

Chapter 23

Threats to Judicial Independence: The Enemy Within*

The themes of this lecture can be summed up in three epigraphs. Chief Justice Dixon reputedly said: “I never agreed in anyone else’s judgment without later coming to regret it”. Another outstanding judge, the lamented Lord Bingham, considered that “judicial independence [involves] independence from one’s colleagues”.¹ The third epigraph is by the anonymous author of the following words on the tomb of Mr Justice Walmsley, a frequent dissenter in the Court of Common Pleas from 1589 to 1612:

His inside was his outside, he never sought
To make fair showes of what he never thought.²

Non-judicial threats to judicial independence usually come from the executive. Some threats from the executive have failed. In 1892 the future Czar Nicholas II was the victim of an assassination attempt while visiting Japan. A great struggle then took place between the Supreme Court of Japan and the advisers to the Meiji Emperor as to whether the would-be assassin should be tried on a capital charge. Article 116 of the Criminal Code provided that anyone who attempted to kill the Crown Prince should be punished by death. The judges considered that this applied only to the Japanese Crown Prince; the executive considered that it applied to any crown prince. The judiciary, after honourable resistance to a lot of pressure, prevailed.³ The would-be assassin was sentenced to life imprisonment. Better known failures by the executive include

* This is based on a lecture delivered on 23 January 2012 at the Cambridge Law Faculty and the Inner Temple; on 24 January 2012 at the Oxford Law Faculty; and on 26 January 2012 at Herbert Smith & Co. This address must not be taken to be speaking about the actual behaviour of any particular court of which the author has been a member, but to tendencies or possibilities in courts in general. Previously published in (2013) 129 *Law Quarterly Review* 205.

1 A Paterson, *Lawyers and the Public Good: Democracy in Action?* (Cambridge University Press, 2012) p 185.

2 Quoted in E Foss, *The Judges of England* (Longman, Brown, Green, Longmans & Roberts, 1857) v 6, p 194. Slightly different language is given by C Young, “The History of Judicial Dissent in England: What Relevance Does It Have For Modern Common Law Legal Systems?” (2009) 32 *Australian Bar Review* 96 at 107, by JH Baker, “Due Process and Wager of Law: Judicial Conservatism in the Tudor Common Pleas” in K O’Donovan and G Rubin (eds), *Human Rights and Legal History: Essays in Honour of Brian Simpson* (Oxford University Press, 2000) and by E Lodge, *Illustrations of British History* (2nd edn, 1838) vol 2, p 278.

3 D Keene, *Emperor of Japan: Meiji and His World, 1852-1912* (Columbia University Press, 2002) pp 448-458.

This is a preview. Not all pages are shown.