



Law Council
OF AUSTRALIA

Jack Richardson Oration

Speech delivered by Fiona McLeod SC, President, Law Council of Australia at the High Court of Australia, Canberra.

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Under the separation of powers doctrine, the principal function of the judiciary is to uphold the rule of law. It is a corollary of that doctrine that the judiciary cannot be deterred from exercising that function by criticisms of the executive branch even if the executive's criticisms have the support of the general public. The Judiciary has to apply the law, not public opinion.

The separation of powers requires the Judiciary to enforce and protect the rule of law. It follows that, when necessary, the Judiciary must speak out publicly against any attempt by the legislature or the executive to undermine the rule of law. The legislature may change the substantive rules of law. It is another question whether, consistently with the separation of powers, the Legislature can, or ought to, prevent the courts from examining the legality of the conduct of those who are bound by those rules of law.¹

Justice McHugh

Introduction

Emeritus Professor Jack Richardson was a visionary, his ability to shape and design new and emerging institutions, particularly the Australian National Universities faculty of law and Commonwealth Ombudsman's Office have left a lasting impact on Australia's legal landscape.

His life-long passion for constitutional law and role on the joint parliamentary committee which recommended the repeal of the provision preventing Aboriginal and Torres Strait Islander peoples from being counted in the census, was both contemporary and bold.

In his role as Commonwealth Ombudsman Jack Richardson was not shy about examining the exercise of administrative power.

Similarly, the judiciary should be bold in challenging the exercise of executive power, even in the 'national interest', where it goes beyond the legitimate use of that power and would undermine the rule of law.

Australia prides itself as a society firmly grounded, in its practices and its institutions, in the rule of law and resistant to tyranny and arbitrary decision making.

This order is and has always faced challenges, not the least from successive executive governments testing the limits of that power.

This is not unusual, and in many ways, is a testament to the strength and enduring nature of the rule of law which holds a significant weight in underpinning the Australian Constitution.

The stability of society depends on adherence to this order of which responsible government and separation of powers under the Australian Constitution are central pillars. Each of the three institutions under this scheme – the executive, legislature and judiciary – perform an important check and balance on the other arms observing the separation of these powers for the most part with jealous vigour.

¹ Michael McHugh, 'Tensions between the executive and the judiciary' (Speech delivered at the Australian Bar Association Conference, Paris, 10 July 2002) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/mchughj/mchughj_paris.htm#42Note>.

The essence of all power however, is the people, and the fundamental social contract that persists and empowers the other limbs to act. Our constitution commences with these words '*WHEREAS the people ... have agreed*'.

It is pertinent to remember the agreement of the people underpins the foundation of our nation state. It is the source of power. It reminds us that the executive and legislature are at heart representative and owe the source of their power to those they govern for so long and only so long as they hold the majority of seats in the house of representatives.

The US Constitution, created in 1787 more than 100 years before our own, similarly commences '*We the People of the United States ... do ordain and establish*'.

Many things have been done this year in the US under executive fiat that we might question. Many more things appear to have been decided and communicated in tweets of 140 characters or less in the interests, it is claimed, of the presidential agenda.

We are fortunate, I suggest, that our parliamentary system does not permit wholesale executive action by individuals with no talent – and an express disdain, for the business of governing.

Executive power asserts itself under the foundation of democratic mandates and section 61 of the Constitution a capacity to 'engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'.²

Section 61 of the Australian Constitution provides for the executive power of Commonwealth in the following terms:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Section 61 is located in Chapter II of the Constitution, which Professor Crommelin has stated was a chapter intended by the Constitutional drafters to 'mask rather than prescribe the workings of the executive'.³

This is particularly so where activities or decisions are made by the executive arm which draw on claims of, the at times, amorphous concept of 'national interest' considerations. These considerations justify – rightly or wrongly – the many areas of activity whereby our democratically elected Governments backed by bureaucratic agencies and sometimes a delegating legislature measures that are said to be in the interest of the Australian people.

My topic today leads me to begin with explaining how I view section 61 of the Constitution, the rule of law, what I mean by 'national interest' and outlining some examples where these concepts currently intercept.

Section 61 of the Constitution

Sir Samuel Griffith in his speech moving consideration of the draft Bill for a Constitution at the Australasian Federal Convention in Sydney in 1891, stated of the proposed Ch II, dealing with executive power:

² *Victoria v Commonwealth* 134 CLR 338, 397 (Mason J).

³ Michael Crommelin, *The Commonwealth Executive: A Deliberate Enigma* (University of Melbourne Law School, 1986) 36.

“This part of the bill practically embodies what is known to us as the British Constitution as we have it working at the present time; but the provisions of the bill are not made so rigid that our successors will not be able to work out such modifications as their experience may lead them to think preferable.”⁴

As noted by the-then Chief Justice of the High Court, Robert French in *Pape v Commissioner of Taxation (Pape)* an earlier draft of section 61 of the Constitution provided that the executive power of the Commonwealth:

“shall extend to all matters with respect to which the legislative powers of the Parliament may be exercised, excepting only matters, being within the legislative powers of a State, with respect to which the Parliament of that State for the time being exercises such powers.”⁵

Sir Samuel Griffith moved an amendment – now section 61 of the Constitution – which he stated did not alter the intention but was required:

As the clause stands, it contains a negative limitation on the powers of the executive; but the amendment will give a positive statement as to what they are to be.⁶

Quite mistakenly he also stated that the amendment was ‘free from ambiguity’.⁷

The first Attorney-General of the Commonwealth, Alfred Deakin wrote:

“The framers of that clause evidently contemplated the existence of a wide sphere of Commonwealth executive power, which it would be dangerous, if not impossible, to define, flowing naturally and directly from the nature of the Federal Government itself, and from the powers, exercisable at will, with which the Federal Parliament was to be entrusted.”⁸

And further:

“The scope of the executive authority of the Commonwealth is therefore to be deduced from the Constitution as a whole. It is administrative, as well as in the strict sense executive; that is to say, it must obviously include the power not only to execute laws, but also to effectively administer the whole Government of which Parliament is the legislative department.”⁹

In testimony to the 1929 Royal Commission on the Constitution, Sir Edward Mitchell KC offered the following view in relation to executive power:

“Of course, the executive government cannot be confined, like a manager of a business might, merely to those specific matters which come within the provisions enumerating what it is authorised to bring before Parliament to legislate about. It is clear that all sorts of

⁴ *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 31 March 1891, 527 (Samuel Griffith).

⁵ *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 56 (French CJ).

⁶ *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 31 March 1891, 777.

⁷ *Ibid.*

⁸ Alfred Deakin, ‘Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth’, in Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14* (Australian Government Publishing Service, 1981) 130.

⁹ *Ibid* 131.

*emergencies may arise, and all sorts of things may happen as to which the executive government must have a free hand.*¹⁰

In *Pape*, former Chief Justice of the High Court did not find it necessary to consider the full extent of powers and capacities of the executive government of the Commonwealth, but noted that such powers may be conferred upon the executive:

- By statutes made under the Constitution;
- By prerogatives of the Crown, for example the power to enter into treaties and to declare war; and
- By the power derived from the legal or common law ‘capacities’ of the Commonwealth (e.g. the power to enter into contracts).¹¹

Chief Justice French noted that these three kinds of powers ‘form part of, but do not complete, the executive power’.¹² Further, the executive power ‘has to be capable of serving the proper purposes of the national government’.¹³

Executive powers can thus be exercised in areas of Commonwealth Constitutional responsibility, which are derived from section 51 of the Constitution, or from the implied nationhood power.¹⁴ The implied nationhood power may also allow the Commonwealth to exercise powers in areas of ‘national interest’.

Rule of law

Very little is more in the national interest than maintenance of the rule of law which essentially ensures that all authority is subject to, and constrained by, law.¹⁵ A society based on the rule of law is stable and ‘legitimate’ as opposed to arbitrary whereby the will of an individual, or a group is the governing force.¹⁶

Now there is quite a bit of debate in theoretical circles about what the rule of law encompasses. In many High Court cases the following features can be discerned from the principle of the rule of law:

- The need for a minimum capacity for judicial review of administrative action;¹⁷
- Courts may not grant the executive dispensation from the criminal law;¹⁸
- That there must be separation between executive and judicial functions;¹⁹

¹⁰ Australian Government, *Report of the Royal Commission on the Constitution*, (1929) Minutes of Evidence, Pt 3 760.

¹¹ *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

¹² *Ibid* [127].

¹³ *Ibid*.

¹⁴ *Davis v the Commonwealth* [1988] HCA 63; 166 CLR 79.

¹⁵ Murray Gleeson, ‘Courts and the Rule of Law’ (The Rule of Law Series, Melbourne, 7 November 2001) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_ruleoflaw.htm#_edn6>.

¹⁶ *Ibid*.

¹⁷ *Church of Scientology v Woodward* (1982) 154 CLR 25, 70-71 (Brennan J).

¹⁸ *A v Hayden* (1984) 156 CLR 532, 595 (Deane J); *Ridgeway v The Queen* (1995) 184 CLR 19, 39, 44 (Mason CJ, Deane and Dawson JJ).

¹⁹ *Abebe v The Commonwealth* (1999) 197 CLR 510, 560 (Gummow and Hayne JJ); *Enfield City Council v Development Assessment Commission* (2000) 199 CLR 135, 157 (Gaudron J).

- Judicial decisions must be made according to legal standards rather than undirected considerations of fairness;²⁰
- Citizens have a right to a fair trial;²¹
- Citizens have a right to privileged communications with legal advisers;²²
- The content of the law should be publicly accessible;²³
- Access to the courts should be available to citizens who seek to prevent the law from being ignored or violated, subject to reasonable requirements as to standing;²⁴
- Courts have a duty to exercise a jurisdiction which is regularly invoked;²⁵
- Citizens are equal before the law;²⁶ and
- The criminal law should operate uniformly in circumstances which are not materially different.²⁷

The rule of law has evolved to mean more than the simple requirement that the people and the Government are 'ruled by and obey the law' and that the 'law should be such that the people will be able and willing to be ruled' by it.²⁸

More broadly the rule of law also covers the principle that no person should be subject to treatment or punishment which is inconsistent with respect for the inherent dignity of every human being. In particular:

- (a) No person should be subject to torture. Information obtained by torture should be inadmissible in any legal proceedings. Adequate provision should be made to prosecute and punish the perpetrators of such conduct.
- (b) No person should be subject to cruel, inhuman or degrading treatment or punishment. No person should be held in conditions of detention which amount to cruel, inhuman or degrading treatment. Information obtained by cruel, inhuman or degrading treatment should be inadmissible in any legal proceedings. Adequate provision should be made to prosecute and punish the perpetrators of such conduct. No person should be subject to the death penalty.²⁹

²⁰ *Federal Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55, 60 (Barwick CJ).

²¹ *Kingswell v The Queen* (1985) 159 CLR 264, 300 (Deane J); *Krakover v The Queen* (1998) 194 CLR 202, 224 (McHugh J).

²² *Baker v Campbell* (1983) 153 CLR 52, 71 per Gibbs CJ; *Corporate Affairs Commission v Yuill* (1991) 172 CLR 319, 346 (McHugh J); *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121, 161 (McHugh J).

²³ *Incorporated Council of Law Reporting (Q) v Federal Commissioner of Taxation* (1971) 125 CLR 659, 672 (Windeyer J).

²⁴ *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 35 (Gibbs CJ).

²⁵ *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197, 239 (Brennan J); *Jago v District Court (NSW)* (1989) 168 CLR 23, 76 (Gaudron J).

²⁶ *R v Shrestha* (1991) 173 CLR 48, 60 per Brennan and McHugh JJ; *Leeth v The Commonwealth* (1992) 174 CLR 455, 485 (Deane and Toohey JJ).

²⁷ *Taikato v The Queen* (1996) 186 CLR 454, 465-466 (Brennan CJ, Toohey, McHugh and Gummow JJ).

²⁸ Katie Walsh, *Rule of law institute's Nick Cowdery backs 'leadership' on same-sex marriage* (31 August 2017) <<http://www.afr.com/business/legal/rule-of-law-institutes-nick-cowdery-backs-leadership-on-samesex-marriage-20170828-gy5had#ixzz4rqoIXF9R>>.

²⁹ Law Council of Australia, *Rule of Law Principles* (2017) <<https://www.lawcouncil.asn.au/policy-agenda/international-law/rule-of-law>>.

A further principle of the rule of law is that states must comply with their international legal obligations whether created by treaty or arising under customary international law. That is, both states and individuals are entitled to expect that other states will comply with and honour their international legal obligations, including obligations relating to the promotion and protection of human rights. States must avoid inconsistencies between their international legal obligations and their domestic laws and policies.

National interest

In democracies such as our own we are fortunate that the exercise of State power in the national interest is dependent upon compatibility with the rule of law. As the concept of the rule of law is amenable to evolution so too is the concept of 'national interest'.

The national interest may broadly include matters that seek to pursue Australia's national security, defence, economy, environment, society and culture.

Former High Court Justice Kirby interpreted the 'national interest' as involving an emergency or threat to the nation as a whole.³⁰ He noted that the expression national interest is different from the 'public interest' and could potentially cover a broad range of considerations resulting in the inability to confine its meaning.³¹ A national interest requirement can be a feature of statute which is not readily otherwise defined. It can be a precondition to the exercise of discretion by the executive as conferred by relevant statutory provisions. It can often be the basis for the exercise of statutory executive power which significantly interferes with the rights and freedoms of individuals.

There is a view that the concept of 'national interest', or as the French might say *raison d'État* (reason of State), is incompatible with the rule of law. In these uncertain times in which we live where we have seen terror attacks across the globe, tensions have arisen between the need to promote national security and public safety and the legality of measures taken to do so. Some consider the national interest in, for example, 'keeping Australians safe' to be paramount.

Former Chief Justice of the Israeli Supreme Court, Aharon Barak, explained the dilemma faced by democratic countries in *Public Committee Against Torture v Government of Israel*, where his Honour said that:

"While terrorism poses difficult questions for every country, it poses especially challenging questions for democratic countries, because not every effective means is a legal means... Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties."³²

In that case, the Israeli Supreme Court, sitting as the High Court of Justice, considered the legitimacy of certain 'enhanced interrogation' techniques used by security forces against suspected terrorists. While the Government of Israel argued that they were necessary to extract information from suspected terrorists about impending attacks that threatened human life and public safety, the High Court found the techniques were illegitimate, notwithstanding the state of emergency that has been declared in Israel since its establishment.

³⁰ *Re Patterson* (2001) 207 CLR 391, 503 [332] (Kirby J).

³¹ *Ibid* 502 [330]-[331].

³² HC 5100/94, *Public Committee Against Torture in Israel v Government of Israel*, 53(4) PD 817, 845.

An unelected judiciary are seen to have limited ability to determine the scope of the national interest. Unlike the UK and the US, there is no doctrine prohibiting the courts from reviewing 'political questions', however courts in Australia have shown themselves reluctant to intervene in certain matters.

Nonetheless, as former Justice McHugh has said, speaking extrajudicially, the principal function of the judiciary is to uphold the rule of law, and it follows that, where necessary, the judiciary must speak out publicly against any attempt by the legislature or the executive to undermine the rule of law. In this context, the judiciary have primacy in ensuring that the executive operates within the confines of the law in exercising its power in the 'national interest'. This may involve:

- Judicial review of decisions and grounds of review;
- Validity of decision making on account of jurisdictional error where a jurisdictional fact necessary for the exercise of the power does not exist;
- Natural justice in determining the basis in which national interest decisions are made;
- Failures to consider relevant factors; and
- Actions done in good faith, not for an improper purpose and the exercise of discretion in the absence of bias (actual or apprehended).

For example, in *Church of Scientology v Woodward*,³³ the High Court found that decisions made by the Australian Security Intelligence Organisation, ASIO, could be subject to judicial review to ensure it had not acted beyond power. Former Justice Brennan observed that:

*"Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly."*³⁴

That said, the Court acknowledged that, in practice, it would be difficult to obtain the documents relevant to determining whether its power had been exercised validly, a complication to which I will return later.

In another case, *A v Hayden*,³⁵ the High Court had to consider whether the executive government could exempt operatives from the Australian Secret Intelligence Service, or ASIS, from the operation of the criminal law, under the guise of 'national security'. The ASIS officers had been authorised by the Minister for Foreign Affairs to conduct a 'hostage rescue' training exercise at the Sheraton Hotel in Melbourne. Unfortunately, someone forgot to tell the hotel staff, who must have been quite taken aback when ASIS officers broke down a door with a sledgehammer and brandished weapons in the hotel. Perhaps unpredictably, the Police were called, who sought to investigate the ASIS officers to determine if they had violated Victorian law. On whether the government could authorise the operatives to violate the criminal law, Justice Brennan found that:

"The incapacity of the executive government to dispense its servants from obedience to laws made by Parliament is the cornerstone of a parliamentary democracy... The

³³ (1982) 154 CLR 25.

³⁴ *Ibid* [5].

³⁵ (1984) 156 CLR 532.

*principle... is that all officers and ministers ought to serve the crown according to the laws... This is no obsolete rule; the principle is fundamental to our law, though it seems sometimes to be forgotten when executive governments or their agencies are fettered or frustrated by laws which affect the fulfilment of their policies.*³⁶

While Justice Brennan was writing in 1984, his Honour's words remain relevant today, where the executive government has found itself frustrated or fettered, by the High Court in the fulfilment of some of its policies in pursuit of the 'national interest'. I will now turn to some examples in the migration and national security contexts where government action in the 'national interest' has potentially encroached upon the rule of law and how this has affected justiciability in those instances.

Examples in migration and national security contexts

Section 501 of the Migration Act and Migration Amendment (Validation of Decisions) Bill 2017

Section 501 gives the Minister the power to refuse or cancel a visa on character grounds. Section 501(3) states that the Minister may refuse or cancel a visa if the Minister reasonably suspects that the person fails the character test, *and* the refusal or cancellation is in the national interest. Neither section 501 nor the Migration Act more broadly define or provide guidance on the matters relevant to determining whether something is in the 'national interest'. The determination of whether refusing or cancelling a visa on character grounds is in the 'national interest' is one entrusted by Parliament to the Minister.³⁷ The High Court has found that what is in the 'national interest' is largely a political question,³⁸ and courts have generally shied away from intruding upon that determination.

Section 501(3) provides that natural justice does not apply to a decision of the Minister to refuse or cancel a visa made under that section.

As noted by the Australian Law Reform Commission, or ALRC, in their report on the encroachment of Commonwealth laws on traditional rights and freedoms, natural justice, or procedural fairness, is an 'important component of the rule of rule'.³⁹ The ALRC recommended that migration laws that oust natural justice, like section 501, should be the subject of review to determine if their encroachment on the right to procedural fairness is justified.

For the purposes of making a decision under section 501, the Minister may receive secret information from gazetted intelligence agencies. Section 503A purports to allow the Minister not to disclose that secret information to a court, tribunal or parliament. Two High Court cases, *Graham* and *Te Puia*, involving two visa holders who had their visas cancelled based on secret information received by the Minister, which he refused to disclose, challenged the constitutional validity of that section.

While judgment in the cases was reserved, the government introduced the *Migration Amendment (Validation of Decisions) Bill 2017* (Validation of Decisions Bill). The Validation of Decisions Bill sought to make previous decisions made by the Minister under section 501, relying on information provided under section 503A, valid. The Bill was

³⁶ *Ibid* [6].

³⁷ *Roach v Minister for Immigration and Border Protection* [2016] FCA 750 [183].

³⁸ *Plaintiff S156/2013 v Minister for Immigration and Border Protection* [2014] HCA 22 [40]; see also *ibid*.

³⁹ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2016) [14.1].

intended to have retrospective effect and address the concern that those decisions may otherwise be found to be invalid by the High Court when it handed down its judgment. On 5 September 2017, the Bill passed both houses of Parliament and received Royal Assent.

While it is not unusual for the government to introduce remedial legislation after the High Court has found certain laws to be invalid, it is unusual for the government to do so before the High Court has ruled on the validity of the legislation being challenged. This raises concerns regarding the separation of powers, namely, allowing the court to do its job. It is a principle of the common law that statutes will be assumed not to have retrospective effect. It is generally considered not to be consistent with the rule of law for the government to retrospectively change individuals' rights and obligations, though it can be justified in some instances. It will be interesting to observe moving forward how the High Court's finding that section 503A is constitutionally invalid will be addressed by the executive government, both in respect of the particular section and migration law more generally.

On 6 September 2017, the High Court found section 503A to be unconstitutional.⁴⁰ The Court found that the section improperly sought to curtail the power conferred by the Constitution on the High Court and the Federal Court, respectively, to adjudicate whether the Minister had lawfully exercised his power, by limiting the court's access to information relevant to the decision the subject of review. Therefore, decisions made by the Minister to cancel visas in *Graham* and *Te Puia* based on secret information were invalid. Nonetheless, less than an hour after the High Court handed down its judgment, the Minister for Immigration cancelled Mr Graham's visa again.

This is the third time that the Minister for Immigration has revoked a visa less than an hour after the High Court has found that his original decision to cancel the visa was invalid. While executive governments are free to respond to judgments of the High Court as they see fit, within the law, the swiftness of the Minister's actions raises questions as to the respect had for the independence of the judiciary. As the highest court in the land, the judgments of the High Court regarding the legitimacy of the exercise of executive power should be carefully read, analysed and digested by before action is taken. I am reminded of a quote from former Chief Justice Gleeson, where he said that:

"It is self-evident that the exercise of jurisdiction such as this – judicial review – will, from time to time, frustrate ambition, curtail power, invalidate legislation, and fetter administrative action. As the guardian of the Constitution, the High Court from time to time disappoints the ambitions of legislators and governments. This is part of our system of checks and balances. People who exercise political power, and claim to represent the will of the people, do not like being checked or balanced."⁴¹

Some consider that this tension between the High Court and the executive branch to be positive, the sign of a 'healthy and well-oiled, working government'.⁴² Others, like former High Court Justice McHugh, have been less optimistic. Speaking almost fifteen years ago, though the tension of which he speaks remains true today, he said:

"If tension persists, as it has done in the migration area in recent years, it damages the public interest. If the executive government is continually criticising the judiciary, the

⁴⁰ *Graham v Minister for Immigration and Border Protection & Anor; Te Puia v Minister for Immigration and Border Protection & Anor* [2017] HCA 33.

⁴¹ Murray Gleeson, 'Legal Oil and Political Vinegar' (1999) 10 *Public Law Review* 108, 111.

⁴² Michael McHugh, 'Tensions between the executive and the judiciary' (Speech delivered at the Australian Bar Association Conference, Paris, 10 July 2002)

<http://www.hcourt.gov.au/assets/publications/speeches/former-justices/mchughj/mchughj_paris.htm#42Note>.

*authority of the courts of justice is likely to be undermined and public confidence in the integrity and impartiality of the judges is likely to be diminished. Continuing conflict is also likely to induce the executive government to prevail on the legislature to take the extreme step of reducing or abolishing judicial review with the result that the rule of law is undermined.*⁴³”

As former Justice McHugh predicted, recall that section 501(3) specifically ousts judicial review. In addition, the Minister for Immigration has recently argued that it is in the ‘national interest’ he be granted a ‘ministerial veto’ to override those decisions of the Administrative Appeals Tribunal which overturn the Minister’s findings that a person is not of ‘good character’ for the purposes of obtaining citizenship.

Aside from reducing the opportunity for review by the courts, there are other ways that the executive government can reduce scrutiny of its decisions and actions in the migration area, in the ‘national interest’, potentially eroding the rule of law.

Australian Border Force Amendment (Protected Information) Bill 2017

An example is the *Australian Border Force Act 2015* (Cth) which prohibits the disclosure of almost all information pertaining to immigration and customs operations in Australia and offshore by almost everyone providing services to the Australian Border Force, liable to imprisonment for two years. This includes prohibiting persons from reporting on conditions in offshore and regional processing centres, except for doctors, who have previously won an exemption from the operation of the principal Act. The Bill seeks to ameliorate some of the concerns regarding the principal Act.

It is interesting to note the references in the Explanatory Memorandum justifying the secrecy provisions of the Bill on the basis of the ‘national interest’. For example:

- ‘This Bill clarifies the policy and legislative intent, which is to protect certain information from unauthorised disclosure to prevent harm to national and public interests, while meeting the expectations of the Australian community of transparency and accountability within the Australian Government’;
- ‘Mishandling of information can cause significant damage to the national and public interest’; and
- ‘The secrecy and information disclosure provisions enable information to be shared within Australia and internationally in furtherance of the national and public interest, and balanced against possible harms. As such, this Bill is consistent with Article 19 of the ICCPR [freedom of expression and communication]’.

However, questions have been raised as to whether the Bill does enough to ameliorate concerns that the principal Act encroaches on freedom of expression. On 5 September 2017, the Parliamentary Committee on Human Rights published a report finding that the Bill ‘engages and limits the right to freedom of expression’ and ‘raises concerns that the measure is not a proportionate measure on the right to freedom of speech’. While there is a public interest in maintaining the confidentiality of some government information, there is also public interest in maintaining an open and accountable government. It may be difficult to achieve balance, but it is necessary, and it is possible. The Law Council, for example, has suggested the introduction of an exemption to the secrecy provisions for disclosures in the public interest.

⁴³ Ibid.

The National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)

Moving away from migration, the justification of 'national interest' arises also in the national security sphere. The *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)* (NSI Act) contains a power which allows certain information to be declared 'national security information' which henceforth protects it from disclosure in federal criminal and civil proceedings on the basis that its disclosure would prejudice national security. The NSI Act also contains provisions that impeded the ability of a defendant to choose their own lawyer as the NSI Act prohibits persons from hearing parts of proceedings without the appropriate security clearance.

Here, the relevant 'national interest' is national security, especially as it concerns information or intelligence related to terrorism. However, this must be balanced against the individual's right to a fair trial, including the right to representation and the public interest in a fair and open judicial system. In relation to the right to representation, the NSI Act potentially restricts a person's right to a legal representative of his or her choosing by limiting the pool of lawyers who are permitted to act in cases involving classified or security sensitive information. Further, the security clearance scheme threatens the independence of the legal profession by potentially allowing the executive arm of government to effectively 'vet' and limit the class of lawyers who are able to act in matters which involve, or which might involve, classified or security sensitive information.

'Call out' powers of the ADF

Also in relation to national security, Prime Minister Turnbull announced changes in July of this year which would increase Defence support for State and Territory police responses to terrorism.⁴⁴ Some of the proposed changes would require amendment to Part IIIAAA of the *Defence Act 1903 (Cth)*, including a provision which limits the ability of States and Territories to ask for ADF support and specialist military skills until their own capabilities have been exceeded.

The changes that would allow States and Territories to 'call out' the Australian Defence Force (ADF) to assist with terrorism responses, as well as the ADF providing training to certain sections of State and Territory police forces.

The Prime Minister explained in his press release that the changes would 'improve the nation's ability to respond to terrorism' and 'the Government's number one priority is keeping Australians safe'.

The key issues are whether the Commonwealth has the power to dispatch troops for matters that fall within the remit of the State and Territories, what powers ADF troops would have and what rules would govern their 'deployment' regarding the civilian population. Further, there is a 'slippery slope' concern that allowing the military to be called out for counterterrorism incidences may eventually lead to military being called out for ordinary police operations, like managing public demonstrations or protests, or non-police operations, like disrupting strike action, which would impact on civil liberties.

Military presence in the streets of Australian cities gives a perception of 'martial law' being in force. If the ability to 'call out' the ADF is going to be expanded, there is a need to clarify what rules would govern 'called out' troops and what powers they would have, to protect civilians and troops alike.

⁴⁴ Prime Minister of Australia, 'Defence Support to Domestic Counter-Terrorism Operations' (17 July 2017) *Australian Government* <<https://www.pm.gov.au/media/2017-07-17/defence-support-domestic-counter-terrorism-arrangements>>.

Conclusion

During the Second World War, President Roosevelt issued Executive Order 9066 which authorised sending Japanese-Americans to internment camps. Mr Korematsu, an American citizen of Japanese descent, challenged the Order in the Supreme Court of the United States, on the basis that notwithstanding the 'national interest' in national security, it violated the Fifth Amendment guarantee of equal protection under law. In *Korematsu v United States*,⁴⁵ the Supreme Court of the United States upheld the Order as constitutional, finding that it was a legitimate exercise of executive power in light of the 'threat posed' by Japanese-Americans given the US was at war Japan.

The case stands as a cautionary tale of the unchecked exercise of executive power and the potential ramifications of a judiciary unwilling to undermine an executive decision where the 'national interest' is implicated. While *Korematsu* is often held up as one of the worst decisions of the US Supreme Court, amazingly, it has not been overturned and remains good law. In his dissenting opinion, Justice Jackson warned of the corrosive impact the decision in *Korematsu* could have on the rule of law:

[An] order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period, a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.⁴⁶

It is difficult to forget Justice Jackson's words when we consider President Trump's recent Executive Order 13769, which imposed a 'travel ban' for persons travelling to the US from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen, including persons holding otherwise valid visas to enter the US. The order was justified by the administration on the basis of it being in the national interest to prevent terrorism and the listed countries apparently being source countries for terrorism. The Order became colloquially known as the 'Muslim ban' due to the countries which it targeted. However, the Order was challenged in the case of *Washington v Trump*,⁴⁷ and the court issued a nationwide injunction suspending the operation of the Order until the case could be decided, which was upheld on appeal. The case is still pending, and argues that the Order violates the Fifth Amendment (which guarantees equal protection under the law).

As a result of the injunction, Homeland Security stopped enforcing portions of the Order and visas cancelled under the Order were reinstated. However, the Supreme Court of the United States has since reinstated certain key provisions of the travel ban to apply only to foreign nationals who have no 'credible claim of a bona fide relationship with a person or entity in the United States' and set the case down for final consideration in October of this year.

It may be that the Supreme Court are able to avoid a decision either way – argument is set down for after the travel ban expires, and it is unclear whether or not it will be replaced. Some commentators have argued that this is a deliberate scheduling decision on behalf of the Supreme Court, as avoiding the case will allow the Supreme Court to

⁴⁵ 323 US 214 (1944).

⁴⁶ Ibid 246 (Jackson J).

⁴⁷ No 2:17-cv-00141 (WD Wash 2017).

avoid second-guessing the President on a matter of national security but also avoid endorsing a controversial and unpopular policy.⁴⁸

In any case, it will be interesting to observe how the Supreme Court handles legal challenges to the executive action of a President that appears to have an uncharacteristically wide interpretation of what falls within his power.

While these examples from the US seem to show expansive uses of executive power on the basis of the 'national interest' and would not necessarily be replicated in Australia, it is undeniable that section 61 and the executive power has widened overtime. In the *Wooltops* case,⁴⁹ executive power was seen to be limited to the execution and maintenance of the Constitution and of Commonwealth laws. This has become extended overtime to include prerogatives that vest in the right of the Commonwealth and the character of the Commonwealth as a national government.

The 'national interest' requirements are situated within this context and may be broadly defined to support views held by Ministers. Such determinations may involve serious matters for the conduct of Australia's domestic and international affairs, such in the examples relating to migration and national security that I discussed earlier.

No one would seriously suppose that executive findings relating to the content of what constitutes the national interest should be open to challenge by a court beyond judicial review to ensure the legality of such decisions as opposed to its factual or political merit. The High Court has said that the determination of what is in the 'national interest' is a political question and has left it aside.⁵⁰

Nonetheless, the role of the judiciary is critical in ensuring that decisions made in the national interest are made legitimately, that is, appropriately confined to processes determined by statute or the Australian Constitution, in accordance with the rule of law.

In that respect, I would like to conclude with a quote from former High Court Justice Dixon from the *Australian Communist Party v Commonwealth* case:

*"History...shows that in countries where democratic institutions have been constitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected."*⁵¹

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⁴⁸ Mark Sherman, 'How Supreme Court Justices could avoid issuing a verdict on Trump's travel ban' (19 September 2017) *PBS* <<http://www.pbs.org/newshour/rundown/supreme-court-justices-avoid-issuing-verdict-trumps-travel-ban/>>.

⁴⁹ *Commonwealth v Colonial Combing, Spinning & Weaving Co* (1921-1922) 31 CLR 421, 431.

⁵⁰ *Plaintiff S156/2013 v Minister for Immigration and Border Protection* [2014] HCA 22 [40].

⁵¹ (1951) 83 CLR 1, 187, quoted in *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 24 [10] (French CJ) 171 [497] (Heydon J).