Inaugural George Winterton Lecture
Sydney Law School, The University of Sydney

The Executive Power

Chief Justice RS French

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It is an honour to have been asked to deliver this inaugural lecture in celebration of the life and work of the late Professor George Winterton. It is nevertheless an honour tinged with sadness and one which I wish had not come to pass. George's death in 2008, although the result of an illness he had battled for a long time, was untimely. He still had much to give to constitutional scholarship in this country, to public debate about the republic and to his family, his wife Ros and their children, and to his friends, including Peter Gerangelos who organised this lecture.

I have chosen "The Executive Power" as my topic as it was a subject which occupied a significant part of George's scholarship. His book *Parliament, the Executive and the Governor-General: a constitutional analysis*[1], published in 1983, was a seminal work in the field. Professor Geoffrey Sawer at the time described it as "a most impressive piece of scholarship, quite the most thorough examination of the question yet written".

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[1] Winterton G, *Parliament, the Executive and the Governor-General: a constitutional analysis* (Melbourne: Melbourne University Press, 1983).

I do not pretend to match the breadth or the depth of George Winterton's thinking on the subject. His body of work and that of his colleagues in the Academy in this, as in other areas of legal scholarship, is neither forensic nor judicial. It is reflective and detached from the context of particular decision-making. It analyses, synthesises and criticises, and illustrates future possibilities flowing from choices yet to be made. In that sense it prophesises. The work of the Academy is cognitive and, in a non-pejorative sense, argumentative. George and his colleagues offer us perspectives, intellectual tools for viewing the problems we confront which can inform the choices that lawyers and judges make in lines of argument and in judgment**.**

As academic scholars are not in the business of writing judgments, neither are judges, in discharging their constitutional function, in the business of writing academic papers. The judging function is different. It is a species of decision-making. There is both a cognitive and a volitional dimension to it. Sometimes after argument and consideration a picture of a case will emerge which indicates an outcome that uniquely satisfies and completes that picture. The decision is then a kind of intellectual recognition. In many cases, however, the picture will be shifting and ill-defined and capable of accommodating a variety of answers to complete it. In such cases the end part of judging is volitional. That is to say it involves an act of will.

Executive power featured prominently in one of the decisions made by the High Court last year: *Pape v Federal Commissioner of Taxation*.[2] It also figured controversially in both political and legal senses in a decision in which I participated in

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[2] (2009) 238 CLR 1.

the Federal Court in 2001: *Ruddock v Vadarlis (No 2)*.[3] George Winterton and others wrote critically of the latter decision and no doubt there will be critical writing in relation to *Pape*. That is to be expected and welcomed. Sometimes academic criticism of judicial decisions, particularly in constitutional law, draws attention to their possible consequences and, where the reasoning is less than fulsome, to corresponding areas of uncertainty for future dispositions. That is also to be expected and welcomed. Without setting up a straw-person argument, it is important, however, to realise that it will rarely be the case that the judge or a court will, in a single judgment, articulate and settle a complete and coherent theory of the particular area of law with which the judgment is concerned. The predictive power of a judgment for the likely disposition of dissimilar cases in the same area is generally confined. The risk attending a judgment which enunciates larger theory than is necessary in important and contested areas of constitutional law is that it may legislate for the unimagined and, perhaps, the unimaginable case. It is not often, therefore, that judgments on large constitutional topics such as executive power will provide a complete explanation and definition of the content and limits of the relevant principle, rule, power, right or obligation, as the case may be. Dissatisfaction with this situation tends to be more prominent in relation to executive power because of its potential for abuse. And such dissatisfaction reflects one of two kinds of concern which are two sides of the same coin, namely, lawyerly anxiety about executive power and executive impatience about judicial review. It is useful to expand upon that theme by reference to an imagined case of abuse of executive power in the 24th century, albeit with connections in ancient Rome.

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[3] (2001) 115 FCR 229.

On 3 March 1999 an episode of the "Star Trek" series, "Deep Space Nine" was broadcast under the title "Inter Arma Enim Silent Leges". The Latin words were used by Starfleet Vice-admiral William Ross to justify a covert executive operation in breach of the laws of the Federation. His interlocutor and critic, Deep Space Nine Medical Officer, Dr Julian Bashir responded:

> In time of war, the laws fall silent. Cicero.
>
> So is that what we have become; a 24th century Rome, driven by nothing other than the certainty that Caesar can do no wrong?[4]

The idea for the title of the episode, according to a website dedicated to detailed analysis of Star Trek episodes, came from its screenwriter Ronald Moore. While the episode was in preparation he happened to be browsing in a bookstore and came across a book by Chief Justice William Rehnquist entitled *All the Laws but One: Civil Liberties in Wartime*.[5] The Latin words were used as the heading for the last chapter and also appeared on the dust jacket.[6] Given the plot, Moore thought the title apposite.

Chief Justice Rehnquist's use of the term "Inter Arma Silent Leges", as it appeared in his book, directed his readers to the conflicts that can arise between constitutionalism and the imperatives of executive governments in what are said to be extreme circumstances. That conflict was exemplified in the suspension by President Abraham Lincoln of habeas corpus during the course of the American Civil War. The

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[4] Memory Alfa, The Star Trek Wiki.

[5] Rehnquist WH, *All the Laws but One: Civil Liberties in Wartime*, (Alfred A Knopf, New York, 1998).

[6] Absent the word "enim".

suspension was justified by a contentious construction of s 9 par (2) of Art 1 of the Constitution of the United States which provides:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

The difficulty with the invocation of that provision as a source of executive power was that it appeared in Art 1 of the Constitution which was concerned with legislative power. Its application by the President was rejected by the Chief Justice of the US Supreme Court, Roger Taney, in a challenge by one Merryman who had been arrested by the Union Military in Baltimore. Lincoln disregarded the Chief Justice's opinion and asserted to Congress that in an emergency, when Congress was not in session, the President had the authority to act under s 9. In discussing Lincoln's actions and the like justification upheld by the Supreme Court for President Franklin Roosevelt's forced relocation of Japanese Americans during the Second World War, Chief Justice Rehnquist in a speech delivered in 2000 said:

> While we would not want to subscribe to the full sweep of the Latin maxim – Inter Arma Silent Leges – in time of war the laws are silent, perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice.[7]

The same Latin epigram was used by Lord Atkin in a famous passage in his dissent in *Liversidge v Anderson*[8] in 1942. That case concerned the *Defence (General) Regulations 1959* (UK) under which a person could be detained upon a determination

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[7] Remarks of Chief Justice William H Rehnquist, 100th Anniversary Celebration of the Norfolk and Portsmouth Bar Association, Norfolk, Virginia, 3 May 2000. www.supremecourtus.gov/publicinfo accessed 14 February 2010.

[8] [1942] AC 206.

by the relevant Secretary of State. Lord Macmillan, one of the majority, described the enabling Act as a law which involved "… interferences with the citizen's most cherished rights of person and property".[9] Nevertheless, he saw it as a law regarded by the Parliament as "necessary and proper in the present grave national danger".[10] Against that reasoning and turning the Latin epigram on its head, Lord Atkin said:

> In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. [11]

He viewed with apprehension the attitudes of judges who "on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive".[12] As the Master of the Rolls, Lord Neuberger said in a lecture delivered last year in honour of Lord Atkin:

> Lord Atkin's point is that Cicero's plea to a higher law justifying all and any steps taken in the executive's sole discretion as to what is in the common good leads inexorably to tyranny. [13]

The reference to Cicero takes us back to 63BC and to the author of the statement in its original form "Silent enim leges inter arma". It seems to have been in truth a statement Cicero made about a person's right, according to what he called a "higher

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[9] [1942] AC 206 at 252.

[10] [1942] AC 206 at 252.

[11] [1942] AC 206 at 244

[12] [1942] AC 206 at 244.

[13] Lord Neuberger MR, "The Equity of Human Rights – The Atkin Lecture 2009" The Reform Club, London, 5 November 2009.

law", of self defence against attack. It has, however, been applied, as has been seen, out of that context to debates about executive power in times of asserted emergency. That generalisation was one with which Cicero was familiar. It was expressed in another way in a form of emergency decree utilised from time to time by the Roman Senate:

> Videat consules nequid respublica detrimenti capiat – Let the consuls take care that the republic suffer no harm.

It was with those words that the Roman Senate on occasions of imminent danger to the State "invested its elected consuls with absolute power and suspended all the ordinary forms of law until the danger was over".[14] And it was with the backing of that decree that Cicero, as Roman Consul, denounced his unsuccessful and plotting rival Lucius Catiline in the Senate and effected the apprehension of some of his co-conspirators.

The imagined future history of Star Trek and the real past history of the United States, the United Kingdom and the Roman Republic of 63BC illustrate, albeit by reference to extreme cases, the enduring tension between executive power and the rule of law. That tension is not confined to the circumstances of war or civil strife. It may arise in politically sensitive areas of executive decision-making or where the executive government has a program of action including the implementation of legislation and limited time to put it in place between elections. The tension between the imperatives of executive government and the rule of law is sometimes manifested in official impatience with legal processes and the view that they are an interference with and impose unnecessary transaction costs on good government. A rather clear example of that view was seen in an argument put in the 2001 Tampa Case. Having succeeded on appeal, the Commonwealth applied for an order for costs against Liberty Victoria and

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[14] Yonge CD, *Select Orations of MT Cicero* (1860) at 1.

Mr Vadarlis who had sought habeas corpus for the asylum seekers on board the Tampa. The claim for a costs order was resisted with the argument that the litigation had been brought in the public interest and that the public interest would, on occasion, justify departure from the normal order that costs follow the event. The Commonwealth contended that the litigation was contrary to the public interest because it involved interference with what had been found to be lawful action by the executive under s 61 of the Constitution. The argument was rejected by the Full Federal Court in a joint majority judgment in the following terms:

> It is not an interference with the exercise of Executive power to determine whether it exists in relation to the subject matter to which it is applied and whether what is done is within its scope. [15]

Executive concern about the burdens imposed upon government by judicial review has from time to time been translated into legislation in the form of privative provisions seeking to prevent or limit access to the courts. Such provisions have a long history in the United Kingdom and in Australia. Generally they have failed to preclude judicial review of the lawfulness of executive decisions. In Australia, which has a written Constitution with a distribution of powers between Commonwealth and State parliaments, no decision-maker has carte blanche. Unlimited power would be unconstitutional power. Moreover, there is a constitutionally entrenched jurisdiction in the High Court to entertain applications for judicial review of the decisions of officers of the Commonwealth where mandamus, prohibition or an injunction is sought.[16] In the United Kingdom and Australia privative clauses have been interpreted so as to limit considerably their impact upon judicial review. These interpretive approaches reflect

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[15] *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at 242 [30].

[16] Constitution, s 75(v).

the concern that executive power without legal constraint would mean, as Lord Denning observed more than 50 years ago, that "the rule of law would be at an end".[17]

The constitutionally entrenched jurisdiction of the High Court to review decisions of officers of the Commonwealth, a jurisdiction which extends to Ministers of the Crown and also to federal judges, is a bulwark of the rule of law which we owe to Andrew Inglis Clark, one of the drafters of the Constitution who was the Attorney-General of Tasmania in 1891. We also owe it indirectly to the decision of John Marshall, Chief Justice of the United States in the famous case of *Marbury v Madison*,[18] decided in 1803. The decision in *Marbury v Madison* was of historic significance in the United States because it asserted the power of the Supreme Court of the United States to decide that a law of the United States legislature was void if it exceeded the law-making power conferred upon the legislature by the Constitution. Importantly for Australia, the law which was struck down in *Marbury* would have conferred on the Supreme Court original jurisdiction to issue writs of mandamus to public officers of the United States. Marshall CJ held that the Constitution of the United States did not authorise the conferring of that original jurisdiction.

Eighty eight years later in time, and half a world away, Andrew Inglis Clark in Tasmania was preparing his draft constitution for the proposed Australian Federation. He was a great admirer of the democracy of the United States which he had visited. He was familiar with the writings of its founding fathers. He had read *Marbury v Madison*. He was a great believer in legal limits on official power enforced by the judiciary. In an article published in the *Harvard Law Review* in November 1903 he wrote:[19]

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[17] *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574 at 586.

[18] 5 US (1 Cranch) 137 (1803).

[19] Inglis Clark A, "The Supremacy of the Judiciary under the Constitution of the United States, and under the Constitution of the Commonwealth of Australia" (1903) 17 *Harvard Law Review* 1 at 18-

Footnote continues

> The supremacy of the judiciary, whether it exists under a federal or a unitary constitution, finds its ultimate logical foundation in the conception of the supremacy of law as distinguished from the possession and exercise of governmental power.

Because of Clark's concern about the deficiency in the original jurisdiction of the US Supreme Court exposed in *Marbury v Madison*, he included in his Draft Constitution a clause designed to avoid that deficiency. Jurisdiction was to be conferred on the High Court in "all cases in which a writ of mandamus of prohibition shall be sought against a Minister of the Crown of the Federal Dominion of Australia." His clause was accepted by the Convention with the substitution of the words "an officer of the Commonwealth" for "a Minister of the Crown of the Federal Dominion of Australia".

The Convention process went into abeyance for a time after 1891, but was revived with more broadly based political support in 1897. Surprisingly, at a Convention session in Melbourne in 1898, at which Clark could not be present, his proposed provision was dropped. Those who moved its exclusion had apparently not read *Marbury v Madison* and misapprehended what was in the US Constitution. The primary opposition to the provision came from Isaac Isaacs. Isaacs said:

> I think I am safe in saying that the power is not expressly given in the United States Constitution, but undoubtedly the Court exercises it.[20]

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19. See also Williams J, "'With Eyes Open': Andrew Inglis Clark and our Republican Tradition", (1995) 23 *Fed Law Rev* 149 at 158.

[20] *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 1898, at 321.

He was not safe in saying that. He also ran an argument that specific reference to mandamus and prohibition might by implication have excluded other remedies.[21] The other delegate who spoke on the matter was Henry Bourne Higgins. He said, reflecting an erroneous understanding of the American Constitution:

> This provision was in the Bill of 1891, and I thought it was taken from the American Constitution.[22]

Clark, who was in Hobart, was informed of what had happened and sent a telegram to Edmund Barton. He reminded Barton of the decision in *Marbury v Madison*. Barton, who may well have been embarrassed by the errors that led to the omission of the provision, wrote back to Clark:

> I have to thank you further for your telegram as to the striking out of the power given to the High Court to deal with cases of mandamus and prohibition against Officers of the Commonwealth. None of us here had read the case mentioned by you of *Marbury v Madison* or if seen it had been forgotten – it seems however to be a leading case. I have given notice to restore the words on the reconsideration of the clause.[23]

At the continuation of the Melbourne Convention in March 1898, Barton moved the reinsertion of the subsection.[24] He referred to *Marbury v Madison* and quoted from the judgment. Nowhere in his speech, as recorded in the Convention Debates, was Clark given credit for the intervention that led to the restoration of the clause. Perhaps everybody remembered that Clark had proposed it in the first place. Barton acknowledged that absent the inclusion of the provision it might be held in Australia

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[21] Ibid.

[22] Ibid.

[23] La Nauze JA, *The Making of the Australian Constitution*, (Melbourne University Press, 1972) at 234.

[24] *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 1898 at 1875.

that the Courts should not exercise the power and that even a statute giving them the power would not be of any effect. He then said:

> … I think that that, as a matter of safety, it would be well to insert these words.[25]

Another delegate, Mr Symons, said: "They cannot do any harm."[26] Barton responded in terms which in the light of history may be seen as masterly understatement: "They cannot do harm and may protect us from a great evil."[27]

Mandamus and prohibition were known at common law as prerogative writs. The writs for which s 75(v) provides have been designated by the High Court as "constitutional writs". The Court explained why in its decision in *Bodrudazza*[28] in 2007. The Court referred to the interaction between the remedies and the federal structure of the Constitution and said:

> … what was to be protected in the Australian constitutional context was not only the rights of all natural and corporate persons affected, but the position of the States as parties to the federal compact, and jurisdictional error might arise from a want of legislative or executive power as well as from decisions made in excess of jurisdiction itself validly conferred. It is out of its recognition of these features of the remedies provided by s 75(v), and their high constitutional purposes, that in more recent years this Court has described the remedies there provided as "constitutional

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25 *Official Record of the Debates of the Australasian Federal Convention,* (Melbourne), 1898 at 1876.

26 Ibid.

27 Ibid.

28 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.

> writs", rather than (as earlier and historically in England) as "prerogative writs".[29] (Footnotes omitted)

The purpose of s 75(v) was described by Sir Owen Dixon in *Bank of New South Wales v The Commonwealth*[30] as being to "make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power".[31] In *Bodruddaza* the judges elaborated upon what Dixon J had said linking the purpose of s 75(v) to the essential character of the judicial power. The object of preventing officers of the Commonwealth from exceeding federal power was not to be confined to the observance of constitutional limitations on the executive and legislative powers of the Commonwealth:

> An essential characteristic of the judicature provided for in Ch III is that it declares and enforces the limits of the power conferred by statute upon administrative decision-makers. [32]

Section 75(v) furthered that end through the control of "jurisdictional error". A decision affected by jurisdictional error will be vitiated and will be amenable to the writs and to certiorari. The words "jurisdictional error" are linked to the history of the ancestors of the constitutional writs. They were the prerogative writs generated by the Royal Courts of Justice in England to restrain inferior courts from exceeding their powers. The application of jurisdictional error in relation to administrative decisions today is

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[29] (2007) 228 CLR 651 at 665-666 [37].

[30] (1948) 76 CLR 1.

[31] (1948) 76 CLR 1 at 363.

[32] (2007) 228 CLR 651 at 668.

concerned with the limits of executive power exercised under statute or directly under the Constitution.[33]

Examples of jurisdictional error include a mistake of law which causes the decision-maker to identify a wrong issue, or ask itself a wrong question, ignore relevant material or rely upon irrelevant material. In some cases a decision-maker may make an erroneous finding or reach a mistaken conclusion on the basis of which its authority or powers are exceeded. Other aspects of executive decision-making which may be challenged in the exercise of the constitutional jurisdiction may include bad faith or a breach of the rules of procedural fairness by the decision-maker. Those rules of procedural fairness are taken to apply to the exercise of public power unless clearly excluded.[34]

The sensitivity of decision-making under the *Migration Act 1958* (Cth), particularly in relation to asylum seekers, led to the attempt by government in 2001 to limit or preclude judicial review in that area. A privative clause was inserted in the *Migration Act* to provide, in respect of decisions made under that Act, that they:

- were final and conclusive;
- must not be challenged, appealed against, reviewed, quashed or called in question in any court;
- were not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.[35]

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[33] As to the equivalence of jurisdictional error and excess of power see Aronson M, Dyer B and Groves M, *Judicial Review of Administrative Action*, 4th ed, 2009 [1.70].

[34] *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 per McHugh J at 93 [126].

[35] *Migration Act 1958* (Cth), s 474.

Had that section on its proper construction operated to oust the jurisdiction conferred by s 75(v) of the Constitution it would no doubt have been invalid. However, in *Plaintiff S157 v The* Commonwealth[36] the Court held that the privative clause did not oust the jurisdiction because it did not extend to decisions affected by jurisdictional error. Such decisions were not decisions made under the Act. The section was read so as not to refer to decisions vitiated by jurisdictional error. This left open the full application of the constitutional jurisdiction under s 75(v).

The importance of s 75(v) as an aspect of the rule of law in relation to executive power was underlined by an observation in *Plaintiff S157*:

> The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them.[37]

In order to avoid the High Court being swamped with cases brought in its original jurisdiction under s 75(v), the like jurisdiction has been conferred by statute upon the Federal Court of Australia and the Federal Magistrates Court. If a case is brought in the High Court under s 75(v) which could be heard in one or other of those courts, then the High Court has the power to remit the matter to the lower court.

The tension between executive and judicial powers, at least in Australia, should not be viewed as acute or dysfunctional. It is probably best viewed as distributed across

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[36] (2003) 211 CLR 476.

[37] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [104].

a spectrum of intensities manifested in different ways at different times responding to different sets of circumstances in ways that are often historically familiar. As history illustrates, wartime conditions may bring it to the fore. Threats of civil strife or disorder or emergency such as natural disasters may also see it more sharply on display. And even under what most would regard as normal peacetime conditions, there are areas of political sensitivity which have given rise to apparent conflict between the executive and the courts.

As to the latter, I speak with some understanding of the executive perspective. As President of the National Native Title Tribunal from 1994 to 1998 I was making administrative decisions under a new statute in a politically and legally charged environment. Subjection to judicial review went with the job. In *North Ganalanja Aboriginal Corporation v The State of Queensland*[38] my application of a statutory test to refuse registration to a claim lodged over the Century Zinc site in Far North Queensland was described by the High Court as "practically tantamount to a proleptic exercise of the jurisdiction of the Federal Court".[39] The High Court set aside my decision with such enthusiasm that they did so upon the close of argument and gave reasons later. Aboriginal applicants in the Court wore Tee-shirts bearing the legend "Ban French Testing".

The other side of the coin of executive impatience with legal process is anxiety by lawyers and legal academics about executive power. This anxiety is perhaps informed by a perception that while the judiciary is "the least dangerous branch" of government, it is the executive which is the most dangerous branch. That perception is fed by the vast array of powers with which the executive is invested by statute and

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[38] (1996) 185 CLR 595.

[39] (1996) 185 CLR 595 at 623.

otherwise, and its control of public finances albeit subject to the requirements of prior approval by parliament in the form of an appropriation.

The impatience and anxiety to which I have referred are concerned with two sides of the one governmental coin. Executive power is essential to the functioning of government. Judicial power is essential to the rule of law. Ultimately the judicial power relies not only upon the confidence of the people but also upon the power of the State to make its exercise effective. Importantly, it is not the only constraint, nor always the most significant constraint upon the abuse of executive power. In a responsible government where ministers are truly answerable to the parliament and where there is a vigorous, sceptical and well-informed media**,** political realities can impose their own limits upon what even a powerful executive can do.

Lawyerly concern about the risks of unchecked executive power was typified in the judgment of Sir Owen Dixon in the *Communist Party Case* when, in a much quoted passage, he said:[40]

> History … shows that in countries where democratic institutions have been unconstitutionally 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.

That concern is underpinned in part by the difficulty, not limited to Australia, of defining the content and limits of this branch of government power. In a collection of essays published in 2006, Professors Paul Craig and Adam Tomkins referred to what they called "[t]he inadequacy of formal constitutional definitions of executive power"

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[40] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 187.

and described it as "a widely shared phenomenon".[41] They offered as examples the Constitutions of the United States, Australia, Canada, New Zealand and Germany. In each of these Constitutions there are gaps and silences in relation to the executive. Although Craig and Tomkins did not expressly mention India, its Constitution has been held to confer executive power which mirrors the legislative powers of the national parliament but does not require statutory authority. This is in addition to powers conferred by statute.[42] The relevant article in the Indian Constitution is positively spare compared to our own. It provides:

> The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

George Winterton observed of the Indian Constitution that it was said to be the longest in the world and "might have been expected to delimit federal executive power both from State executive power and federal legislative and judicial powers".[43]

Justice PB Mukarji, writing in 1967 about the Indian Constitution suggested in fairly stark but persuasive terms that definitional difficulty is inherent in the nature of executive power:[44]

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[41] Craig P and Tomkins A (eds) *The Executive and Public Law* (Oxford University Press, 2006) at 4.

[42] *Rai Sahib Ram Jawaya Kapur v State of Punjab* (1955) 2 SCR 225 and see the discussion in Le Roy K and Saunders C (eds) *Legislative, Executive and Judicial Governance in Federal Countries* (McGill-Queens University Press, 2006) at 178.

[43] Winterton G, "The Relationship between Commonwealth Legislative and Executive Power" (2004) 25 *Adelaide Law Review* 21 at 23.

[44] Mukarji PB, *Critical Study of the Indian Constitution 9-10* (Bombay University Press, 1967) cited in Vijayakumar V, *Contemporary Challenges to Executive Power: The Constitutional Scheme and Practice in India*.

> … executive power can never be constitutionally defined and all constitutional efforts to define it must necessarily fail. Executive power is an undefinable, multi-dimensional constitutional concept varying from time to time, from situation to situation and with the changing concepts of State in political philosophy and political science … Executive power is nothing short of "the whole state in action" in its manifold activities. In one sense the legislative power and the judicial power, in order to graduate from phrase to facts have finally to culminate in executive power to become effective.

There is debate in the United States also about the scope of the executive power conferred by Art II of its Constitution. On a narrow view the Article would be confined to the specific subject areas set out in it. A wider view would regard those subject areas as non-exhaustive and focus upon the opening words of the Article "The executive power shall be vested in a President of the United States of America …". On that view, the President has the powers which were understood to be executive powers at the time that the Constitution was drafted.[45]

Australia's Constitution says a great deal about legislative power in Ch I. It also says a great deal about judicial power in Ch III. Like the Constitution of the United States and also that of Canada, what it has to say about executive power in Ch II is considerably less fulsome. George Winterton made the point in his book *Parliament, the Executive and the Governor-General* when he wrote: [46]

> A constitution which, like the Australian, embodies both federalism and the separation of powers must, in its definition of legislative, executive and judicial powers, define the ambit of those powers relative both to

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[45] Young EA, "Taming the Most Dangerous Branch: The Scope and Accountability of Executive Power in the United States" in Craig P and Tomkins A (eds) *The Executive and Public Law* (Oxford University Press, 2006) at 164.

[46] Winterton G, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) at 27.

> each other and to the powers of the States. But while this was done in some detail in respect of legislative and judicial powers, the equivalent provision for executive power – s 61 – was remarkably cryptic; indeed, it has been suggested that it was deliberately left vague.

Professor Michael Crommelin has also described Ch II of the Constitution as "'suggestive rather than expressive' concerning the distribution of executive power".[47]

Professor Winterton essayed a description of executive power under our Constitution by reference to what he called "its depth and its breadth" and sought to define its limits. Before turning to that description, it is useful to recall how our Constitution came to provide for the executive.

Chapter II of the Constitution, which deals with the executive, was debated in the 1891 Convention. It was said at the time by Samuel Griffith to embody "… what is known to us as the British Constitution as we have it working at the present time". But the purpose of the 1891 draft in its application to the executive was not to be made "… so rigid that our successors will not be able to work out such modifications as their experience may lead them to think preferable".[48] In its original form, cl 8 of the 1891 draft which evolved into s 61, extended the executive power 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". This was amended on Griffith's motion to read:

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[47] Crommelin M, "The Executive" in Craven G (ed) *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986) at 130-131 citing Harrison Moore W, *The Constitution of the Commonwealth of Australia* (1902) at 213.

[48] *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 1891 at 527.

> The executive power and authority of the Commonwealth shall extend to the execution of the provisions of this Constitution and the laws of the Commonwealth.

The amendment, as explained by Griffith, was to give a positive statement of the executive power and to remove the negative limitation upon it.

In its final form s 61 provided:

> 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.

Definitional indeterminacies seem to have been recognised from the start. As Alfred Deakin wrote in 1902:[49]

> 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.

In like vein, Professor Harrison Moore pointed out in 1902 that colonial constitutions had tended to be "almost silent on the subject of the powers as of the organisation of the Executive". He attributed this drafting practice to the inclusion in legislative powers of "full provision for the execution of the law" and the desire not to displace the prerogative which was seen as constituting a large part of executive power.[50] The use of

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[49] Deakin A, "Channel of Communication with Imperial Government: Position of Consuls; Executive Power of Commonwealth" in Brazil P and Mitchell B, (eds), *Opinions of Attorneys General of the Commonwealth of Australia* vol 1, 1901-14 (Australian Government Publishing Service, 1981) 129 at 130.

[50] Harrison Moore W, *The Constitution of the Commonwealth of Australia* (1902) at 212.

the words "extends to" and the reference to the maintenance of the Constitution leave open areas of contention about the scope of the executive power beyond the exercise of powers conferred by statute. It is the inherent uncertainty of the scope of the power and the compressed language in which it is conferred that poses a challenge to the judiciary in making its decisions about its limits and to the Academy in expounding principles which may be of assistance to such decision-making.

In his book *Parliament, the Executive and the Governor-General*, George Winterton expounded an influential approach to analysing executive power in s 61 of the Constitution. He resolved the power, whose uncertain extent he acknowledged, into dimensions which he described as "breadth" and "depth". Those limits which flow from the federal distribution of powers define its breadth.[51] The limits found in the boundaries between executive, legislative and judicial powers in the Constitution, defined what he called its "depth".

In his book George Winterton argued that the executive power conferred by s 61, so far as it extended beyond powers conferred by statute, should be confined to the historic prerogatives or common law powers of the Crown which, like other common law powers, were subject to statutory control.[52] Other scholars held the view that s 61 conferred power to "maintain the Constitution" which went beyond the limits of the traditional prerogatives. One of those scholars was Geoffrey Sawer who wrote of s 61 as conferring "an area of inherent authority deriving partly from the Royal prerogatives, and probably even more from the necessity of a modern, national government".[53]

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[51] Winterton G, op cit, at 29.

[52] Ibid at 95.

[53] Sawer G, "The Executive Power of the Commonwealth and the Whitlam Government" unpublished Octagon Lecture, University of Western Australia (1976) at 10 cited in Winterton G, "The Limits and Use of Executive Power by Government" (2003) 31 *Federal Law Review* 421 at 430-431.

Another scholar with a wider view of the power was Professor Jack Richardson who, in a passage which George Winterton quoted in his book, had written:

> The extension of the executive power through the maintenance of the Constitution is a power to maintain a law superior to any Act of the Commonwealth Parliament. It suggests, therefore, that the executive power is partly inalienable and not within reach of the federal parliament, and that this should be so also in relation to laws of the Commonwealth. It must be remembered that Chapter II, and not Chapter I, is the principal source of executive authority, just as Chapter III, and not Chapter I, contains the sources of judicial power. [54]

George Winterton rejected the Richardson approach for a number of reasons, including the vagueness and uncertainty of a power "to maintain … the Constitution". If there were such a power, he argued, it would be unlikely that much scope would be left for the prerogative.[55] He also regarded it as undesirable that the power should extend beyond the prerogative as suggested by Professor Richardson because of the dangers it posed for "civil liberties and the equilibrium of government". On the extended view, the executive could exercise a virtually unlimited power to maintain the Constitution. The hazards would be greatly multiplied if it were free from legislative control in that area.[56]

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[54] Richardson JE, "The Executive Power of the Commonwealth" in Zines L (ed) *Commentaries on the Australian Constitution* (Butterworths, Sydney, 1977) at 82 cited by Winterton G, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) at 97.

[55] Winterton G, *Parliament, the Executive and the Governor-General*, (Melbourne University Press, 1983), at 97.

[56] Ibid.

He acknowledged that the prerogative was "hardly ideal" as the yardstick of federal executive power. For its origins lay in the powers, rights and privileges of medieval kings.[57] As he said:[58]

> … both the ambit of prerogatives and the extent to which they survive can be shrouded in obscurity.

On the other hand, there were many well settled areas of the prerogative such as the power to conduct foreign relations and enter into treaties.

Foreshadowing by some 20 years more recent debates arising out of the *Tampa Case* and, to some degree out of *Pape*, he expressed his apprehension about approaching the prerogative from a "functional" perspective allowing the executive to exercise powers and enjoy privileges "which of necessity inhere in government". In that event he argued that there would be "… no criterion or standard, other than a judge's personal opinion, by which courts could assess the 'necessity' for governmental action, and civil liberty would be gravely imperilled if the determination of 'necessity' were left to the government itself". In so doing he accepted that judicial decisions regarding the "applicability of prerogative powers to new situations [would] inevitably be influenced by the judges' opinions regarding the proper powers and functions of governments".[59]

When George Winterton wrote on the topic in 2004 in the *Adelaide Law Review*, there had been, since federation, fewer than 10 cases in the High Court concerning s 61. He was also able to make the observation and the claim that it took 80 years from

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[57] Ibid at 115.

[58] Ibid.

[59] Ibid at 116.

federation before a book, namely his book, appeared which was devoted to the executive power of the Commonwealth. The much greater number of texts on legislative and judicial power as he put it:

> … reflects the fact that the exercise of executive power raises fewer justiciable controversies than the exercise of legislative and judicial power.

He added that "executive power has always been something of a mystery, frequently being defined merely as the 'residue' of governmental powers after legislative and judicial powers are excluded".[60] By the time he wrote in 2004, there were decisions of the High Court containing judgments which lent support to the view that the depth of the executive power extended beyond statutory powers and the prerogatives or common law powers which he had envisaged in his book.

George Winterton accepted that by 2004 it was questionable whether recent constitutional jurisprudence supported his preferred interpretation of s 61.[61] In particular he acknowledged that the decision of the High Court in *Davis v The Commonwealth*[62] suggested that the depth component of executive power extended beyond the prerogatives. He nevertheless adhered to his preferred construction, observing:

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[60] Winterton G, "The Relationship between Commonwealth Legislative and Executive Power" (2004) 25 *Adelaide Law Review* 21 at 21-22.

[61] Ibid at 30.

[62] (1988) 166 CLR 79.

> Notwithstanding recent commentary, the preferable interpretation of s 61 is that the depth of federal executive power under the "maintenance" limb [of s 61] should be limited to the Crown's prerogative powers.[63]

One of the bases for preferring the power to be limited to the prerogative was that it would thereby be subject to control by statute. The availability of statutory control was linked to the origins of the prerogative in England under a system of parliamentary supremacy.[64] So much having been said, it is still an open question whether the grant of executive power under s 61, if it extends beyond the prerogative powers, could be subject to legislative control. That is a question upon which further academic writing might be helpful.

The most recent writing on the topic to which George Winterton contributed is to be found in the chapter written by Peter Gerangelos in the book to be launched after the lecture tonight. The Gerangelos chapter is entitled "Parliament, the Executive, the Governor-General and the Republic: The George Winterton Thesis". It was partly written by George and completed by Peter Gerangelos under his instructions. In that chapter the preference for an executive power limited to the prerogative powers is maintained. Again, there is acknowledgement of the contrary force of the judgments in *Davis*. On the other hand, at the time of writing there had been no decision directly contrary to the view that the depth of federal executive power should be limited to the Crown prerogative powers.[65]

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[63] Winterton G, op cit, at 33.

[64] Ibid at 35.

[65] Winterton G, in Lee HP and Gerangelos PA (eds) *Constitutional Advancement in a Frozen* Continent (Federation Press, 2009) at 196.

In our last conversation in October 2008, George Winterton and I discussed the chapter which he was then working on with Peter Gerangelos. I suggested to him that he might write about limiting principles in relation to an executive power of greater depth than his preferred version. In the last chapter through Peter Gerangelos, he again made reference to the uncertainty surrounding the capacity of parliament to legislatively control an extra statutory executive power. He suggested an amendment to the Constitution to make it clear that s 61 is subject to the legislative power of the parliament. That would be a way of putting the matter beyond doubt and allaying some of the very legitimate concerns expressed in his writings. It is well known, however, that the path to constitutional change is not smooth. Moreover the executive, which tends to dominate the legislative program of the Commonwealth Parliament into which an amendment bill would have to be introduced, might be less than enthusiastic about making such a change. There is room, therefore, for further academic discussion and suggestions for a principled approach to appropriate limits upon executive power. This may include discussion about the extent to which the executive power is subject to statutory control or limitation.

Conclusion

This discussion of executive power has focussed in part upon the role of the Academy in analysis, criticism, synthesis and prophecy. George Winterton was an exemplar of that role. In the area of executive power he made a major contribution. Others have already built upon it and will continue to do so. His legacy will be with us for a very long time.