

JOHN DOWD: A JUDGE'S VIEW
PREMIER'S DINNER TO HONOUR JOHN DOWD QC
REGENT HOTEL, SYDNEY 3 JULY 1991

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Former Attorney General for New South Wales

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The Hon Justice Michael Kirby*

SCHOOL DAYS & BOILED ONIONS

I launched John Dowd upon the public stage. I did it personally and virtually single-handedly. Doubtless this is why I - and not the sainted Chief Justice - have been asked to speak tonight. None of you would be here tonight, but for me.

My memories of John Dowd go back nearly forty years. Through the mists accompanying the passing of time, I can see him in his school days. Come back with me to the 1950s at Fort Street High when John Dowd wore short pants (without benefit of corporate logo). I was his head prefect.

Despite their many notable contributions to human history, head prefects have rarely been accorded the respect they properly deserve. There are, of course, well known exceptions. Malcolm Fraser, an exemplar of the honourable company of head prefects, became quite well known for his tendencies in that regard. But it is all terribly unfair. The community simply refuses to take head prefects like

Malcolm and me seriously.

Take for example the well known story of how Malcolm Fraser was said to delight in planting boiled onions in the pockets of the school students put in *his* charge - as John Dowd was put in *my* charge. That temporary, horrible feeling as the callow schoolboy reached for a boiled lolly or connie-agate marble only to discover the cold, clammy, unexpected feeling of a boiled onion. I am bound to say that this image trivialises the head prefect's point of view. Malcolm Fraser, of course, was seeking by allegory to teach enduring values:

- * The importance of onions to the rural sector, something to be indelibly engraved on every Australian schoolboy's mind;
- * The importance of the very little things of life; and
- * The importance of ever being prepared for unusual situations and the need to accept them with a straight face - shrugging aside the discovery of an unwanted boiled onion in one's pocket as if one always carried a boiled onion there.

Similar lessons I too sought to impart to John Dowd. If he has been a success I, his head prefect, can surely take a lot of the credit for it. It is the more remarkable that I never had to resort to boiled onions in his instruction.

The moment of truth in his life came one day in 1955. Dowd (I mean no disrespect, but a senior person like me at Fort Street would never even *know* the first name of a boy

two years his junior) had been naughty in some respect, now generously lost in time. I was not involved in his arrest. Indeed, ever-understanding of human failings, I myself only ever placed two boys on detention. One (John Singleton) later mended his ways. He went on to mammon, correcting his ways after my earnest instruction. The other turned to God and became a priest. Even in those days I had a profound effect on people. So it was with John Dowd.

He came into the prefects' room. I had to consider what was the appropriate punishment for his crime. Of course, I did not have the inestimable benefit of the *Sentencing Act*. Nor was I required to exhibit truth in sentencing. There before me was a spindly boy. What to do?

PARLIAMENT - A CRUEL & UNUSUAL PUNISHMENT

Instead of requiring him to write a hundred lines; run around the playground with full cadet pack or otherwise humiliate himself in some grovelling way (as less imaginative sentencers would have done), I devised an especially cruel and unusual punishment for him. I made him sit with me through a broadcast of Federal Parliament. I was glued to the wireless. There was the rasping voice of Mr Speaker Cameron. Now and then the lordly intervention of the future Warden of the Cinq Ports. The familiar voice of that old Fortian H V Evatt. The sniping and sparring of Eddie Ward, Arthur Calwell and Eric Harrison. Can you still hear those voices rattling around in your head?

John Dowd and I can both recall quite vividly the proceedings before Federal Parliament that far-away sunny day. They concerned the trial of Brown and Fitzpatrick at the Bar of the House of Representatives. The penitent

Fitzpatrick. The defiant Brown. It was a gripping drama. When it came to a vote and the two contemners of Parliament were dragged out to serve their sentences, I balefully lifted my eyes. I noticed, as if for the first time, that in this *sanctum sanctorum* sat a third year student, Dowd, assigned for punishment. I lifted my head prefect's gaze slowly - for that is what head prefects were supposed to do. I saw that the young Dowd was transfixed. Over his eyes had come a Monte Python type stare. At home, he only ever listened to Tony Withers, Johnny O'Keefe, to 2SM and the hit parade. In my company, he had his first taste of Parliament. He was transported as to another planet. His life opened up before him. Like John Keats on first looking into Chapman's Homer:

*"Or like stout Cortez when with eagle eye
He stared at the Pacific and his men
Looked at each other with a wild surmise
Silent upon a peak in Darien."*

From that moment John Dowd's future was settled. He would tread the path of the other lawyer politicians Fort Street had produced: H V Evatt, Garfield Barwick, Neville Wran, Bob Ellicott and the rest. Liberal and Labor. Left and right. The passion of Parliament was in his blood. Now, there was no stopping him.

As he left the prefects' room I shouted after him: "And don't do it again". But he was deaf to my utterances. John Dowd's fate was already sealed.

The pages of the school magazine reveal that, from that moment on, he muscled his way into every speaking occasion he could grasp. He could not stop. Thus, the record of Empire Day 1956 held in the School Memorial Hall on 24 May of that

year. It appears from the record that all students were issued with an admirable booklet *The Centenary of Responsible Government in New South Wales*. According to the note this contained:

"Some fine illustrations and explained the development and working of the NSW Parliament since May 22, 1856, the day on which the present method of making and altering laws was first adopted."

Imagine the feelings of the young Dowd as he fingered, trembling, through this publication. Politicians should reflect in awe upon the responsibility of putting thoughts of Parliament in the hands of impressionable schoolchildren.

ROOTS BENEATH THE SEA

The school ceremony of 1956 droned on with its solemn ritual of the loyal pledges by the boys to "our God, our Queen and our country". The school choir sang an "appropriately patriotic air 'The Motherland'". It was not, of course, a song of Australia but of those far-away windswept islands we then called "home":

*"Her broad roots coiled beneath the sea.
Her branches sweep the world."*

The record goes on:

*"The final speech was then made by John Dowd of fourth year. In his speech, *The British Empire in the Changing World*, John gave a brief outline of such earlier empires as the Roman Empire which was held together by bonds of force and domination. He explained the many weaknesses which bring about the downfall of an empire. He then stated his reasons for thinking the Commonwealth of Nations held together by a vastly stronger bond of freedom and Christianity and will be the answer to the great problems arising in politics and denominationalism during this age of ever-increasing scientific wonders."*

The Hon Fred Nile could not have done better himself. Mind you the Moslems and Hindus of the Empire were not amused. Millions of them left the Empire soon after this speech. Nevertheless, in due course of time, Dowd was rewarded for all these loyal utterances, as people usually are. He too became a prefect. But the sounds of Parliament were still in his ears. He could not wait to get there. He hurried, breathless, through his University time and those early struggling years at the Bar. Before long he was in Parliament. For a time he was Leader of the Opposition. But it was in his rôle as Attorney General that I came to know him again. It is appropriate that, as the only judicial officer speaking - squeezed uncomfortably between three politicians - I should say something about this phase of his life.

THREE ACHIEVEMENTS OF A DOUGHTY CHAMPION

It was a period of many achievements for the administration of justice. It would be tedious to list them. They are there in the statute book and operating in the community. Three points, however, deserve special mention.

- * The first was John Dowd's commitment to a new managerial style in the Department: with more attention to efficiency; more openness in the supply of information; better corporate planning and improved monitoring of organizational performance both of the department and of the courts and other bodies

for which it was responsible. His was a modern managerial style. This will certainly endure;

* Then there was a commitment to orderly reform. He adopted, overnight, something which I had fruitlessly pressed upon successive Federal Attorneys General. There is now in this State a system in place to receive, consider and process judicial suggestions for reform of the law. No longer do judges cry in the wilderness when they see a source of legal injustice. It is truly remarkable how many such suggestions were accepted, collected in miscellaneous reform Acts and shepherded through Parliament. This was a feature of John Dowd's voracious appetite for work and unquenchable fascination with detail. I hope it will endure; and

* Thirdly, and most importantly, John Dowd had a clear idea of the proper relationship between the legislative and executive branches of government and the judiciary. This is not a relationship always understood. It doubtless gives rise to occasional inefficiencies and innumerable political frustrations. The judiciary is sometimes a break on majoritarian democracy. Its agenda is different, longer term. It is not a part of the government's bureaucracy. John Dowd never treated it so. He, at least, knew that judges of this State do not work only from 10 to 4 - or on weekdays alone. The judiciary has an historic mission.

Within the law, it safeguards fundamentals, fair procedures and minority rights. It keeps even democratically elected governments within the law. In Thomas Fuller's famous words:

"Be you ever so high, the law is still above you."

Ceaselessly, John Dowd reminded his colleagues, the Parliament and the community of these abiding truths. We were grateful to have such a doughty champion.

Some of John Dowd's understanding of the functions of the judiciary in a democratic society derived from his leading rôle in the Australian Section of the international Commission of Jurists (ICJ). That body, devoted to safeguarding human rights and the rule of law, also brought us together once again. Despite the crippling burdens of the office of Attorney General, John Dowd continued to attend the meetings of the Council of the ICJ. He never grew so high as to spurn the base degrees by which he did ascend, including the ICJ. He maintained his links with his friends. In some ways he was similar to Barry Jones. He irritated many members of his own Party, almost beyond endurance. But he had many admirers on the other side of politics and countless devotees in the community. All this, despite his eccentric work habits and latterday love affair - with his cordless phone.

"I WILL UNDO MYSELF"

People now speculate on what will become of him. Is there life after politics, they ask? Will he take the judicial vows? Will he adapt to the life of a busy

barrister? Does his future lie in some international activity?

My last association with him was in Hong Kong a week ago where we were attended a rather sombre conference on the future of the rule of law in that Territory after 1997. He stayed on for a mission of the International Commission of Jurists. The mission investigated whether Britain provided the people of Hong Kong with the right to self-determination promised them by the *United Nations Charter*. There has been no more important mission of the ICJ in recent years.

At one stage of the conference, after a dinner, a group of lawyers from Hong Kong and Britain came up to me and asked:

"Who is this John Dowd?"

In words which seemed faintly familiar they said: "He seems reactionary, conservative, Dickensian. Does he [date from] the quill and ink days?"² I was able to assure them that Dowd was actually regarded as a dangerous radical by some members of his own Party. In Australian political terms he was comparatively enlightened and liberal. They walked away scratching their heads in disbelief. Which just goes to show how these labels lie in the eye of the beholder.

Generally, when the mantle of office passes from a politician or a judge, the attendant swarm of admirers evaporates like desert rain. The office-holder is left alone. He or she discovers true friends. In words we first savoured in our schooldays:

*"Now mark me, how I will undo myself; -
I give this heavy weight from off my head,
And this unweildy sceptre from my hand,
The pride of kingly sway from out my heart;
With mine own tears I wash away my balm.
With mine own hands I give away my crown,
With mine own tongue deny my sacred state,
With mine own breath release all duteous rites:
All pomp and majesty I do forswear;
My manors, rents, revenues, I forego;
My acts, decrees, and statutes, I deny:
God pardon all oaths that are broke to me!
God keep all vows unbroke are made to thee!
Make me, that nothing have, with nothing
griev'd,
And thou, with all pleas'd, that hast all
achiev'd!"³*

It is a tribute to you, John Dowd, that so many friends - some heavy with years and others young in association - have come to this dinner to mark your service. For them all - but especially for the judicial officers of this State who honoured you as First Law Officer - I say in the words of the Bard, whatever your life's journey may entail, may you be sent:

"Many years of sunshine days."

FOOTNOTES

- President of the Court of Appeal. President, Australian Section, International Commission of Jurists. Personal views.
1. *The Fortian*, Magazine of Fort Street Boys' High School, 1956 (vol 54), 26 at 27.
 2. Comments attributed to Mrs K Greiner about judges in *The Independent Monthly*, June 1991, 23.
 3. Shakespeare, *King Richard II*, Act IV, Scene I.