

LAWYERS AND POLITICS

THE HONOURABLE BRET WALKER SC

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I am privileged to have been asked to speak this evening. Actually, we are all privileged (in a different sense) to be gathered together for an address on a topic involving politics: as I speak, many lawyers in Turkey and prominent lawyers in China are in dire straits because of their actual, presumed or alleged involvement in

politics. Australian lawyers need not acknowledge other customs and cultures by setting out to lower our own ideal standards of political participation. We could perhaps reflect more frequently on how high those standards really are by comparison with many other jurisdictions (or countries, as real people call them). That slightly globalized view might even moderate the Australian habit, by no means itself wholly bad, of exaggerating how terrible things are here, how we'll all be rooned, etc.

Unfortunately, this occasion is not privileged (in yet another sense). Not all my thoughts

the Bench are made by Ministers thrown up by the electoral process. Beware disdain

members may well react by living down to over-generalized pessimistic expectations. I.

This warning is balanced by two important habits of thought that may lend confidence to the legal profession in relation to its members venturing into the political arena.

achievements, is its unsurpassed talent for self-congratulation.)

The first is the definitive way we claim to mark off the territory that lawyers should not be required to contest or adjudicate, as lawyers. It still goes by the label "political questions" in US constitutional practice. It stems from the prescient cunning of the late 18th century Jay Supreme Court. These were no political know-nothings, those early US

making at the apex of our judicature, in the High Court. But all of us participating in

In *Fardon* (in 2004), Gleeson CJ disposed of an argument against the judiciary deciding whether certain criminals should be detained after serving their sentences by noting, with typically effective understatement, the professional commitment to independence

and impartiality that would more likely enhance than detract from the respect that such fraught decisions desirably attract. The real test of that respectability is whether respect

forward to an appropriately gradual change and altered appreciation of the content of the

perennial value.

Gleeson CJ, Gummow J and Kirby J in *Al-Kateb* (in 2004), dissenting against the

My linguistic out-of-touchness aside, that project with The New South Wales Bar Association, the Australian Bar Association and the Law Council of Australia showed me the seriously political quality of professional governance including of, for and by

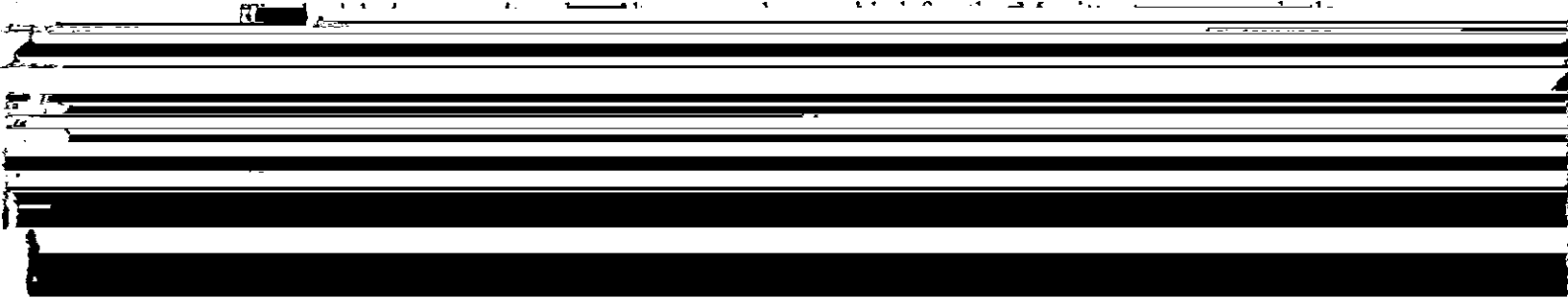
lawyers. Rejection of the guild approach, that had been easily if sometimes unfairly called a conspiracy against the public, proceeded rapidly to near completion by the end of last century. (I know I have just made an arguable political comment.) In that

independence from executive dictation. These are, by historical consensus, at the heart

of the whole of the system. As a result of that process it is therefore desirable that lawyers

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At the risk of revealing for instance a cramped legalism or other personal defect in the way I carried out my functions, let me briefly recall some aspects of the approach I took when from 2011-2014 I was the INSLM. Please do not hear these comments as self-praise, but forgive my subjectivity. The role requires reporting through the Prime Minister to the Houses of Parliament on the efficacy, appropriateness and necessity of Australia's counter-terrorism laws. I think such a task is unique.



year term of appointment, the equivalent of Act of Settlement security of tenure as for judges. There are powers to compel evidence and information as ample as a Royal Commission, with the extension of that reach to restricted material by reason of security clearance. There is the protection of privilege at all stages of hearing and reporting.

The tenure in particular is necessary for the requisite independence of the Monitor who may report that CT Laws are not what their parliamentary promoters boasted. Laws that are bereft of any empirical foundation to predict their capacity to prevent any atrocity,

multiply the undergrowth of criminal offences where murder is the cardinal target. I am

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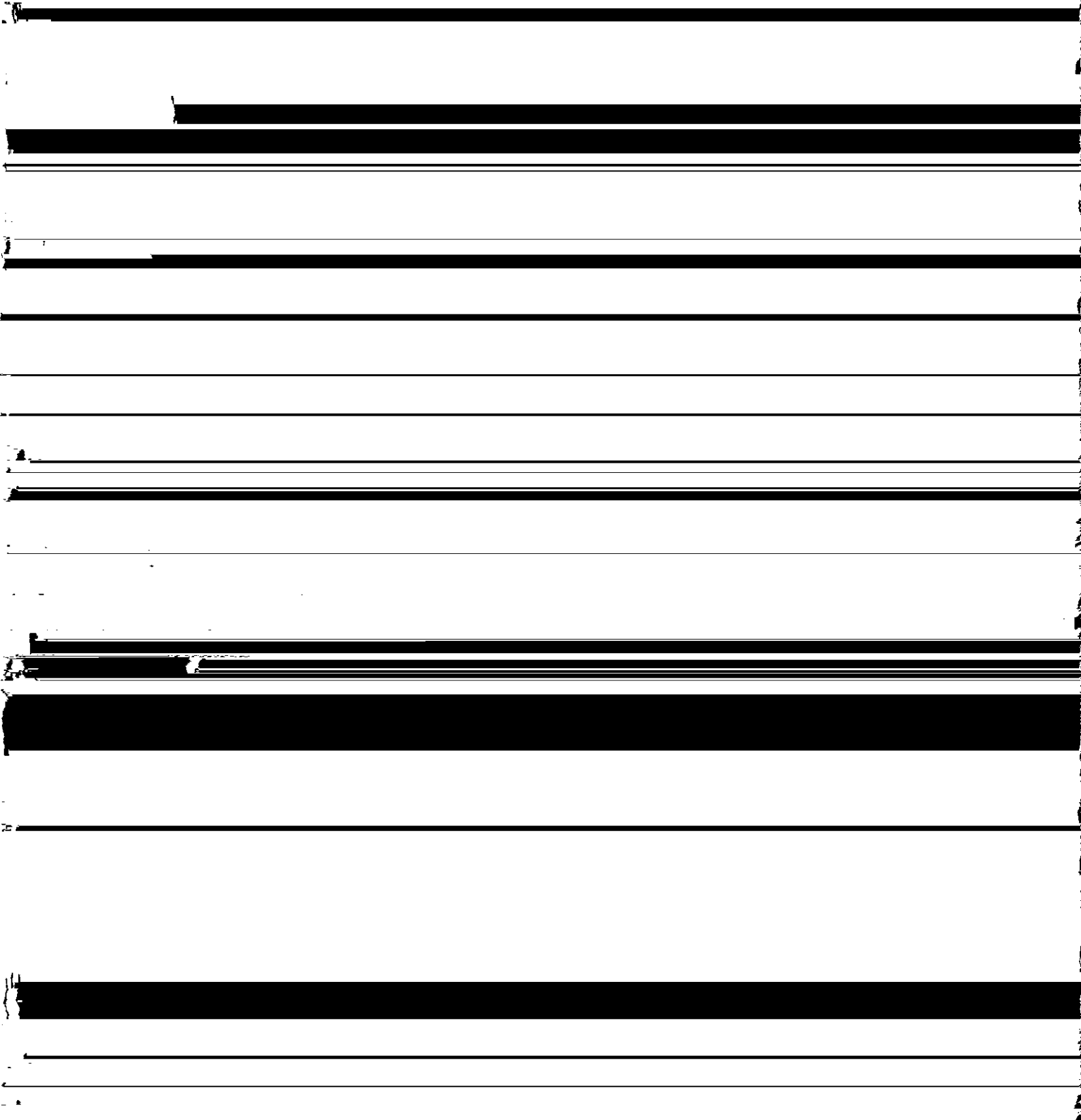
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trying to save or better themselves and their families?

Reflection on the mixed signals about lawyers and politics coming to us across the Pacific must also mention a significant difference about which it is hard not to sound smug. The routine party-political labelling of lawyers, especially when judicial appointment is mooted and always after they become important judges, in the US is not

The admonition over the millennia of which the most famous delivery was by Pericles in his funeral oration for the Athenian war dead, that citizens must not be uninterested in politics, surely dispels any notion that disinterested lawyers should either not have or, worse, pretend not to have any interest as voting citizens in politics. In my dreams, I see ranks of Attorneys General nodding in sage agreement with the eminently



It was, as I still remember my shocked reading of Hal's reasons, that he had himself