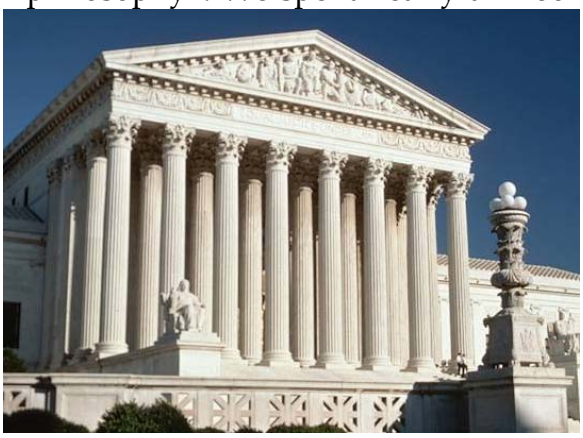
3 Hare Court member reflects on judicial decision-making from across the Pond. Rowan Pennington-Benton (see picture below, on the far right), barrister at 3 Hare Court Chambers and currently on secondment to the UK Supreme Court as judicial assistant to Baroness Hale of Richmond, embarked,

along with six of his fellow judicial assistants, on a rapport-building fact-finding tour of the legal institutions and practices of Washington D.C. The trip was organised by Lord Dyson, taking on the mantle from the late Lord Rodger, who maintained connections between the two Courts through his friendship with Justice Scalia. Several of last year's U.S. Judicial Assistants (known as "clerks") spent several days at the UK Supreme Court in the autumn, as part of a trip to London under the auspices of the American Inns of Court. The trip was funded by the UK Supreme Court, along with a number of sponsors including Middle Temple and Combar. Rowan reports as follows.

We spent two days at the United States Supreme Court, a day at the Court of Appeals for the District of Colombia Circuit, a day at the DC Superior Court and an afternoon watching a moot at Georgetown University's Supreme Court Institute. We also took a guided tour of the Pentagon, the White House, and the Capitol Building. We had front row seats for two gripping and fast-paced hearings in the US Supreme Court. Unlike in the UK, cases are dealt with almost entirely on the papers by way of extensive written submissions. Before sitting down the Justices have already familiarised themselves in full with the facts and arguments of each of the parties. The issues are narrowed down and oral argument is reserved for specific questions by the Justices

which are fired at the advocates in quick succession. In a word: intense. The advocates do prepare speeches but I didn't see any of them get through more than a few words before interjections from the Bench.

One gets the impression that, on the whole, each of the Justices has already formed an opinion as to where the merits of the case lie. Their questions could at times be mistaken for submissions in support of one side or the other; although to whom these were being directed is not entirely clear, perhaps each other. There is no mistaking the fact that some of the Justices wear their political persuasions on their shirt sleeves or (as Justice Scalia would prefer it said) at least their particular "judicial philosophy". We spent nearly an hour with Justice Scalia following the second hearing during which time we had a lively debate about constitutional interpretation, the role of the judiciary and comparative approaches to adjudication. "Living trees?" scorned Justice Scalia when confronted with the possibility of an "evolutive" approach to interpretation such as that famously adopted by the European Court of Human Rights when interpreting the Convention. He thought it odd that we are now being told, so many years after the Convention has been in force, that prisoners now have the "right" to vote. For Scalia the US Constitution means now what it meant when it was enacted by the Founding Fathers in 1791. Well, for comparative analysis it's always useful to have extremes.



At the DC Superior Court, Judge Anderson explained the process of plea bargaining, before working her way through the morning's domestic violence

list with a combination of careful pragmatism and admirable efficiency. In the Court of Appeals for the DC Circuit we were given an insight into the relationship between state and federal power. In the appeal – *EME Homer City Generation, L.P v. EPA* – a rule promulgated by the Environmental Protection Agency to address the interstate movement of noxious gases between States was challenged on the ground that it failed properly to demarcate the roles and responsibilities of each, being unduly harsh on some.

After the hearing we met with Judge Sentelle, Chief Judge of the Court of Appeals. We discussed the political nature of appointments to the senior judicial positions in the U.S. and the possibility of Parliamentary confirmations in the UK. Interestingly, in the U.S. it would be impossible to reach senior judicial level without transparent political affiliation; yet once appointed all judges are required to cease political activity and swear allegiance only to the law and justice. One wonders why the political criterion in the first place.

Quirks of legal systems, some more ironic than others, are of course no stranger to the UK legal system. The UK Supreme Court is only three years old, the quirk being that up until 2009 it was an Appellate Committee within the Houses of Parliament – something that, looking back even over this short period of time, seems to me now rather strange. That is not to say that its function has changed much since it sat in the House of Lords. The highest appellate body in the land has been behaving much more like a Constitutional Court for the past 15 years or so, if not longer. This no doubt has more to do with the questions that the Court is required to answer these days (for example under the Human Rights Act or EU law) than the nature of the Justices who constitute it. Interestingly, however, given the nature of this workload, the ethnicity, gender as well as political persuasions of our senior

judiciary is something that is attracting more interest than ever. Lessons perhaps to learn from the States.

The trip was rounded off by guided tours of the main political and defence institutions in Washington, D.C. and by a number of evening events where

we met with senior lawyers and other officials, as well as last year's U.S. judicial clerks. A growing relationship between the UK Bar and the U.S. legal profession was anticipated and welcomed by all. During this trip we created new friendships across the Pond that I am sure will remain strong in the years to come.

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Rowan Pennington-Benton