

Australia: The political issues behind the jailing of former Federal Court judge Marcus Einfeld

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The conviction of former Federal Court Justice Marcus Einfeld last Friday on perjury charges relating to a 2006 speeding fine marks the culmination of an extraordinary two-year media vilification campaign. After pleading guilty before the New South Wales Supreme Court, Einfeld was sentenced to three years imprisonment with a non-parole period of two years, making him the first judge in Australian history to be sent to jail.

Many serious questions surrounding the affair remain unanswered. But the timing and nature of the media and police investigations point to the distinct possibility that they were motivated by a political desire, on the part of the former Howard government, to blacken Einfeld's name and undermine his professional credibility.

Marcus Einfeld is among the most widely known judges in Australia, with a particularly distinguished career. The son of NSW Labor parliamentarian Syd Einfeld, Marcus Einfeld combined a legal career with active involvement in humanitarian work—defending refugees, Aborigines, and other oppressed groups. The founding president of the Human Rights and Equal Opportunity Commission in 1986, Einfeld was later awarded the Order of Australia and voted one of 100 "national living treasures".

After his retirement from the Federal Court in 2001, he repeatedly clashed with the Howard government. In 2002, Prime Minister Howard declared "outrageous and offensive" a statement by Einfeld comparing the behaviour of Woomera detention centre guards with that of the Nazi SS. In 2005 Einfeld represented Vivian Alvarez Solon, an Australian who had been illegally deported to the Philippines four years earlier. The case—which exposed the efforts of senior immigration department officials to cover up the expulsion—proved a major embarrassment to the government.

On January 8, 2006 Einfeld was clocked by a speed camera driving his Lexus through the Sydney suburb of Mosman at 10 kilometres an hour over the speed limit. He was sent a \$75 speeding fine, but tried to evade payment by telling a Local Court magistrate on August 7 that the car had been driven at the time by a friend, Professor Teresa Brennan, who lived in the US.

The magistrate accepted this statement and cancelled the fine. Journalists with Murdoch's Sydney tabloid the *Daily Telegraph* then set to work and, after apparently trawling through the details of the case, discovered that Professor Brennan had died three years earlier. Einfeld responded to the subsequent front-page story with a series of desperate

and reckless attempts to cover his initial lie with other false alibis and accounts. Only after an extensive police investigation, involving the tracking of Einfeld's movements on January 8 through mobile phone and credit card use, the former justice did admit to perjury and perversion of the course of justice.

His unprecedented sentencing to three years jail was grossly disproportionate. While perjury and perverting the course of justice are serious crimes, there are different levels of such an offence. It is one thing to lie to a court about information concerning a murder or rape; to lie to a court over a speeding ticket is of a different order. Moreover, in the general principles of sentencing the identity of the accused and his or her personal characteristics ought to be a secondary consideration—the objective criminality is the primary factor. Justice Bruce James, however, declared that in this case there was a special need to give effect to the purpose of "general deterrence and denunciation" given Einfeld's former position on the Federal Court.

Considering the accused's contribution to society as a mitigating factor is another major sentencing principle. Einfeld had unusually powerful such material in his favour. The former judge was supported by several high profile figures who testified to his community and humanitarian work. On customary sentencing principles, a custodial sentence was not mandatory, and a lengthy sentence was certainly not required as a matter of legal principle, especially given Einfeld's age and very poor physical and mental health.

How then does one explain the court's ruling? What has the Einfeld affair really been about?

For all the manufactured outrage over the former judge's actions, the reality is that amid the upper echelons of the business, political, media, and legal world, such arrogant disregard for legal norms is routine. All sorts of unseemly or outright criminal activity occurs regularly—whether in the form of "travel rorts", sexual exploits, bribery, nepotism or simply avoiding the various obligations that are part of normal life for the vast majority. Einfeld, it ought to be noted, had himself gotten away with not paying for numerous other speeding infringements over many years by claiming that overseas friends had been driving his car. His guilty plea ensured he avoided prosecution for these.

Only when a figure like Einfeld falls foul of the establishment are such transgressions suddenly elevated in the public arena to the level of a moral crusade.

A review of the wider circumstances points to the likely motivations behind the highly sensationalised affair.

Einfeld and the Solomon Islands

In mid-2006, the prime minister of the Solomon Islands, Manasseh Sogavare, appointed Einfeld to chair a Commission of Inquiry into the origins and causes of rioting that destroyed much of the country's capital, Honiara, on April 18 and 19 of that year.

From the outset, the Howard government adamantly opposed the Commission. After all, any impartial investigation into the riots would expose the astonishing failure of Australian Federal Police and soldiers with the Regional Assistance Mission to Solomon Islands (RAMSI) to secure the city. Their apparent inability to prevent the violence by taking elementary security precautions, after a divisive national election, represented, at the very least, criminal negligence. A serious inquiry would also examine evidence suggesting that RAMSI forces may have been deliberately stood down in order to allow the violence to proceed, thereby creating the necessary justification for the continuation and strengthening of the Australian military-police intervention and for overseeing, if not determining outright, the post-election makeup of the next government. (See "The Howard government, RAMSI, and the April 2006 Solomon Islands' riots")

Another danger was that a Commission of Inquiry might result in the revocation of the sweeping powers enjoyed by RAMSI personnel, including immunity from Solomon Islands law. And any investigation of the social issues underlying the riots, such as the severe poverty and unemployment in Honiara, would expose the fraud of RAMSI's "humanitarian" mission. From July 2003, when the Australian-dominated force was first deployed, Canberra has spent virtually nothing on health, education or other basic social services for the local population. At the same time, it has poured hundreds of millions of dollars of so-called "aid" money into the construction of prisons and the payment of exorbitant Australian Federal Police salaries. RAMSI was, and remains, a neo-colonial intervention driven by Canberra's efforts to secure its geo-strategic interests in the Pacific region and to shut out rival powers.

A chronological review of the events surrounding the Einfeld scandal is instructive:

* July 13, 2006: Sogavare announces the Commission of Inquiry and appoints Marcus Einfeld as chairman.

* July 25: ABC Radio Australia reports: "The chairman of a Commission of Inquiry into last April's riots in the Solomon's capital, Honiara, says his terms of reference are comprehensive. Justice Marcus Einfeld says the inquiry, to start next week, will look into the causes of the uprising and those who were responsible for it."

* August 4: Solomon Islands' Attorney-General Primo Afeau initiates court action aimed at blocking the Commission. He is openly supported by senior Australian RAMSI legal officials in Honiara; but on September 6 the Solomons' High Court affirms the legality of the inquiry and dismisses the case.

* August 6: Einfeld, having arrived in the Solomons five days earlier, meets Sogavare. The Commission of Inquiry is scheduled to begin within days.

* August 9: The *Daily Telegraph* runs its front-page story on Einfeld's fake speeding fine alibi. In subsequent weeks, the press runs sensationalised coverage of the former justice on a near daily basis.

* August 10: Police commence their criminal investigation. At the same time, Foreign Minister Alexander Downer declares in parliament: "[W]e have some concerns about a commission of inquiry into the April Honiara riots, to be led by Mr Marcus Einfeld."

* September 8: With media in tow, police raid Einfeld's home and seize computer equipment and other personal belongings.

* September 11: Sogavare announces that Australia's High Commissioner in Honiara, Patrick Cole, is now persona non grata and will soon be expelled for his attempts to sabotage the Commission of Inquiry by inciting opposition parliamentarians to bring down the government through a no-confidence motion. Cole's expulsion enrages Howard and Downer, who step up their well-organised "regime change" campaign in the Solomons.

* September 14: The *Australian*, in an article titled "PM hits 'corrupt' Einfeld probe in Solomons", reports: **"John Howard last night denounced a judicial inquiry headed by disgraced former Federal Court judge Marcus Einfeld as an attempt to subvert the legal process in Solomon Islands.** Mr Einfeld and a little-known Gold Coast lawyer nominated as the country's next attorney-general [Julian Moti] are at the centre of a deepening diplomatic row between Canberra and Honiara."

* September 17: Sogavare announces Einfeld's withdrawal from the Commission. "It is interesting to note that no scrutinising of Marcus Einfeld's background was conducted while he was a Federal and Supreme Court Judge of Australia or before receiving his OBE and most valuable Australian awards," the Solomons' PM states. "This is an example of what happens to anybody who does not comply with Australian government demands, which now includes the sovereign government of Solomon Islands."

* September 18: The *Australian* acknowledges: "Mr Einfeld had reportedly come under pressure from Canberra to quit the inquiry into the riots in the Solomons' capital, Honiara."

Shortly before Einfeld perjured himself at the initial court hearing on the speeding fine, another behind-the-scenes federal police investigation was launched into the other senior legal expert involved with the Solomons' Commission of Inquiry, Julian Moti. Moti was centrally responsible for drawing up of the Commission's terms of reference and had issued the recommendation for Einfeld to chair the inquiry.

By June 2006, Australian Federal Police had secretly resumed their pursuit of the well-known international lawyer, based on politically motivated statutory rape charges that were thrown out of a Vanuatu court in 1998. On September 29—twelve days after Einfeld resigned from the Commission of Inquiry—Moti was unlawfully detained in Papua New Guinea on the orders of Australian police working in the Transnational Crime Unit. The protracted diplomatic standoff that followed was accompanied by a vile Australian government and media slander campaign. Just as Einfeld was portrayed as a corrupt and inveterate liar, efforts were made to destroy Moti's reputation and legal standing by

accusing him of being a paedophile.

The attacks on Moti and Einfeld served to delay the Commission of Inquiry for nearly a year. With a new chairman, former Papua New Guinean judge Brian Brunton, it finally began its work in May 2007. The lengthy delay meant that by the time the Commission had completed its investigation and issued a final report, the Howard government had succeeded in orchestrating the ousting of Sogavare from office. The Canberra-aligned government of Derek Sikua, installed last December, simply buried the report, no doubt with the support of the new Australian Labor government of Prime Minister Kevin Rudd.

Amid the countless reports on the Einfeld scandal, not one media outlet, with the sole exception of the *World Socialist Web Site*, has mentioned the Solomons' connection. Nor have any of the so-called "progressives" in political and legal circles, or the "lefts" in the middle class radical milieu or a single figure in the Rudd Labor government. Nor, for that matter, has Einfeld himself. This serves to underscore both the deep-going interests at stake in Canberra's Solomons' operation, and the seamless transition that has been effected by the Rudd government from the Howard government's neo-colonial foreign policy.

The authors recommend:

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