federal judges in their capacity as *personae designatae*, that is, as individuals "detached from the court they constitute".[20] Clearly, this "designated person principle" could operate to undermine the doctrine of the separation of powers unless confined in some way.[21] Hence, the Court in its 1995 decision in *Grollo v. Palmer*[22] identified two conditions which must be satisfied if non-judicial functions are to be validly conferred on a federal judge in her or his individual capacity. First, a judge must consent to being used as a *persona designata*.[23] And secondly, the relevant non-judicial functions must not be incompatible with the holding by the designated person of judicial office. More specifically:

> no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power ...[24]

On the facts in *Grollo*, a majority of the High Court upheld the validity of provisions of the Telecommunications (Interception) Act 1979 (Cth) which conferred the non-judicial function of issuing telecommunication interception warrants on Federal Court judges who had consented so to act in an individual capacity. The designated person principle has also been held to support the appointment of a serving Federal Court judge as Deputy President of the Administrative Appeals Tribunal (a non-judicial body).[25]

In *Wilson* the High Court recognized that Justice Mathews had been appointed as a reporter under s.10 of the Act, not in her capacity as a Federal Court judge, but "as an individual", "persona designata".[26] Moreover, all members of the Court accepted the authority of *Grollo* and the twin conditions laid down in *Grollo* for the valid conferral of non-judicial functions on persons who are judges of federal courts. Where Kirby J. parted company with the majority was in his application of that test.

(b) The Approach of the Majority

Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. in their joint majority judgment in *Wilson*[27] emphasized the way in which the *Grollo* incompatibility condition protects "the independence of Ch III judges from the political branches of government",[28] thereby reconciling the designated person principle with the objectives underpinning the constitutional separation of federal judicial power. (This of course begs the question of why non-judicial functions cannot validly be conferred on a federal court or on a judge of a federal court acting as such, subject to a similar incompatibility condition. This, however, is a topic for another day.[29]) The High Court in *Grollo* had suggested a number of ways in which the doctrine of constitutional incompatibility of office might be infringed, including by the

conferral on a federal judge *persona designata* of "non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity is diminished".[30] This was the type of incompatibility relevant to Justice Mathews' nomination as a reporter[31] and, in a crucial paragraph of their judgment, Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. set out a three part test for determining whether the separation between the judicial and legislative and executive branches had in fact been breached in this way. Their Honours said that in any particular case:

> The statute or the measures taken pursuant to the statute [purporting to confer a non-judicial function on a judge of a federal court *persona designata*] must be examined in order to determine, ***first***, whether the function is an integral part of, or is closely connected with, the functions of the Legislature or the Executive Government. If the function is not closely connected with the Legislature or the Executive Government, no constitutional incompatibility appears. ***Next***, an answer must be given to the question whether the function is required to be performed independently of any instruction, advice or wish of the Legislature or the Executive Government, other than a law or an instrument made under a law ... If an affirmative answer does not appear, it is clear that the separation has been breached ... If the function is one which must be performed independently of any non-judicial instruction, advice or wish, ***a further question arises***: Is any discretion purportedly possessed by the Ch III judge to be exercised on political grounds - that is, on grounds that are not confined by factors expressly or impliedly prescribed by law?[32]

Justice Mathews' nomination as a reporter failed this test in several respects. In so concluding, Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. focussed upon the terms of the Aboriginal and Torres Strait Islander Heritage Protection Act which, in their view, effectively placed a reporter within the executive branch. In their Honours' words:

> The function of a reporter under s 10 is not performed by way of an independent review of an exercise of the minister's power. *It is performed as an integral part of the process of the minister's exercise of power.* The performance of such a function by a judge places the judge firmly in the echelons of administration, liable to removal by the minister before the report is made and shorn of the usual judicial protections, in a position equivalent to that of a ministerial advisor.[33]

The joint majority judgment had earlier noted that an obligation on the part of a *persona designata* to perform her or his non-judicial functions in accordance with the rules of natural justice would assist a finding of compatibility of office.[34] But the fact that a reporter was under such an obligation in this case was "not significant".[35] Instead, "the Act does not require the reporter to disregard ministerial instruction, advice or wish in preparing the report. The report may be prepared so as to accord with ministerial policy".[36] Moreover, the Act envisaged a reporter performing political functions such as addressing the competing interests of stakeholders in the area of land or water for which the Act's protection had been sought.[37] The final indicium of incompatibility was the requirement under s.10(4)(g) of the Act that a reporter deal with "the extent to which the area is or may be protected by or under a law of a State or Territory, and the effectiveness of any remedies available under any such law". This, said the joint majority judges, would amount to the rendering of an advisory opinion to the minister upon a question of law, advisory opinions being "alien to the exercise of the judicial power of the Commonwealth".[38]

It followed from these considerations that the function of a reporter under the Act could not, consistently with the Commonwealth Constitution and its entrenched doctrine of the separation of powers, be conferred by legislative or

executive action upon a person holding office as a judge of a federal court. Thus, s.10(1)(c) of the Act was read down so as to exclude such a person from the ranks of eligible reporters.

(c) The Dissent of Kirby J.

As noted above, Kirby J. accepted the authority of *Grollo v. Palmer*, but nonetheless concluded that performance of the reporting function under s.10 of the Act was not incompatible with Justice Mathews' commission as a Federal Court judge. Two factors in particular contributed to his Honour's finding. First, Kirby J. placed considerable emphasis upon historical practice, pointing out that the use of federal and state judges to conduct federal governmental inquiries - "some of them very controversial and partisan in their potential" - had been "a settled feature of Australian public life during the whole history of the Commonwealth".[39] Against this backdrop, the continued availability of federal judges to perform a variety of non-judicial tasks as *personae designatae* was "incontestably to the benefit of good government".[40] As his Honour put it:

> Australia's relatively small population, scarce governmental resources and limited numbers of trained personnel argue strongly against the imposition of a new and rigid constitutional rule which history, past practice and constitutional understandings to date would deny.[41]

To this argument of history and the practical demands of governance, Kirby J. added a conception of the reporting function under s.10 of the Act which differed from that of the majority. In his Honour's opinion, it was wrong to describe a reporter "as akin to a ministerial adviser": the minister had no power to interfere in the discharge of a reporter's function, the performance of which was subject to the rules of natural justice.[42] Thus, "[a]s a donee of statutory powers required to act with lawfulness, integrity and fairness, the reporter, upon accepting nomination, is obliged to act in a way that is wholly independent of the minister and completely conformable to the conduct normal to a judge".[43] As far as Kirby J. was concerned, if the secretive function of issuing telecommunication interception warrants could validly be conferred on persons who are judges of the Federal Court (*Grollo v. Palmer*), it followed that Justice Mathews' nomination under the Act was consistent with the Constitution.

The Impact of *Wilson* on the Use of Federal Judges to Conduct Governmental Inquiries and Other Non-Judicial Functions

Wilson is the first case in which the performance of non-judicial functions by a person who is a judge of a federal court has been held to contravene the Constitution. As such, the principles elaborated in *Wilson* - against which any future use of federal judges to discharge executive functions must be tested - deserve close attention. But what precisely is their impact? Do they provide sufficient guidance for future cases? When closely examined, it is submitted that the three part test embraced by Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. in *Wilson* is unclear in a number of respects.[44] The question whether a particular non-judicial function conferred by or under statute on a person who is a federal judge "is closely connected with"[45] the functions of Parliament or the executive begs the question of what degree of connection is "close". But accepting that in most controverted cases such a connection will exist, it is the final limb of the three part test which excites most difficulty: what do the joint majority judges mean when they deny that a federal judge *persona designata* can validly exercise a "political" discretion?[46] Their Honours described such a discretion as exercisable "on grounds that are not confined by factors expressly or impliedly prescribed by law".[47] But how "confined" or "structured" must a discretion be to escape

classification as a political discretion?[48] As indicated above, the need for a reporter to make "political decisions"[49] was one reason which Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. gave for their decision on the facts of the case. These "political decisions" (they were in fact recommendations - the minister was bound only to consider a report) flowed from the terms of s.10(4) of the Act - specifically, the requirement that a reporter address "the extent of the area that should be protected" (s.10(4)(c)), "the prohibitions and restrictions to be made with respect to the area" (s.10(4)(d)), "the effects the making of a declaration may have on the proprietary or pecuniary interests of persons other than the [applicants]" (s.10(4)(e)) and "the duration of any declaration" (s.10(4)(f)). As a reporter's conclusion in relation to each of these matters would surely take colour from the purposes of the Aboriginal and Torres Strait Islander Heritage Protection Act which were declared in s.4 of the Act to be "the preservation and protection from injury or desecration of areas and objects in Australia ... that are of particular significance to Aboriginals in accordance with Aboriginal tradition", it would seem to follow that the notion of a political discretion under the *Wilson* tripartite test will capture a relatively wide range of decisions. But whatever its ultimate scope proves to be, the use of the term "political" in this context is to be regretted; not only is it vague, but it also conveys undertones of discredited distinctions between law and policy.

The joint majority judges in *Wilson* did comment specifically on the impact of their decision on the use of federal judges to conduct Royal Commissions, observing that:

> A judge who conducts a Royal Commission may have a close working connection with the Executive Government yet will be required to act judicially in finding facts and applying the law and will deliver a report according to the judge's own conscience without regard to the wishes or advice of the Executive Government except where those wishes or advice are given by way of submission for the judge's independent evaluation. The terms of reference of the particular Royal Commission and of any enabling legislation will be significant.[50]

While this passage suggests that the duties of a Royal Commissioner may be compatible with judicial functions, it does not imply compatibility of office in all circumstances. Each case will turn on its own facts. It is clear, however, that the prospect of a finding of compatibility between a Royal Commissioner's judicial and non-judicial duties will be enhanced by the existence of enabling legislation expressly insulating the Commissioner from any governmental instruction, advice or wish (other than as formally submitted to the Commission for its independent evaluation) and obliging the Commissioner to act in accordance with the rules of natural justice. Whether the making of a series of recommendations bearing upon the subject of her or his report could ever amount to the exercise by a Royal Commissioner of a "political" discretion remains to be seen. Any function in the nature of the giving of an advisory opinion on a question of law in the sense referred to in *Wilson* would also have to be avoided.[51]

The other specific extra-judicial activity to which the joint majority judges directed their attention was the appointment of a person who is a federal judge as a presidential member of the Administrative Appeals Tribunal. Although Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. did not unequivocally endorse the 1979 finding of the Full Federal Court in *Drake v. Minister for Immigration and Ethnic Affairs*[52] that such appointments are consistent with the separation of federal judicial power, they went out of their way to stress that the Administrative Appeals Tribunal is required to act independently of the executive government.[53] In *Grollo v. Palmer*, McHugh J. (party to the *Wilson* joint

judgment) had expressed the view that although the functions performed as a presidential member of the Administrative Appeals Tribunal by a person who is a federal judge are non-judicial, "those functions do not fall beyond the limits of the persona designata exception".[54] It would seem to follow then that service on the Administrative Appeals Tribunal by members of the Federal Court does not fall foul of the doctrine of constitutional incompatibility of office.

But whereas the Administrative Appeals Tribunal may be unaffected by *Wilson*, the decision will have a significant impact upon the availability of federal judges to discharge other executive functions. In the penultimate paragraph of their judgment, the joint majority judges proffered the view that "the criteria of incompatibility above expressed have not always been observed in practice",[55] a comment which casts doubt on the constitutionality of certain historical instances of the use of federal judges in executive positions. The wartime appointments of Latham C.J. and Dixon J. (as designated persons, but whilst serving judges of the High Court) to diplomatic posts in Japan and the United States respectively, might well be such examples.[56] It would also seem highly unlikely that a member of the federal judiciary could validly be appointed to head a body like A.S.I.O. or the National Crime Authority.[57] Whether a federal judge could now be appointed to a Law Reform Commission is unclear.[58]

Given that *Wilson* fails to provide clear guidance in distinguishing those non-judicial functions which are constitutionally consistent with office as a judge of a federal court from those which are not, members of the federal judiciary may choose to err on the side of caution in doubtful cases and decline nomination as a designated person. In these situations, and those of undoubted incompatibility of office, to whom do the federal legislature and executive turn for the conduct of official inquiries and other executive functions which demand (at least in the eyes of the executive) judicial expertise and impartiality for their effective discharge? In the past, judges of State courts have served on federal inquiries,[59] but another recent decision of the High Court alluded to above suggests (without deciding) that such judges - even as designated persons - may also be constrained by the Commonwealth Constitution in terms of the non-judicial functions they can validly undertake.[60] Thus, to a significant extent, senior counsel and retired judges look like filling the breach.

Ultimately, *Wilson* limits the extent to which the judicial reputation for independence and impartiality may be borrowed by the legislative and executive branches in the name of upholding that reputation.[61] As McHugh J. said in his dissenting judgment in *Grollo*:

> One of the usual reasons for investing executive power in a judge as persona designata is that it gives the exercise of executive power the appearance of independence and impartiality that is always associated with the exercise of judicial power. That independence and impartiality is only possible, however, because of the institutional separation between executive and judicial functions.[62]

The High Court is clearly moving in the direction of strengthening the institutional separation referred to by McHugh J. As to whether its decision on the facts in *Wilson* is a necessary consequence of the separation of federal judicial power, or adopts too precious a view of potential threats to judicial independence, takes one back to the debates referred to at the outset of this commentary. *Wilson* does not spell an end to those debates - on the contrary, it will doubtless inaugurate another round of discussion by lawyers and political scientists as to the appropriate role of judges in society. The difference this time is that the High Court has signalled that it will enforce

entrenched limitations on the use of federal judges in the performance of non-judicial functions.

Endnotes

1 *Mistretta v. United States* (1989) 488 U.S. 361, 407 (quoted with approval by Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. in *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 A.L.R. 220, 225).

2 M. McInerney, "The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities" (1978) 52 Australian Law Journal 540, 548.

3 Many examples of the use of judges to perform non-judicial functions in the federal sphere may be found in A.J. Brown, "The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge" (1992) 21 Federal Law Review 48. A list of Royal Commissions conducted by judges for the various colonial and state governments, as well as the Commonwealth government, may be found in M. McInerney, G.J. Moloney and D.G. McGregor, *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals* (1986) 70-87.

4 Quoted in Sir John Kerr, "The Ethics of Public Office" (Robert Garran Memorial Oration, delivered to the Australian Regional Groups, Royal Institute of Public Administration, Canberra, 11 November, 1974) 6.

5 Quoted in *ibid* 7.

6 *Ibid* 9.

7 G.S. Reid, "The Changing Political Framework" in T. van Dugteren (ed), *The Political Process: Can It Cope?* (1978) 91.

8 *Ibid* 90-91.

9 *Ibid* 92.

10 Justice Connor, "The Use of Judges in Non-Judicial Roles" (1978) 52 Australian Law Journal 482 (describing Professor Reid's warning as "timely and well worthy of consideration by Australian lawyers and others" (*ibid* 484 (footnote omitted)), but confining his comments to situations where serving judges are "seconded to executive positions in which they have a hand in determining and implementing government policy" (*id*)); M. McInerney, "The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities" (1978) 52 Australian Law Journal 540 (a judge of the Supreme Court of Victoria arguing against serving judges accepting appointment on commissions of inquiry); Justice F.G. Brennan, "Limits on the Use of Judges" (1978) 9 Federal Law Review 1 (arguing that judicial skills have an important contribution to make to the work of Law Reform Commissions, Royal Commissions, Committees of Inquiry "and Tribunals and Commissions of differing kinds". Thus, "[j]udicial skills should not be denied to them unless their jurisdiction or procedure require the judge to depart so substantially from the traditional judicial function that the departure carries an unacceptable risk of loss of confidence" (*ibid* 11)).

11 See, for example, M. McInerney, G.J. Moloney and D.G. McGregor, *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals* (1986) and G. Winterton, "Judges as Royal Commissioners" (1987) 10 University of New South Wales Law Journal 108. And for an earlier example see J.D. Holmes, "Royal Commissions" (1955) 29 Australian Law Journal 253 and accompanying commentaries.

12 Notably in Victoria where the judges of the Supreme Court have generally declined to act as Royal Commissioners. This is to be contrasted with the greater willingness of New South Wales judges to conduct commissions of inquiry (see generally the account of Professor Winterton, "Judges as Royal Commissioners" (1987) 10 University of New South Wales Law Journal 108).

13 L. Zines, *The High Court and the Constitution* (3rd ed) (1992) 179-180; *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 A.L.R. 220, 226 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.: "The separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges." In relation to Ch.III judges, see below n.28.

14 Authoritatively established in *New South Wales v. Commonwealth* (the *Inter-State Commission* case) (1915) 20 C.L.R. 54 and *Waterside Workers' Federation of Australia v. J.W. Alexander Ltd* (1918) 25 C.L.R. 434.

15 *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254 affirmed on appeal to the Privy Council in *Attorney-General (Cth) v. The Queen* (1957) 95 C.L.R. 529.

16 *New South Wales v. Commonwealth* (the *Inter-State Commission* case) (1915) 20 C.L.R. 54, 88 per Isaacs J.

17 (1996) 138 A.L.R. 220.

18 *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 138 A.L.R. 577 (judgment in which was delivered six days after judgment in *Wilson*). In *Kable*, a majority of the High Court held invalid the Community Protection Act 1994 (N.S.W.) as contrary to Ch.III of the Commonwealth Constitution (Ch.III of the Constitution being headed "The Judicature" and commencing with s.71). Specifically, the Community Protection Act purported to empower the Supreme Court of New South Wales to make a preventive detention order in relation to a single, named individual - Mr Gregory Wayne Kable (being "the person of that name who was convicted in New South Wales on 1 August 1990 of the manslaughter of his wife, Hilary Kable" (s.3(4) of the Act)) - and no one else. This function was held to be incompatible under Ch.III of the Constitution with the exercise by the Supreme Court of its invested federal jurisdiction ((1996) 138 A.L.R. 577, 612, 615 per Gaudron J.; 622, 624, 627-629 per McHugh J. and 630-632, 644 per Gummow J.) or at least to require the Supreme Court to exercise federal jurisdiction in the case at hand (the case falling within federal jurisdiction both at first instance and on appeal) in a manner contrary to traditional judicial process (*ibid* 608 per Toohey J.)

19 For a useful chronology of the events which constitute the "Hindmarsh Island Bridge Affair" see B. Lane and A. Ramsey, "Hindmarsh ruling places Herron in bridge row spotlight", The Australian, 7 September 1996 and for a more detailed account J. Clarke, "Chronology of the Kumarangk/Hindmarsh Island Affair" (1996) 84 Aboriginal Law Bulletin 22.

20 *Grollo v. Palmer* (1995) 184 C.L.R. 348, 363 per Brennan C.J., Deane, Dawson and Toohey JJ.

21 *Hilton v. Wells* (1985) 157 C.L.R. 57, 81-82 per Mason and Deane JJ.

22 (1995) 184 C.L.R. 348.

23 *Ibid* 364-365 per Brennan C.J., Deane, Dawson and Toohey JJ.

24 *Ibid* 365 per Brennan C.J., Deane, Dawson and Toohey JJ.

25 *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577 (Full Court of the Federal Court).

26 (1996) 138 A.L.R. 220, 223-224 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.

27 Gaudron J. wrote a separate concurring judgment.

28 (1996) 138 A.L.R. 220, 229. Their Honours used the term "Ch III judge" (referring to Chapter III of the Commonwealth Constitution headed "The Judicature") to signify a judge of the High Court or of a court created by the Commonwealth Parliament under Ch.III of the Constitution (*ibid* 224, n.6).

29 But see, for example, Sir Anthony Mason, "A New Perspective on Separation of Powers" (1996) 82 Canberra Bulletin of Public Administration 1, 5-6.

30 (1995) 184 C.L.R. 348, 365 per Brennan C.J., Deane, Dawson and Toohey JJ.

31 *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 A.L.R. 220, 230 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.; 235 per Gaudron J.

32 *Ibid* 230-231 (italics and bold script added, footnote omitted).

33 *Ibid* 232 (emphasis added and footnotes omitted). See also *ibid* 236 per Gaudron J.: "The function of reporting under s 10 of the Act is one which, if performed by a judge in his or her individual capacity, gives the appearance that the judge is acting, not in any independent way, but as the servant or agent of the minister. Thus, it is not a function that parliament may confer on a judge of a court exercising the judicial power of the Commonwealth." In Gaudron J.'s opinion, the reporting function was not such as to undermine public confidence in the ability of Justice Mathews to discharge her judicial functions with integrity. Instead, Gaudron J. found that for a federal judge to act as a reporter *persona designata* would undermine public confidence in the integrity of the judiciary as an institution (*ibid* 236).

34 *Ibid* 231.

35 *Ibid* 232.

36 *Id* (their Honours adding that this circumstance could not be remedied by a judge choosing to erect a "*cordon sanitaire*" between her or himself and the Parliament or executive (*ibid* 233)).

37 *Ibid* 232.

38 *Ibid* 233 (footnote omitted).

39 *Ibid* 244.

40 *Ibid* 250.

41 *Ibid* 251.

42 *Ibid* 247.

43 *Id.*

44 In considering this three part test, it should be borne in mind that it does not exhaust the possible categories of constitutional incompatibility of office. Resort should always be had to the basic *Grollo* incompatibility condition of which the *Wilson* three part test is but one refinement. For example, *Grollo* indicated that incompatibility of office might

also arise from "so permanent and complete a commitment to the performance of non-judicial functions by a judge that the further performance of substantial judicial functions by that judge is not practicable" (*Grollo v. Palmer* (1995) 184 C.L.R. 348, 365 per Brennan C.J., Deane, Dawson and Toohey JJ.).

45 (1996) 138 A.L.R. 220, 230 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.

46 *Ibid* 231 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.

47 *Id.*

48 See M. Allars, *Introduction to Australian Administrative Law* (1990) 11. Compare the view of Kirby J. in *Wilson*: "It is not necessarily incompatible with the judicial office for a judge to be involved in highly controversial matters and even matters which concern partisan or political questions" ((1996) 138 A.L.R. 220, 253).

49 *Ibid* 232 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.

50 *Ibid* 231 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ.

51 Gaudron J., in her separate majority judgment in *Wilson*, referred only indirectly to the conduct of Royal Commissions by persons who are serving judges (*ibid* 237).

52 (1979) 24 A.L.R. 577.

53 *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 A.L.R. 220, 231-232 per Brennan C.J., Dawson, Toohey, McHugh and Gummow JJ. Gaudron J. did not specifically mention the appointment of federal judges *persona designata* to the Administrative Appeals Tribunal. However, her Honour's statement that "[i]n general terms, a function which is carried out in public ... which is and which is manifestly free of outside influence and which results in a report or other outcome which can be assessed according to its own terms, will not be one that gives the appearance of an unacceptable relationship between the judiciary and the other branches of government" might be taken as apposite to the performance of functions by the Administrative Appeals Tribunal (*ibid* 237).

54 (1995) 184 C.L.R. 348, 383. Note also the point made by Professor Winterton that this aspect of the decision in *Drake* was approved by the High Court in *Hilton v. Wells* (1985) 157 C.L.R. 57 (G. Winterton, "Judges As Royal Commissioners" (1987) 10 University of New South Wales Law Journal 108, 122 n.79.

55 (1996) 138 A.L.R. 220, 233.

56 These wartime appointments are discussed in A.J. Brown, "The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge" (1992) 21 Federal Law Review 48, 51-52. In later years, Sir Owen Dixon was not sure that he had been right to accept appointment to this and other executive positions in wartime (he also chaired the Central Wool Committee, the Australian Coastal Shipping Control Board and the Marine War Risks Insurance Board (see *ibid* 51, n.15)). In Dixon's words: "I do not wish it to be thought that, looking in retrospect, I altogether approve of what I myself did" (J. D. Holmes, "Royal Commissions" (1955) 29 Australian Law Journal 253, 272 (commentary by Sir Owen Dixon).

57 In relation to the appointment by the Fraser government of Woodward J., a federal judge, as Director-General of A.S.I.O., see A.J. Brown, "The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge" (1992) 21 Federal Law Review 48, 60. On the appointment of persons who are judges to the Chair of the National Crime Authority, see *ibid* 62-64.

58 See Law Reform Commission Act 1973 (Cth). But see also Canon Four of the United States' Canons of Judicial Ethics quoted by Sir John Kerr in his Garran Oration: "A judge may engage in activities to improve the law, the legal system, and the administration of justice" (Sir John Kerr, "The Ethics of Public Office", Robert Garran Memorial Oration, delivered to the Australian Regional Groups, Royal Institute of Public Administration, Canberra, 11 November, 1974, 6, 9-10).

59 See the list in M. McInerney, G.J. Moloney and D.G. McGregor, *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals* (1986) 83-87.

60 See *Kable v. Director of Public Prosecutions (N.S.W.)* (1996) 138 A.L.R. 577 (referred to above n.18). *Kable* is unclear as to the future direction of the High Court on this point. Of the majority judges see, for example, *ibid* 623-624 per McHugh J., but compare *ibid* 612 per Gaudron J.

61 See *Mistretta v. United States* (1989) 488 U.S. 361, 407 referred to above n.1.

62 *Grollo v. Palmer* (1995) 184 C.L.R. 348, 377 per McHugh J.