

THE SIGNIFICANCE OF THE COMMUNIST PARTY CASE

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[Last year marked the fortieth anniversary of the Communist Party case — a celebrated triumph of constitutionalism and the rule of law over national hysteria.

In this article, the author first examines the historical and political background to the case and the Communist Party Dissolution Act 1950 (Cth). Secondly, he discusses the High Court's decision to invalidate the Act. He notes that the fundamental underlying principle of the decision is that the judiciary, and not the legislature, must determine the existence of 'constitutional facts', and argues that this principle should extend to the defence power in wartime. The author finally assesses the overall significance of the case and concludes that it is probably the most important decision ever rendered by the High Court.]

Forty-one years ago, Australian constitutionalism scored one of its greatest triumphs when the High Court invalidated the Communist Party Dissolution Act 1950 (Cth). That Act was designed to ban the Communist Party and affiliated bodies, and to restrict the civil liberties of persons declared by the government to be dangerous or *potentially dangerous* communists. In other words, it potentially restricted the civil liberties of everyone. The High Court's decision,¹ a celebrated victory for the rule of law, was followed by the defeat — remarkable at a time of anti-communist hysteria fanned by the Korean War — of a referendum to amend the Constitution to achieve the government's objectives. Yet while a referendum defeat has lasting impact only in a negative sense, the *Communist Party* case lives on, and is as important a declaration of fundamental principles today as it was in 1951.

As with all great constitutional decisions, the *Communist Party* case can only be understood in its historical and political context. Accordingly, Parts 1 and 2 of this article will deal with that subject. Part 3 examines the case itself, and the case's overall significance will be assessed in Part 4.

1. BEFORE THE BAN

Robert Menzies's epochal general election victory of 10 December 1949 brought to office a Liberal-Country Party government committed to dissolving the Australian Communist Party.

This was not the first time a Menzies-led government had sought to ban the communists. Outlawing the Party had long been debated by the conservative

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¹ *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1 ('the *Communist Party* case').

parties, and unsuccessful measures had been taken against communists by the Lyons government, in which John Latham was Attorney-General.² But the Party had survived, assisted no doubt by the hardship of the Depression and the rise of fascism.³

During the period of Soviet wartime neutrality pursuant to the Molotov-Ribbentrop Pact of August 1939, the Australian Communist Party had strongly opposed the war.⁴ This led the Menzies United Australia Party-Country Party government to dissolve it on 15 June 1940 under the National Security (Subversive Associations) Regulations 1940 (Cth) as a body

the existence of which the Governor-General . . . declares to be, in his opinion, prejudicial to the defence of the Commonwealth or the efficient prosecution of the war.⁵

These regulations were eventually held invalid by the High Court in the *Jehovah's Witnesses* case three years later, almost to the day.⁶ The government had already, three weeks earlier, banned nine Communist publications, namely *Tribune*, *Communist Review*, *Soviets Today*, *Wharfie*, *World Peace* and *Militant* (all published in Sydney), *The Guardian* (Melbourne), *The Workers' Star* (Perth), and the *North Queensland Guardian*.⁷ Their publication was prohibited on the grounds that they were published by the Communist Party or a body which the Minister believed had 'substantially the same objects' and that, in the Minister's opinion, publication was 'likely to prejudice the defence of the Commonwealth or the efficient prosecution of the war'.⁸

The Communist Party had anticipated the ban⁹ and implemented contingency plans to continue an underground existence.¹⁰ Government officers raided Party premises, seized papers and documents — much lampooned by communist

² See, e.g., *R. v. Hush; ex parte Devanny* (1932) 48 C.L.R. 487. See also Lloyd, C., 'Not Peace But a Sword! — The High Court Under J. G. Latham' (1987) 11 *Adelaide Law Review* 175, 191; Campbell, E. 'Democracy and Political Opposition' in Preston, R. (ed.), *Contemporary Australia: Studies in History, Politics, and Economics* (1969) 316, 325-7; Ricketson, S., 'Liberal Law in a Repressive Age: Communism and the Law 1920-1950' (1976) 3 *Monash University Law Review* 101, 106-8. For a comment on the 'striking continuity in the personalities involved' in the legislative and judicial battles against communism, see Ricketson, *op. cit.* n. 2, 110-11.

³ Reliable figures on Communist Party membership are scarce, but even if the figures cited by Webb (550 in 1928, maybe 30,000 a decade later) are vastly overstated, Party membership must have increased phenomenally in the 1930s. See Webb, L., *Communism and Democracy in Australia: A Survey of the 1951 Referendum* (1954) 22.

⁴ On its attitude, see Hasluck, P., *The Government and the People 1939-1941* (1952) 585-7, 589-90.

⁵ National Security (Subversive Associations) Regulations 1940 (Cth) reg. 3; *Commonwealth Gazette*, No. 110, 15 June 1940. See also Cain, F., *The Origins of Political Surveillance in Australia* (1983) 268-9.

⁶ *Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth* (1943) 67 C.L.R. 116. Latham C.J. and McTiernan J. dissented.

⁷ Cain, *op. cit.* n. 5, 266; *Manual of National Security Legislation* (2nd ed. 1942) 313 (n. *). For the interesting position in the United Kingdom, see Stammers, N., *Civil Liberties in Britain During the 2nd World War* (1983) especially 102-16. Although contemplated, a ban was never imposed on the Communist Party. But a communist leaflet, *The People Must Act*, was suppressed on 8 July 1940, and two communist papers, the *Daily Worker* and *The Week*, were banned from 13 January 1941 to 26 August 1942: Stammers, *op. cit.* n. 7, 100-1, 107, 116.

⁸ National Security (General) Regulations 1939 (Cth) reg. 17B, inserted 24 May 1940, in *Manual of National Security Legislation* (1941) 159-60.

⁹ The ban was anticipated even though an attempted tip-off to Sharkey in Sydney by a non-Communist proof-reader at the Government Printing Office in Canberra failed because Sharkey's mail was intercepted: Cain, *op. cit.* n. 5, 268-9. The proof-reader was sentenced to six months jail.

¹⁰ Carment, D., 'Australian Communism and National Security: September 1939-June 1941' (1980) 65 *Journal of the Royal Australian Historical Society* 246, 252; Cain, *op. cit.* n. 5, 266, 269.

sympathizers¹¹ — and subjected communists to surveillance,¹² but Party activities do not seem to have been greatly disrupted.¹³ Party meetings continued to be held, albeit disguised as book or tennis club meetings,¹⁴ communists continued to hold union offices,¹⁵ and Party members stood as 'Independents' or 'Socialists' in the September 1940 general election and received record votes, although it was an election in which independents generally polled well.¹⁶

The Communist Party's attitude to the war changed dramatically following the German invasion of the Soviet Union on 22 June 1941: 'the local comrades' "line" on the whole war issue had suffered one of its characteristic over-night sea changes' as Crisp aptly put it.¹⁷ Now the Party wholeheartedly supported the war and urged the most strenuous possible exertions against the Axis powers. The government's attitude to the Party inevitably softened, although the ban remained in force:

With the growth of pro-Russian feeling there was in practice some mitigation of the ban on their activities. Their pamphlets appeared more numerous and their known members appeared to enjoy considerable freedom of movement, speech-making and organising. It was one of the remarkable features of the changed attitude that, at a time when the organisation was still illegal its known officials were able to receive travel permits, it was able to obtain paper for the printing of its banned publications, additional telephones were connected to its offices, J.B. Miles (described as its general secretary) broadcast from the platform of the Sydney Town Hall at a demonstration to mark the first anniversary of the Soviet Union's entry into the war, and it published on at least one occasion a message of greeting to the Communist Party from a Minister in the Labour Government. An even more remarkable feature of the situation was its public campaigning during 1942 for the imposition on so-called 'Fascists' in Australia of exactly the same restrictions and penalties which, when applied in its own case by the previous Government, it had represented to be a violation of 'freedom'.¹⁸

When the Curtin Labor government entered office on 7 October 1941, the Soviet Union had been an ally for several months and local communists were generally supporting the war effort. Yet the ban on the Party and communist publications was not lifted, partly because of division of opinion within the Labor Party.¹⁹ When the ban on the Party and communist publications was finally lifted on 18 December 1942, the Attorney-General, Dr Evatt, issued a lengthy statement making it clear that the ban had been lifted because of the Communists' change of policy since the Soviet Union became an ally, especially in supporting the war in the industrial field, and certainly not because of sympathy with communist views. The government had received undertakings from the Party that members would support the war effort, war production and

¹¹ See Brown, W. J., *The Communist Movement and Australia: An Historical Outline — 1890s to 1980s* (1986) 108. After perusing the files, Attorney-General Evatt noted that 'very few of the "raids" were justified by the meagre results where papers or pamphlets were seized': Commonwealth, 169 *Parliamentary Debates*, House of Representatives, 14 November 1941, 467.

¹² Cain, *op. cit.* n. 5, 269-76.

¹³ See Webb, *op. cit.* n. 3, 7; Carment, *op. cit.* n. 10., 253-4; Cain, *op. cit.* n. 5, 274. Jupp regarded the ban as 'extremely ineffectual for most of its operation': Jupp, J., *Australian Party Politics* (2nd ed. 1968) 91.

¹⁴ Cain, F. and Farrell, F., 'Menzies' War on the Communist Party, 1949-1951' in Curthoys, A. and Merritt, J. (eds), *Australia's First Cold War 1945-1953: Vol 1: Society, Communism and Culture* (1984) 109, 111; Cain, *op. cit.* n. 5, 271, 274.

¹⁵ Webb, *op. cit.* n. 3, 7.

¹⁶ *Ibid.* 7-8; Cain, *op. cit.* n. 5, 274.

¹⁷ Crisp, L. F., *The Australian Federal Labour Party 1901-1951* (1955) 178.

¹⁸ Hasluck, *op. cit.* n. 4, 591.

¹⁹ *Ibid.*

industrial harmony. Dr Evatt made it clear that the lifting of the ban was conditional upon the honouring of these undertakings and threatened to reimpose the ban if they were not observed.²⁰ Just to be sure, the government simultaneously promulgated new regulations prohibiting the advocacy of force for the advancement of any political cause, or sabotage.²¹

The ban had legally been in place for 2½ years, but had not been enforced for some time after the Soviet Union entered the war, especially the final six-months.²² There are few impartial assessments of how the Party fared during those 2½ years, but communist claims that its position strengthened have some credibility.²³ The Party certainly claimed an increase in membership, and figures published by Prime Minister Menzies in 1951 confirmed a 400% increase from 4,000 in June 1940, when the ban was imposed, to 16,000 in December 1942, when it was lifted.²⁴ Communist sympathizers claimed similar success for the Party's publications: a 300% increase in circulation for the *Communist Review* and a 200% increase for the *Tribune* in New South Wales.²⁵

The end of the war in Europe, and with it the alliance with the Soviets, saw relations between the Communist Party and the main political parties revert to their more normal position of mutual enmity. A rash of industrial disputes involving unions in which communists occupied leadership positions, including coalmining, stevedoring, transport and ironworkers unions,²⁶ led to renewed calls for action to be taken against the Communist Party, including banning. As usual, the campaign was led by the Party's oldest enemies, the Returned Services League, the Australian Constitutional League, the Victorian League of Rights, and the Country Party.²⁷ The New South Wales branch of the Country Party resolved in favour of a ban in April 1946,²⁸ a policy thereupon²⁹ adopted by the federal Country Party leader, Arthur Fadden, who, in his policy speech for the federal election later that year, advocated a ban and went so far as to liken a communist to a 'venomous snake to be killed before it kills'.³⁰ This image must have struck a sympathetic chord,³¹ for three years later Fadden's erstwhile colleague and now Liberal, Archie Cameron, who, as Minister for Commerce,

²⁰ 'End of Ban on Communists', *Sydney Morning Herald* (Sydney), 19 December 1942, 8, partly quoted in Webb, *op. cit.* n. 3, 9. Dr Evatt reiterated these remarks in answering a parliamentary question on 28 January 1943: Commonwealth, 173 *Parliamentary Debates*, House of Representatives, 28 January 1943, 111.

²¹ National Security (General) Regulations 1939 regs 41A, 41B, inserted 18 December 1942.

²² See Prime Minister Menzies' written answer: Commonwealth, 214 *Parliamentary Debates*, House of Representatives, 26 September 1951, 121; Webb, *op. cit.* n. 3, 7.

²³ Webb, *op. cit.* n. 3, 7.

²⁴ Menzies, *supra* n. 22, noted in Webb, *op. cit.* n. 3, 7, 22. A month later, membership was 20,000: Jupp, *op. cit.* n. 13, 91.

²⁵ Brown, *op. cit.* n. 11, 111. See also Webb, *op. cit.* n. 3, 7.

²⁶ Webb, *op. cit.* n. 3, 13.

²⁷ Cain and Farrell, *op. cit.* n. 14, 111-12.

²⁸ Webb, *op. cit.* n. 3, 12.

²⁹ *Ibid.* The *Sydney Morning Herald* stated that Fadden had advocated a Communist Party ban as early as 1943: *Sydney Morning Herald* (Sydney), 14 May 1950, 9. Fadden, however, did not make this claim in his memoirs: see Fadden, A. W., *They Called Me Artie* (1969) 97.

³⁰ Fadden, *op. cit.* n. 29, 97, 109.

³¹ The ophidian allusion was not original. Prime Minister Bruce called the Communist Party 'this viper' in a speech at Dandenong, 9 December 1925: quoted by Prime Minister Chifley: Commonwealth, 196 *Parliamentary Debates*, House of Representatives, 7 April 1948, 608.

had been responsible for the May 1940 ban on communist publications,³² referred to communists as 'human vermin'.³³

Menzies long resisted Country Party pressure to adopt the same policy, opposing a ban on the practical grounds that an underground party was harder to defeat than one operating openly,³⁴ and because

[w]e must not let it be thought that they are such a force in political philosophy that we cannot meet them.³⁵

Menzies later claimed that he had resisted a ban 'on the ground that, in time of peace, doubts ought to be resolved in favour of free speech'.³⁶ It is true that in this context he had, in May 1947, expressed 'complete confidence in the sanity of our own people',³⁷ which could be interpreted as a Holmesian expression of faith in the triumph of democracy over communism in the market-place of ideas,³⁸ although he went on to make the more practical argument already referred to.³⁹

In any event, the Liberal Party finally joined its coalition partner in advocating a ban, whether (as perhaps in 1940)⁴⁰ due to Country Party pressure as some suggested,⁴¹ a change of heart on Menzies's part resulting from intensification of the Cold War and industrial strife,⁴² or even a Machiavellian belief that divisions within the Labor Party made the issue one with the potential to split the party and thereby destroy it.⁴³

Perhaps it was a combination of some or all of these. In any event, the Parliamentary Liberal Party adopted a policy of banning the Communist Party in March 1948,⁴⁴ and in April the Victorian Liberal-Country Party government considered a Bill to outlaw the Party, but never introduced it into Parliament.⁴⁵

³² Cain, *op. cit.* n. 5, 266.

³³ Commonwealth, 201 *Parliamentary Debates*, House of Representatives, 8 March 1949, 1053 quoted in Davidson, A., *The Communist Party of Australia: A Short History* (1969) 110.

³⁴ Menzies: Commonwealth, 191 *Parliamentary Debates*, House of Representatives, 15 May 1947, 2460 quoted in Crisp, L. F., *Ben Chifley: A Political Biography* (1961) 381. See also Davidson, *op. cit.* n. 33, 359 (n. 12).

³⁵ Menzies, 13 February 1946, quoted in Webb, *op. cit.* n. 3, 12, and Fadden, *op. cit.* n. 29, 99.

³⁶ Second reading speech on the Communist Party Dissolution Bill: Commonwealth, 207 *Parliamentary Debates*, House of Representatives, 27 April 1950, 1995.

³⁷ *Supra* n. 34.

³⁸ See *Abrams v. United States* 250 U.S. 616, 630 (1919), *per* Holmes J., dissenting.

³⁹ *Supra* n. 34 and accompanying text.

⁴⁰ David Carmont goes so far as to suggest that the Communist Party ban of June 1940 was 'part of some understanding under which Country Party members joined the ministry' in March 1940: Carmont, *op. cit.* n. 10, 251-2.

⁴¹ See Whittington, D., *The House Will Divide: A Review of Federal Politics* (1954) 154.

⁴² As Menzies claimed, when announcing his change of view upon returning from overseas in January 1949: Webb, *op. cit.* n. 3, 13.

⁴³ Both Ben Chifley and Frank Green (the Clerk of the House of Representatives) believed that the Communist Party Dissolution Bill 1950 would have this effect. Chifley is reported to have remarked after Menzies' Second Reading speech: 'This is a political measure aimed at splitting the Labour movement': Crisp, *Ben Chifley*, *supra* n. 34, 386. In his memoirs, published in 1969, Green wrote: 'It was quite obvious that Menzies' real objective was to split the Labor Party': Green, F. C., *Servant of the House* (1969) 133. On the other hand, although conceding in their discussion of the 1951 referendum that discord within the Labor Party on the communism issue was a bonus for the government, Cain and Farrell assert that 'there is no reason to doubt Menzies' sincerity in hoping to carry the referendum for a Yes vote': Cain and Farrell, *op. cit.* n. 14, 129.

⁴⁴ Cain and Farrell, *op. cit.* n. 14, 112.

⁴⁵ Ricketson, *op. cit.* n. 2, 118-20.

Upon returning from an overseas visit during the Berlin Airlift, Menzies announced that the Liberals' election platform would include a ban on the Communist Party because war with the Soviets was foreseeable, and it would have been 'madness to wait until you are at war before you take steps to protect yourself' against communists' fifth-column activities.⁴⁶ The proposed ban was supported by several newspapers, including the *Sydney Morning Herald*,⁴⁷ and, as promised, featured prominently in the joint Opposition Policy Speech which Menzies delivered on 10 November 1949. In that speech, Menzies condemned the communists as 'the most unscrupulous opponents of religion, of civilized government, of law and order, of national security', and announced that '[t]he day has gone . . . for treating communism as a legitimate political philosophy':

Communism in Australia is an alien and destructive pest. If elected, we shall outlaw it.

The Communist Party will be declared subversive and unlawful and dissolved. A receiver will be appointed to deal with its assets.

Subject to appeal, the Attorney-General will be empowered to declare other bodies substantially Communist; to follow the party into any new form and attach illegality to that new association.

No person now a member of the Communist Party shall be employed or paid a fee by the Commonwealth; nor shall any such person be eligible for any office in a registered industrial organization.⁴⁸

Although the Labor Party was, like its coalition opponents, generally united in opposing communism, it too was far from monolithic on the issue of the appropriate steps to be taken against the Party, including banning. The better educated, more far-sighted federal parliamentary leaders of the Labor Party were more tolerant and less hostile to communism than the Party machine, State branches and the industrial wing of the Labor movement, which came into daily contact with communist militants in the unions.⁴⁹ Meredith Burgmann has remarked that

[f]or the Australian labour movement, VE day was the beginning of the Cold War. . . . My evidence suggests that the antagonism of the ALP machine towards the CPA (Communist Party of Australia) can be traced back to the day the war ended in Europe. However, it took much longer for the federal leadership to adopt anti-communist positions. . . . Even then they meticulously distinguished between the activities of the domestic Communist Party and the Soviet Union — a distinction which the ALP machine had never acknowledged.⁵⁰

Official Labor policy regarding the Communist Party had long been clear and consistent: it opposed communism, but refused to endorse a ban on the Party because it recognized communists' rights as fellow-citizens to freedom of speech and association provided that they did not contravene the law (including treason,

⁴⁶ 'Liberal Plan to Ban Communists', *Sydney Morning Herald* (Sydney), 19 January 1949, 3, noted in Webb, *op. cit.* n. 3, 13.

⁴⁷ See, e.g., 'Communists Should be Banned' (editorial), *Sydney Morning Herald* (Sydney), 8 March 1949, 2; 'What to Do About the Communist Party' (editorial), *Sydney Morning Herald* (Sydney), 13 March 1949, 2; 'Nation-Wide Ban the Real Answer to Communism' (editorial), *Sydney Morning Herald* (Sydney), 23 April 1949, 2.

⁴⁸ 'Drastic Action on Communists', *Sydney Morning Herald* (Sydney), 11 November 1949, 5. For Fadden's remarks on this issue, see Webb, *op. cit.* n. 3, 23.

⁴⁹ See Burgmann, M., 'Dress Rehearsal for the Cold War', in Curthoys and Merritt, *op. cit.* n. 14, 49, 64. See, e.g., the Queensland Labor government's harsh attitude towards strikers: McMullin, R., *The Light on the Hill: The Australian Labor Party 1891-1991* (1991) 251.

⁵⁰ Burgmann, *op. cit.* n. 49, 64.

⁵¹ See Webb, *op. cit.* n. 3, 4, 9-12.

sedition, or other offences against the state).⁵¹ This policy had been enunciated at the 1945 Triennial Conference of the Party,⁵² and was re-iterated at the 1948 Conference, which laid down the policy which governed the Party in the 1949 general election and indeed during the 1950 debate on the Communist Party Dissolution Bill. That Conference issued a 'Repudiation of the Communist Party' which

[reaffirmed] its repudiation of the methods and principles of the Communist Party and the decisions of previous Conferences that between the Communist Party and the Labour Party there is such basic hostility and differences that no Communist can be a member of the Labour Party.

The document went on to declare that the A.L.P.

must carry on an increasing campaign directed at destroying the influence of the Communist Party wherever such exists throughout Australia.⁵³

Nevertheless, the same Conference, citing its 'adherence to the basic freedoms of the right of association and the right of expression', again declared that

any proposal for the banning of a political party because of hostility and objection to its platform and beliefs, no matter how repugnant such may be, is a negation of democratic principles and should be rejected.⁵⁴

These principles reflected the views of the government, including Prime Minister Chifley and Deputy Prime Minister Evatt. At an election meeting in September 1946, Dr Evatt had remarked: 'Communists are fellow citizens. Let them have freedom of expression unless they break the law of the country.'⁵⁵

In defending his government against a censure motion moved by Opposition Leader Menzies in April 1948, alleging that the government had failed to take adequate steps against communist subversion, Prime Minister Chifley gave a lucid exposition of his thinking. While conceding 'the grave menace to democracy that communism presents' and emphasising the Labor Party's complete opposition to and abhorrence of its principles, he reminded the House that communism was 'the fruit of hundreds and hundreds of years in which 80% of the people lived in the direst poverty'. Consequently, communism could be fought effectively only by addressing the injustices which gave it birth:

[T]he only way in which to defeat communism is for the democracies of the world to be really democratic. . . . Communism can only be beaten by improving the conditions of the people, because bad conditions are the soil in which it thrives.

Moreover, he opposed a ban on the practical ground that repression would only serve to strengthen the Communist Party while threatening our liberties:

Let me emphasize that never is liberty more easily lost than when we think we are defending it.

His conclusion echoed Menzies's own remarks of only the year before:⁵⁶

If a ban is imposed on the Communist party, it will merely change its name as it did in Canada and go on in exactly the same way. We are going to fight communism in the open.⁵⁷

⁵² *Ibid.* 12.

⁵³ Quoted in Crisp, *op. cit.* n. 17, 179-80.

⁵⁴ *Ibid.* 179. See also McMullin, *op. cit.* n. 49, 250-1.

⁵⁵ Quoted in Webb, *op. cit.* n. 3, 12.

⁵⁶ *Supra* n. 34 and accompanying text.

⁵⁷ Chifley, Commonwealth, 196 *Parliamentary Debates*, House of Representatives, 7 April 1948, 609-13 reprinted in Stargardt, A. W. (ed.), *Things Worth Fighting For: Speeches by Joseph Benedict Chifley* (1952) 43-8.

And indeed the Labor government did. As Crisp has noted

[t]hrough his opponents sought to minimize and deprecate it, the record of anti-Communist action during Chifley's Prime Ministership was substantial.⁵⁸

The government secured special legislation to protect the Anglo-Australian experimental rocket project at Woomera from boycotts by communist-led unions,⁵⁹ and to prevent fraud in union ballots.⁶⁰ It prosecuted several communists for uttering seditious words and for contempt of court,⁶¹ and established the Australian Security Intelligence Organization (ASIO).⁶² Its most famous battle was, of course, against the communist-controlled Miners' Federation, which called a strike which lasted from 27 June 1949 until the first week of August, severe disrupting industry in New South Wales and South Australia.⁶³ During that period, the government secured special legislation to prohibit unions from financially assisting the strikers,⁶⁴ leading to the imprisonment of four unionists for contravening court orders under that Act,⁶⁵ police and security officers raided Marx House, the Sydney headquarters of the Communist Party, on 8 July⁶⁶ and troops were finally employed to move open-cut coal in New South Wales on 27 July after a joint meeting of the Commonwealth and New South Wales cabinets (both Labor).⁶⁷ So Dr Evatt was surely justified in claiming, in May of the following year, that the Chifley government had

passed drastic special legislation and took strong executive action to defend the people against specific disruptive activities.⁶⁸

However, an electorate used to seeing issues in black and white (or red and white) must have found it difficult to understand Labor's policy on communism, as the election results demonstrated. It was easy to charge, as did Fadden and others, including occasionally Menzies, that the Labor Party and the Communist Party shared similar objectives, differing only in their methods and speed in pursuing them.⁶⁹ Nor were supposedly more sophisticated observers immune from similar perceptions. In an editorial published during the election campaign,

⁵⁸ Crisp, *Ben Chifley*, *supra* n. 34, 359 (emphasis in original).

⁵⁹ Approved Defence Projects Protection Act 1947 (Cth).

⁶⁰ Commonwealth Conciliation and Arbitration Act 1949 (Cth).

⁶¹ L. L. Sharkey, sentenced to three-years imprisonment, conviction upheld: *R. v. Sharkey* (1949) 79 C.L.R. 121 (the N.S.W. Court of Criminal Appeal reduced the sentence to 18 months in February 1950); G. Burns, sentenced to six-months imprisonment, conviction upheld by an equally divided High Court: *Burns v. Ransley* (1949) 79 C.L.R. 101; K. Healy, prosecuted for seditious utterance, but acquitted; J. McPhillips, imprisoned for contempt of court. See Davidson, *op. cit.* n. 33, 108-9; Ricketson, *op. cit.* n. 2, 113-8.

⁶² Crisp, *Ben Chifley*, *supra* n. 34, 360.

⁶³ Webb, *op. cit.* n. 3, 13.

⁶⁴ National Emergency (Coal Strike) Act 1949 (Cth).

⁶⁵ Webb, *op. cit.* n. 3, 14. Dr Evatt stated that ten had been imprisoned: Commonwealth, 207 *Parliamentary Debates*, House of Representatives, 9 May 1950, 2287.

⁶⁶ Webb, *op. cit.* n. 3, 14.

⁶⁷ McMullin, *op. cit.* n. 49, 253.

⁶⁸ Evatt, H. V., 'Danger to All Citizens', *Herald* (Melbourne), 6 May 1950.

⁶⁹ See Webb, *op. cit.* n. 3, 23; Ricketson, *op. cit.* n. 2, 112. Cf. Prime Minister Menzies: 'I see no distinction whatever between the ultimate objective of the Communist party and the ultimate objective of the Socialist party; but I have always been prepared to assume, in favour of the Socialist party, that it did entertain some difference of method.': Commonwealth, 206 *Parliamentary Debates*, House of Representatives, 7 March 1950, 369, discussed by Chifley: Commonwealth, 207 *Parliamentary Debates*, House of Representatives, 9 May 1950, 2275-6.

the *Sydney Morning Herald*, for example, cavalierly dismissed Chifley's argument that banning the Party would merely drive it underground and ultimately prove futile — as the wartime experience demonstrated, and Menzies had until recently conceded — and suggested that his party's refusal to ban the Communist Party was, instead, based upon

a fear of provoking a fatal split in the trade-union movement which is the basis of political Labour's strength

which was, presumably, a factor in Labor thinking. But then it added maliciously:

Fear is one element; a sense of kinship between advanced Labour and Communist doctrines is another. How else explain the extraordinary indulgence shown towards Communists by Labour in office?⁷⁰

It advised readers to vote Labor out. They did.

2. THE COMMUNIST PARTY DISSOLUTION ACT 1950 (Cth)

The Liberal-Country Party coalition won the December 1949 election on a platform that promised, *inter alia*, to 'put value back in the pound', abolish petrol rationing, provide child endowment to first-born children and, of course, to ban the Communist Party.⁷¹ In the enlarged 121-seat House of Representatives, the coalition won 74 seats (Liberal 55, Country Party 19) to Labor's 47. The Senate was also enlarged, and in the simultaneous half-Senate election (on the new proportional representation system), the coalition won 23 seats to Labor's 19. However, when added to the strong Labor majority in the remaining half of the Senate, Labor enjoyed a Senate majority of 34 to 26.⁷²

The Communist Party Dissolution Bill was introduced into the House of Representatives by Prime Minister Menzies on 27 April 1950. The Bill's operative provisions were preceded by a long preamble containing nine 'recitals', which:

- (a) cited the three powers principally relied upon: the defence power, the express incidental power, and the executive power (ss 51(vi), 51(xxxix) and 61 respectively);
- (b) summarized the case against the Communist Party by reference to its objectives and activities: it was said to engage in activities designed, in accordance with 'the basic theory of communism, as expounded by Marx and Lenin', to create a 'revolutionary situation' enabling it 'to seize power and establish a dictatorship of the proletariat.' To this end, it engaged in 'activities ... designed to ... overthrow ... the established system of government in Australia and the attainment of economic, industrial or political ends by force, ... intimidation or [fraud]', especially espionage, sabotage, treason or subversion, and promoted strikes in order to disrupt production in industries vital to Australia's security and defence, including coal-mining, steel, engineering, building, transport and power;⁷³ and
- (c) asserted that the measures taken by the Bill were necessary for Australia's defence and security and the execution and maintenance of its Constitution and laws, thereby tying the Bill's operative provisions to the powers cited in (a).

⁷⁰ "'Dead" Issue of Communism is Alive and Kicking', *Sydney Morning Herald* (Sydney), 17 November 1949, 2.

⁷¹ See Menzies' Policy Speech: *Sydney Morning Herald* (Sydney), 11 November 1949, 1, 4, 5.

⁷² Webb, *op. cit.* n. 3, 29; Beasley, F. R., 'Australia's Communist Party Dissolution Act' (1951) 29 *Canadian Bar Review* 490, 492-5.

⁷³ Latham C.J., in a model of concision, summed up the charges in the following way: 'the Australian Communist Party is a revolutionary party using violence, fraud, sabotage, espionage and treasonable or subversive means for the purpose of bringing about the overthrow or dislocation of the established system of government of Australia and, particularly by means of strikes or stoppages of work, causing dislocation in certain industries which are declared to be vital to the security and defence of Australia.' (The *Communist Party* case, *supra* n. 1, 129.)

The Bill's operative provisions fell into three categories. First, the Australian Communist Party was declared an unlawful association and abolished. Its property was to be vested in a government-appointed receiver⁷⁴ who was to realize the Party's assets, discharge its liabilities,⁷⁵ and pay the balance to the Commonwealth.⁷⁶ In other words, the Party's property was to be confiscated without compensation.

Secondly, the Bill dealt with affiliated organizations other than trade unions and included safeguards against improper declaration of bodies as unlawful associations.

Affiliated organizations were broadly defined to include not only bodies claiming to be affiliated with the Communist Party but also those run by members of the Party or advocating communist principles.⁷⁷ This was clearly designed to include any disguised reincarnation of the Communist Party. The Bill empowered the Governor-General (meaning the Governor-General in Council) to declare bodies to be communist affiliates and, if satisfied that their existence was prejudicial to security and defence, unlawful. The body was thereupon dissolved and its property vested in a receiver, thus suffering the same fate as the Communist Party.⁷⁸ The Bill also made it an offence, punishable by five years imprisonment, for a person knowingly⁷⁹ to be an officer or member of an unlawful association which included the Communist Party and 'declared' bodies.⁸⁰

Safeguards against improper declaration of bodies as unlawful associations were very limited. First, the Executive Council could not advise the Governor-General to declare a body unless the evidence had been considered by a committee comprising of the Solicitor-General, the Secretary of the Defence Department, the Director-General of Security and two other persons appointed by the government.⁸¹ It was the committee's *consideration* of the evidence, however, and not its *approval* which was a precondition of declaration.⁸²

Secondly, the body could apply to a court⁸³ for a declaration that it was not affiliated with the Communist Party.⁸⁴ Despite strenuous argument from the Labor Party, the government adamantly refused to allow judicial review of both limbs of its declaration of unlawful associations. In other words, a decision that

⁷⁴ Communist Party Dissolution Act 1950 (Cth) s. 4. (Reference will be made to the provisions of the Act, rather than the Bill, where they are essentially identical.)

⁷⁵ Unlike the National Security (Subversive Associations) Regulations 1940, held invalid in *Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth* (1943) 67 C.L.R. 116, in which the absence of such a provision was a critical factor in their invalidity: see Williams J. (Rich J. concurring), who referred to this 'holocaust of proprietary rights' (at 166-7).

⁷⁶ Communist Party Dissolution Act 1950 (Cth) s. 15.

⁷⁷ *Ibid.* s. 5(1).

⁷⁸ *Ibid.* ss 5(2), 6, 8 and 15.

⁷⁹ 'Knowingly' was added by the government at the suggestion of the Opposition. For a succinct account of the amendments proposed by Labor — most of which were not accepted by the government — see Beasley, *op. cit.* n. 72, 497-502.

⁸⁰ Communist Party Dissolution Act 1950 (Cth) s. 7.

⁸¹ *Ibid.* s. 5(3), an amendment introduced by the government.

⁸² As Dixon J. noted: the *Communist Party* case, *supra* n. 1, 176.

⁸³ The High Court or the Supreme Court of a State or Territory. The Bill originally confined review to the High Court, but this was a Labor amendment the government accepted.

⁸⁴ Communist Party Dissolution Act 1950 (Cth) s. 5(4).

the existence of a 'declared' body was prejudicial to defence and security was final and conclusive and not open to review.

One of the most controversial aspects of the Bill was that the body had the onus of disproving communist affiliation in judicial review proceedings.⁸⁵ This was strenuously opposed by the Opposition and others, yet received no significant concession from the government. The government claimed that its sources of information would be prejudiced if it had to bear the onus of proving illegality in line with long-established traditions of the common law.

Thirdly, the Bill provided that individuals could be 'declared' if the Governor-General was satisfied that, at any time after 10 May 1948 (the last day of the most recent National Congress of the Australian Communist Party), the individual was a communist or an officer or member of the Party and was engaged, or was 'likely to engage',⁸⁶ in activities prejudicial to the security and defence of Australia.⁸⁷ The same 'safeguards' noted above applied here.⁸⁸

'Declared' persons could not be employed by the Commonwealth or a Commonwealth authority. Nor could they hold office in a union in an industry declared by the Governor-General to be 'vital to the security and defence of Australia.'⁸⁹

Interestingly, 'communist' was defined as

a person who supports or advocates the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin.⁹⁰

The effect of this, as Chifley and others noted, was that Menzies, Fadden and others could declare Labor Party members 'communist' on the basis that the Labor and Communist Parties allegedly shared the same 'objectives', differing only in their methods of achieving them.⁹¹

In an eloquent second-reading speech, calling in aid earlier anti-communist statements by Labor, Prime Minister Menzies conceded that the legislation was 'novel . . . and far-reaching',⁹² but argued that it was necessary 'to deal with the King's enemies in this country.'⁹³ A fundamental question was 'what liberty should there be for the enemies of liberty under the law?'⁹⁴ Referring extensively to the writings of Stalin, Sharkey and other communists, he argued that '[t]he importance of the Australian Communist is . . . not numerical, but positional',⁹⁵ which he illustrated by listing 53 alleged Communist trade union leaders in key industries,⁹⁶ a list he had to correct a fortnight later in respect of five of them.⁹⁷

Since the Labor Party still controlled the Senate, its attitude was critical to the

⁸⁵ *Ibid.* sub-ss 5(5)-(6). The onus of proof would fall upon the government only if the applicant, who was obliged to begin, had given evidence in person: s. 5(5).

⁸⁶ Emphasis added.

⁸⁷ Communist Party Dissolution Act 1950 (Cth) s. 9(1)-(2).

⁸⁸ *Ibid.* s. 9(3)-(6).

⁸⁹ *Ibid.* ss 10, 14.

⁹⁰ *Ibid.* s. 3(1).

⁹¹ See Chifley: Commonwealth, 207 *Parliamentary Debates*, House of Representatives, 9 May 1950, 2275-6.

⁹² Commonwealth, 207 *Parliamentary Debates*, House of Representatives, 27 April 1950, 1994.

⁹³ *Ibid.* 1995.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.* 1996.

⁹⁶ *Ibid.*

⁹⁷ Commonwealth, 207 *Parliamentary Debates*, House of Representatives, 9 May 1950, 2242.

future of the Bill, but division within the Party and the Labor movement generally presented the Party with a serious dilemma and made the issue one with the potential to provoke a split. Chifley believed that this was indeed Menzies' real objective;⁹⁸ as Crisp remarked, Menzies had 'thrust a burning brand — the *Communist Party Dissolution Bill* — deep into the Labour undergrowth.'⁹⁹ Chifley's own view, in line with the 1948 Federal Conference policy noted earlier,¹⁰⁰ was that the Bill should be rejected.¹⁰¹ However, others in the Labor movement differed: a small group of Victorians, for example, mainly associated with The Movement, actually supported the ban, and many on the right in caucus, in the Labor movement and in the State parties pragmatically argued that, although the Bill was undesirable, it was 'unlikely to work satisfactorily' — so '[w]hy damage yourself to help the Comms?'¹⁰² Dr Evatt, Deputy Leader of the Opposition, contrasted Labor's own 'drastic special legislation' with this Bill on the important ground that Labor's legislation 'applied to all persons, not merely to Communists', and any penalties were 'imposed by courts of law according to the principles of justice and due process', while this Bill was *ad hominem* legislation in the nature of an Act of Attainder.¹⁰³ Its provisions allowing persons to be 'declared', with very serious consequences to reputation and employment, without being informed of the allegations against them, yet bearing the onus of disproving them were, he rightly argued, a denial of basic principles of British justice — an adoption of the methods of fascism and communism.¹⁰⁴ As Chifley aptly remarked, the Bill

opens the door for the liar, the perjurer and the pimp to make charges and damn men's reputations and to do so in secret without having either to substantiate or prove any charges they might make.¹⁰⁵

Dr Evatt's reference to Acts of Attainder was particularly appropriate because, although our Constitution, unlike the American, does not forbid Acts of Attainder as such,¹⁰⁶ the fact that the legislation was aimed at specific persons and bodies, rather than regulating or proscribing specific conduct, underlay its constitutional invalidity.¹⁰⁷ In fact, Dr Evatt was so convinced of the Bill's

⁹⁸ *Supra* n. 43.

⁹⁹ Crisp, *Ben Chifley*, *supra* n. 34, 384.

¹⁰⁰ *Supra* n. 54 and accompanying text.

¹⁰¹ Crisp, *Ben Chifley*, *supra* n. 34, 388; Murray, R., *The Split: Australian Labor in the Fifties* (1970) 79.

¹⁰² Murray, *op. cit.* n. 101, 79-80. 'The Movement', as the Catholic Social Studies Movement was commonly known, was a secret organization of Catholics established by B. A. Santamaria in Victoria in 1942 to oppose communism in the trade unions. It was succeeded by the National Civic Council in 1957. See Rawson, D. W., 'The A.L.P. Industrial Groups' in Isaac, J. E. and Ford, G. W. (eds), *Australian Labour Relations Readings* (2nd ed. 1971) 205; Santamaria, B. A., "'The Movement': 1941-60 — an Outline' in Mayer, H. (ed.), *Catholics and the Free Society* (1961) 54.

¹⁰³ Evatt, H. V., 'Danger to All Citizens', *Herald* (Melbourne), 6 May 1950; Dr Evatt: Commonwealth, 207 *Parliamentary Debates*, House of Representatives, 9 May 1950, 2287-8.

¹⁰⁴ Commonwealth, 207 *Parliamentary Debates*, House of Representatives, 9 May 1950, 2293.

¹⁰⁵ *Ibid.* 2268.

¹⁰⁶ *Cf.* U.S. Constitution, Art. 1, s. 9(3); *United States v. Brown* 381 U.S. 437 (1965); *United States v. Lovett* 328 U.S. 303 (1946); Note, (1951) 65 *Harvard Law Review* 343, 344. See also *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, noted *infra*, n. 107.

¹⁰⁷ *The Communist Party case*, *supra* n. 1. The Communist Party Dissolution Act was probably an Act of Pains and Penalties and, as such, invalid on the additional, but closely related, ground that it contravened the constitutional separation of judicial power in that the legislature was purporting to

invalidity that he advised his colleagues to let it pass through Parliament and let the High Court destroy it.¹⁰⁸ Evatt's confidence in the High Court was ultimately vindicated when the Act was invalidated by a majority of six to one, but it could have proved a dangerous gamble, for the arguments in favour of validity were not groundless and derived support from wartime cases. After all, ten 'leading constitutional lawyers' took the opposite view,¹⁰⁹ as did Chief Justice Latham, and many were surprised when the High Court's decision was announced.¹¹⁰ Moreover, Dr Evatt could hardly have been familiar with the views of all the justices, since Justice Fullagar had only recently been appointed and Justice Kitto's formal appointment was dated the day after Evatt's second-reading speech on the Bill. Perhaps Dr Evatt simply had faith in an impartial judiciary, or maybe in the persuasiveness of Sir Owen Dixon who had misgivings regarding the Bill's validity from the very beginning,¹¹¹ although Evatt presumably did not know of them.

In any event, the Labor Party Federal Executive and caucus decided to support the Bill in principle, but endeavour to obtain amendments to secure greater protection for civil liberties by widening judicial review, removing the reverse onus of proof, and modifying the provision authorizing the warrantless search of premises.¹¹² The Opposition conceded that the government had a 'mandate' to dissolve the Communist Party; indeed Chifley believed that the issue of communism was the principal reason for Labor's electoral defeat.¹¹³ However, Labor justifiably argued that the Bill exceeded the government's mandate because, *inter alia*, Menzies's policy speech had promised to provide a right of appeal, but the Bill's provisions were grossly inadequate in this respect.¹¹⁴

Australian newspapers generally supported the Bill. The Hobart *Mercury*, for example, while conceding that the Bill was 'drastic and some of its provisions are not in accord with the generally accepted version of democratic principles', nevertheless announced that it had abandoned its reservations regarding a ban:

[T]he Prime Minister made out a case which is unanswerable. Communism is no longer to be regarded as a political philosophy. It is a threat to internal and external security. It is an avowed enemy and must be dealt with as such.¹¹⁵

exercise the judicial power of the Commonwealth. *Cf. Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 539 *per* Mason C.J., 606 ff. *per* Deane J., 686 *per* Toohey J., 706-7 *per* Gaudron J., 721 *per* McHugh J. But see *contra* the *Communist Party* case *supra* n. 1, 172-3 *per* Latham C.J., 234-5 *per* Webb J., 268-9 *per* Fullagar J.

¹⁰⁸ Tennant, K., *Evatt: Politics and Justice* (1970) 260.

¹⁰⁹ Ted Laurie, counsel for the Communist Party, quoted in Marr, D., *Barwick* (1980) 82.

¹¹⁰ Kirby, M. D., 'H. V. Evatt, The Anti-Communist Referendum and Liberty in Australia' (1991) 7 *Australian Bar Review* 93, 104. But see the accurate early assessment of an unnamed 'constitutional lawyer' in 'These are Menzies' Powers', *Smith's Weekly* (Sydney), 22 April 1950, 3. (This impressively accurate assessment was published five days before the Bill was introduced in the House.)

¹¹¹ See Dixon's letter to Latham, 23 May 1950, quoted in Lloyd, *op. cit.* n. 2, 199.

¹¹² Webb, *op. cit.* n. 3, 25-9.

¹¹³ Crisp, *Ben Chifley*, *supra* n. 34, 381. See also Cain and Farrell, *op. cit.* n. 14, 116. Webb thought that banking policy, nationalization and the cost of living may have been more important: Webb, *op. cit.* n. 3, 23.

¹¹⁴ See Chifley: Commonwealth, 207 *Parliamentary Debates*, House of Representatives, 9 May 1950, 2269-70.

¹¹⁵ 'War on Communism' (editorial), *Mercury* (Hobart), 28 April 1950, 3.

The Brisbane *Courier-Mail* similarly argued that

if democratic liberty is to be preserved for all who believe in it, it must be defended against enemies who would destroy it. It cannot allow itself to be used for its own destruction, and that is the only use communists have for free speech and other democratic rights.¹¹⁶

The *West Australian*¹¹⁷ and the *Adelaide Advertiser*¹¹⁸ were more restrained in their support of the Bill, but other newspapers were particularly virulent. The *Sydney Morning Herald*, long a supporter of a ban, dismissed Labor concerns regarding civil liberties as disingenuous and hypocritical.¹¹⁹ The editorial in the *Canberra Times* on the day after the Bill's introduction was entitled 'Drastic Remedy For Cancer', and suggested that 'freedom in the accepted British sense' be suspended until it is no longer under threat from the cancer of communism.¹²⁰ The *Bulletin* may have outdone them all. It congratulated itself on having supported a ban for at least a decade, urged the government to do more, and published a dramatic cartoon entitled 'Cornered' which featured a spotlight in which a cornered rat, branded with a hammer-and-sickle, was snarling at a fist-borne baton labelled 'Anti-Red Bill'.¹²¹

But the Labor Party was not alone in its misgivings. While commending the Prime Minister's 'brilliant' and 'masterly' performance in Parliament, the *Age* nevertheless warned that the Bill was 'repressive' and 'more drastic than many liberal-minded people would have expected.' It urged that 'the right of any individual to have full justice at all times' not be impaired.¹²² Another leading Melbourne daily, the liberal *Argus*, called the Bill 'the most significant measure in the history' of the Commonwealth Parliament 'in its bearing upon fundamental liberties.' It suggested

vigorous debate whether the idea of Communism cannot in fact be best suppressed or defeated by a better democratic idea in action.¹²³

Highly regarded overseas newspapers expressed similar reservations at the Bill's infringement of civil liberties. Among these were the *Manchester Guardian*, the *New York Times*, which warned against 'witchhunts',¹²⁴ and the *London Times*, which commented on the Bill several times. On the day after its introduction into the House it noted that many government supporters 'distrust deeply the arbitrary repressions which the Bill embodies as a desertion of the traditional British respect for civil liberties' and cautioned that methods which

imperil fundamental freedoms . . . , once written into the Statute Book, may be used in years to come for purposes not remotely to be envisaged now.¹²⁵

¹¹⁶ 'Defence of Liberty' (editorial), *Courier Mail* (Brisbane), 2 May 1950, 2.

¹¹⁷ 'The Subversion Bill' (editorial), *West Australian* (Perth), 28 April 1950, 2.

¹¹⁸ 'No Compromise' (editorial), *Advertiser* (Adelaide), 28 April 1950, 2.

¹¹⁹ 'Limit of Concessions on the Anti-Communist Bill' (editorial), *Sydney Morning Herald* (Sydney), 9 June 1950, 2.

¹²⁰ 'Drastic Remedy for Cancer', *Canberra Times* (Canberra), 28 April 1950, 4.

¹²¹ 'The Anti-Red Bill', *Bulletin*, 3 May 1950, 6 and cover.

¹²² 'Dealing with the Communists' (editorial), *Age* (Melbourne), 28 April 1950, 2.

¹²³ 'Australia and Communism' (editorial), *Argus* (Melbourne), 28 April 1950, 2.

¹²⁴ See Crisp, *Ben Chifley*, *supra* n. 34, 385.

¹²⁵ 'Anti-Communist Bill in Australia: Many Misgivings About Methods', *The Times* (London), 29 April 1950, 5.

It returned to the subject the following month, reminding readers that the United Kingdom had never, even in wartime, banned the Communist Party. It noted that the Bill's constitutional validity was doubtful, and concluded that:

There are too many provisions of the Bill which may be used as precedents to undermine safeguards which the Constitution and laws of the Commonwealth purport to guarantee.¹²⁶

Misgivings were also expressed by many individuals in Australia. Many of the clergy, including the Roman Catholic Archbishop of Melbourne, Dr Mannix, were troubled by the civil liberty implications of the Bill.¹²⁷ Professor Julius Stone of the University of Sydney Law School concluded that the Bill's provisions on the onus of proof amounted to 'a grave reversal of our legal ideals, which traditionally, far from easing the Crown's burden in [political offence] cases, has rather deemed it fitting to increase it.'¹²⁸ The following day he joined thirty-two academics from that University, none of whom were associated with the Communist Party, in warning that this 'illiberal' Bill exposed Australia to 'the charge of employing the same tactics as the Communists' and would 'provide a happy hunting-ground for malicious secret informers. . . . Few abuses are so dangerous to freedom and so hard to check.'¹²⁹ They urged several amendments to the Bill, including that it be given a time limit — a 'sunset clause' in modern jargon. The government adopted none of them.

Three days later, twenty-six other academics from the same University, including S.J. Butlin, John Anderson and Henry Mayer, published a more far-reaching attack upon the entire concept of the Bill. They condemned 'the use of totalitarian methods' as undermining respect for democratic principles and '[playing] into the hands of Communist and other totalitarian ideologies.' Foreshadowing the High Court's decision, they argued that '[t]he proper procedure in dealing with treasonable activities is to make overt acts or utterances illegal, whoever commits them.' And, in a telling argument, they alleged that to assume that communists could not be resisted if they complied with the general law 'implies that people, in free discussion and debate, will prefer totalitarianism to democracy.'¹³⁰

The *Times*' assertion that even Liberal Party supporters had misgivings regarding the Bill was correct.¹³¹ In a well-argued contribution to *Australian*

¹²⁶ 'Subversive Elements in Australia: Controversy Over the Bill Against Communism', *The Times* (London), 22 May 1950, 5; Accord: 'Australian Policy', *The Times* (London), 13 July 1950, 7.

¹²⁷ See, e.g., Marr, *op. cit.* n. 109, 81; Crisp, *Ben Chifley*, *supra* n. 34, 389; Letters, *Sydney Morning Herald* (Sydney), 2 and 3 May 1950.

¹²⁸ Letter, *Sydney Morning Herald* (Sydney), 18 May 1950, 2.

¹²⁹ Letter from 10 professors and 23 readers and lecturers, *Sydney Morning Herald* (Sydney), 19 May 1950, 2.

¹³⁰ Letter, *Sydney Morning Herald* (Sydney), 22 May 1950, 2. Two days later, fourteen academics from the University of Melbourne, including R. M. Crawford, W. Friedmann, J. La Nauze, P. H. Partridge and A. K. Stout, condemned the Bill as 'dangerous and unwise' because it 'depart[ed] from the fundamental democratic principles of constitutional and criminal law, in outlawing supporters of certain doctrines and associations rather than prosecuting definite actions directed against the state.' The Bill was an example of 'democracy fighting totalitarianism by some of its own methods, and thus undermining faith in the values of democracy [without which] no democracy can stand.': *Age* (Melbourne), 24 May 1950, 2. See also Walter Murdoch, Letter, *Herald* (Melbourne), 24 June 1950: 'Not even Mr Menzies, with all his eloquence, has succeeded . . . in converting me to the communist faith.'; Australian Council for Civil Liberties, *The Unnecessary Police State Bill* (July 1950).

¹³¹ See Whittington, *op. cit.* n. 41, 153. In a public opinion poll taken on 24-5 June 1950, Liberals believed by 48% to 43% that the onus of proving someone a communist should be on the

Quarterly, published before the Bill had been introduced into the House, Norman Cowper (later Sir Norman), like so many others with civil liberty concerns, urged the government not to act against specific groups or individuals, but to penalize conduct, leading to enforcement through the courts.¹³² He cautioned the government not to destroy the liberties it was seeking to defend:¹³³ 'Why oppose Satan if we are going to adopt his ways?'¹³⁴ In a masterly statement of the principal objections to the Bill, he argued that a law banning the Communist Party

will be objectionable and dangerous. It will constitute a grave threat to the right of association and all civil liberties, and make a lamentable precedent. . . . The Communist Party will be outlawed, not because of what it or its members have been proved to have done, but because of what the ruling party in Parliament thinks of it. . . . If it be right to point the legislative bone at the Communist Party today, why may not a differently-constituted Parliament in the future point it at, for example, Catholic Action, or the Rationalist Association, or the Anti-Vivisectionist Society?¹³⁵

He recalled that during the war Justice Starke had branded such regulations 'arbitrary, capricious and oppressive',¹³⁶ and noted that 'already there is a tendency to brand as Communists all who differ from opinions generally held or who are dissatisfied with conditions as they find them.'¹³⁷ All in all, it was a particularly timely contribution from someone closely associated with the Liberal Party.

In Parliament, the Labor Party implemented its agreed policy of supporting the Bill in principle, but seeking to amend it to lessen its infringement of civil liberties. This occurred in the committee stages in the House where, Crisp records, Dr Evatt 'handled the lion's share and fought tirelessly a tremendous duel with Menzies.'¹³⁸ But Labor did not have the numbers in the House, so it was able only to secure amendments which the government approved or itself moved. In the Senate, which Labor controlled, its amendments were carried, but the House rejected these, and the Bill was 'laid aside' on 23 June, shortly before the winter recess.¹³⁹

There was now concern in Labor ranks that Menzies would reintroduce the Bill as last approved by the House with a view to securing a double dissolution under s. 57 of the Constitution, and consequently an election on the issue of communism.¹⁴⁰ This was particularly worrying because an Australian Gallup Poll in May 1950 had found that 80% of voters favoured banning the Communist Party,¹⁴¹ and that was before the Korean War broke out on 25 June. (Australia announced its military involvement four days later.)

government. Labor voters objected to the reversal of the onus of proof by 65% to 25%. See Crisp, *Ben Chifley*, *supra* n. 34, 390.

¹³² Cowper, N., 'Action Against Communism' (1950) 22:1 *Australian Quarterly* 5, 7.

¹³³ *Ibid.* 5.

¹³⁴ *Ibid.* 6.

¹³⁵ *Ibid.*

¹³⁶ *Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth* (1943) 67 C.L.R. 116, 154, quoted in Cowper, *op. cit.* n. 132, 7. Dr Evatt also quoted Starke J.'s comment: *Commonwealth*, 207 *Parliamentary Debates*, House of Representatives, 9 May 1950, 2294.

¹³⁷ Cowper, *op. cit.* n. 132, 7-8.

¹³⁸ Crisp, *Ben Chifley*, *supra* n. 34, 388.

¹³⁹ *Ibid.* 388-90; Webb, *op. cit.* n. 3, 28-30.

¹⁴⁰ See Webb, *op. cit.* n. 3, 31-2, 38.

¹⁴¹ Crisp, *Ben Chifley*, *supra* n. 34, 390.

The government did indeed reintroduce the Bill on 28 September 1950. Menzies concluded his second-reading speech with a clear threat of double dissolution: 'Let us vote on this matter, let the Senate vote on it, and let the Australian people then say what they have to say about it.'¹⁴²

The Labor Party maintained its previous position, with Chifley stressing the danger the Bill posed to ordinary men and women, who should not be deprived of their fundamental right to an impartial trial before a court of law.¹⁴³

We are not concerned about guilty people. The Healys, McPhillipses, the Thorntons and their like are all Communists. They concede that they are and everybody knows it. It is not necessary to go before any court to find out that they are Communists. But there are hundreds of people in the community who have radical views. When once the Government starts to establish the degree to which a man may lean towards some point of view, and then action is taken upon secret information that is not open for rebuttal by the accused person a fundamental principle of British justice and of natural justice is ignored.¹⁴⁴

A cynic might remark that Chifley's main concern was not so much to protect the civil liberties of everyone, but to protect Labor members and supporters. The notion that the government might 'declare' some of Labor's more radical members may appear fanciful in retrospect, particularly after the legislation was invalidated and the subsequent referendum failed. But it must have seemed quite plausible in the anti-communist hysteria of those times, and was fuelled by an allegedly jocular, but nevertheless chilling, interchange in the House between the Prime Minister and Eddie Ward in which Menzies remarked that he could 'think of at least one Labour senator whom it would be easy to declare' and 'one member of [the House of Representatives] who might escape only by the skin of his teeth.'¹⁴⁵

In any event, while debate on the Communist Party Dissolution Bill (No.2) continued, there was increasing Labor concern at the prospect of a double dissolution and election on the issue of communism, especially since the outbreak of war in Korea.¹⁴⁶ Two days before Parliament resumed, a Federal Executive meeting, called to reconsider Labor's attitude to the Bill, had been evenly divided, leaving the *status quo* intact. But at the instigation of Tom Burke, the member for Perth (and father of Brian Burke), the Western Australian Executive called for the Federal Executive to reconvene.¹⁴⁷ When it did, on 16 October, after the Bill had been passed by the House and again reached the Senate,¹⁴⁸ the Western Australian delegation changed sides and supported passage of the Bill. Accordingly, the Federal Executive voted (probably *ultra vires*)¹⁴⁹ by 8 votes to 4 to direct the Federal Parliamentary Labor Party to allow

¹⁴² Commonwealth, 209 *Parliamentary Debates*, House of Representatives, 28 September 1950, 87.

¹⁴³ *Ibid.* 110-1.

¹⁴⁴ *Ibid.* 113.

¹⁴⁵ Commonwealth, 207 *Parliamentary Debates*, House of Representatives, 4 May 1950, 2219, discussed by Chifley: Commonwealth, 207 *Parliamentary Debates*, House of Representatives, 9 May 1950, 2270-1.

¹⁴⁶ For Chifley's remarkably sanguine view regarding such an election, see Crisp, *Ben Chifley*, *supra* n. 34, 394.

¹⁴⁷ For Chifley's reaction, see Crisp, *Ben Chifley*, *supra* n. 34, 394.

¹⁴⁸ For the parliamentary progress of the Bill, see Beasley, *op. cit.* n. 72, 502-3.

¹⁴⁹ Because it contravened the policy, quoted above, which was laid down at the 1948 Federal Conference (*supra* n. 54 and accompanying text). See Crisp, *Labour Party*, *supra* n. 17, 128, 180.

passage of the Bill without further amendment.¹⁵⁰ In a humiliating statement — ‘wretched and abject’ Crisp called it¹⁵¹ — tabled in the Senate on 17 October, the Executive sought to save face by arguing that it had decided to allow the Bill passage in the Senate

to test the sincerity of the Menzies Government before the people, and to give the lie to its false and slanderous allegations against the Labour party.¹⁵²

It nevertheless endorsed Labor’s criticism of the Bill’s controversial features, thereby maintaining, as the *Argus* sarcastically noted, ‘We shall be upright men — but not this week.’¹⁵³

The Senate finally passed the Bill on 19 October and the next day, after receiving the Royal Assent, it became law.

3. THE COMMUNIST PARTY CASE

The Australian Communist Party, ten unions and several union officials, including well-known communists, challenged the constitutional validity of the legislation on the very day of its enactment,¹⁵⁴ having already announced their intention to challenge two days earlier.¹⁵⁵ An immediate challenge was, of course, necessary so that the Party could initiate proceedings before it was dissolved and its assets confiscated.

The plaintiffs applied to the High Court for an injunction to restrain the government from enforcing any of the Act’s provisions. Dixon J. refused to issue such a general injunction, but did enjoin the Commonwealth from disposing of any property of the Party or ‘declaring’ any association or person pending a decision on the Act’s validity.¹⁵⁶ The plaintiffs wished to introduce evidence to challenge the veracity of the recitals, but the Commonwealth did not intend to introduce evidence and relied upon judicial notice of allegedly notorious facts. Accordingly, Dixon J. stated a case for the Full High Court, including himself, which essentially posed two questions: first, whether the validity of the Act depended upon proof in court of the facts recited in the preamble (and whether the plaintiffs were entitled to adduce evidence in support of their denial of those facts); and secondly, if not, whether the Act was invalid. Five of the seven justices answered the first question ‘No’ and the second ‘Yes’.¹⁵⁷

¹⁵⁰ Weller, P. and Lloyd, B. (eds), *Federal Executive Minutes 1915-1955* (1978) 441-3.

¹⁵¹ Crisp, *Ben Chifley*, *supra* n. 34, 395.

¹⁵² See Senator McKenna, Commonwealth, 209 *Parliamentary Debates*, Senate, 17 October 1950, 810-11. The Statement is quoted and discussed in Webb, *op. cit.* n.3, 34-7. For Chifley’s statesmanlike response, see Crisp, *Ben Chifley*, *supra* n. 34, 396.

¹⁵³ Crisp, *Ben Chifley*, *supra* n. 34, 396.

¹⁵⁴ See the *Communist Party* case, *supra* n. 1, 6. Proceedings were issued three hours after the Royal Assent was given: ‘Anti-Reds Bill Challenge’, *Sydney Morning Herald* (Sydney), 21 October 1950, 4.

¹⁵⁵ ‘Reds to Fight New Act’, *Sydney Morning Herald* (Sydney), 19 October 1950, 1. The Communist Party had announced its proposed challenge four days before enactment: ‘Reds will Challenge Bill in Court’, *Sydney Morning Herald* (Sydney), 17 October 1950, 4.

¹⁵⁶ ‘High Court Judge Issues Orders’, *Sydney Morning Herald* (Sydney), 22 October 1950, 3; ‘Anti-Red Act Case Adjourned: Injunction Stands’, *Sydney Morning Herald* (Sydney), 26 October 1950, 5.

¹⁵⁷ Dixon, McTiernan, Williams, Fullagar and Kitto JJ. Webb J. answered both questions ‘Yes’ and Latham C.J., dissenting, answered both ‘No’. Webb J. held that the validity of the Act depended upon proof of the truth of the recited facts, so since the Commonwealth offered no evidence to support them, its case failed: the *Communist Party* case, *supra* n. 1, 242-5.

The Commonwealth certainly did not wait for the outcome of the case before enforcing provisions of the Act. Commonwealth officers raided Party headquarters in Sydney, Melbourne, Perth, Hobart and Darwin as early as 23 October (three days after enactment) and seized documents and printed papers.¹⁵⁸ The Communist Party went 'underground' again, selling Marx House in Sydney for £50,000 and destroyed documents and account books.¹⁵⁹

On 25 October, Dr Evatt's appearance before Dixon J. revealed that he had accepted a brief to represent the communist-controlled Waterside Workers' Federation and James Healy, its General Secretary, two of the plaintiffs.¹⁶⁰ The news that the Deputy Leader of the Opposition would appear on the 'communist side' caused 'a minor sensation'.¹⁶¹ This led Harold Holt, a government Minister and Menzies' eventual successor, to launch in Parliament — in the absence of both Menzies and Evatt — a reprehensible attempt to smear Dr Evatt as a communist sympathizer. Holt's principal objective was clearly to foment dissension within the Labor Party, in which he partly succeeded, for the Victorian State Executive soon criticized Dr Evatt for accepting the brief.¹⁶² Holt alleged that Evatt's appearance as counsel would be interpreted by the public as a demonstration of communist sympathies. To fan Labor unease, he asked whether Chifley and the Party had been consulted in advance, suggesting that, if they had not, Dr Evatt's action revealed 'a reckless disregard of its consequences to his party'.¹⁶³ In fact, Dr Evatt had not consulted Chifley about taking the brief, nor was Chifley forewarned after the event.¹⁶⁴ Nevertheless, despite private reservations, Chifley loyally defended Evatt both in private and in public.¹⁶⁵ In the House he condemned Holt's 'miserable' and 'petty' 'smear campaign', and defended Evatt's right to appear 'as a member of the legal profession':

I suggest that because . . . members of the legal profession defend murderers they certainly cannot be accused of being in sympathy with murder. The whole thing is completely ridiculous.¹⁶⁶

The next evening, with Dr Evatt present, Chifley again rose to his defence and tabled a statement made by the (Liberal) chairman of a Victorian bar committee on behalf of the bar, which re-iterated the long-standing ethics of the bar, which have been well-known since the time of Erskine:

It is a barrister's *duty* to accept a brief . . . unless there are special circumstances to justify his refusal to accept a particular brief. . . . A barrister is not entitled to refuse a brief merely because of the character of the cause or of the client, or because he does not share the ideals involved in the former or dislikes the latter.¹⁶⁷

Menzies sought lamely to concede the bar's rules and yet not dissociate himself from Holt, which was not easy. In the end, all he could say was that it

¹⁵⁸ Webb, *op. cit.* n. 3, 39-40; Marr, *op. cit.* n. 109, 82 (Marr states that the raids occurred on 'Monday 22 October', but Monday was the 23rd).

¹⁵⁹ Tennant, *op. cit.* n. 108, 263.

¹⁶⁰ Marr, *op. cit.* n. 109, 82-3.

¹⁶¹ Cain and Farrell, *op. cit.* n. 14, 125.

¹⁶² Crisp, *Ben Chifley*, *supra* n. 34, 399.

¹⁶³ Commonwealth, 210 *Parliamentary Debates*, House of Representatives, 25 October 1950, 1392-3.

¹⁶⁴ As Chifley intimated to the House: *ibid.* 1393.

¹⁶⁵ Crisp, *Ben Chifley*, *supra* n. 34, 398-9.

¹⁶⁶ Commonwealth, 210 *Parliamentary Debates*, House of Representatives, 25 October 1950, 1394.

¹⁶⁷ *Ibid.* 1547 (emphasis added).

was up to the individual barrister to decide whether or not to accept a brief, but he personally would find it highly embarrassing to have to lead evidence to deny the facts recited in the Act's preamble if the High Court agreed to hear such evidence (it did not).¹⁶⁸ Evatt responded disdainfully that 'there will be no embarrassment in this case' and emphasized that '[t]his is not a question of counsel's rights', but of 'counsel's duty.'¹⁶⁹

So yet another interesting issue of civil liberty and judicial independence was thrown up by the Communist Party dissolution saga. From the point of view of the political future of himself and his party, Dr Evatt's appearance on behalf of the union was undoubtedly imprudent. But brave actions rarely seem prudent at the time.

The case opened on 14 November 1950 and ran for 24 days to 19 December.¹⁷⁰ The Commonwealth was represented by Garfield Barwick K.C. (later appointed Chief Justice by Menzies) and nine other counsel, of whom two later became judges of the High Court (Taylor and Windeyer) and four of State Supreme Courts (McInerney, Menhennitt and Lush of Victoria and Macfarlane of New South Wales). Not surprisingly, there were fewer future judges on the other side: apart from Dr Evatt K. C. (later Chief Justice of New South Wales), only Simon Isaacs K.C. and Martin Hardie K.C., who appeared for various unions, would reach the Supreme Court (of New South Wales).

After reserving its decision for almost three months, on 9 March 1951 the High Court declared the Act invalid by a majority of six to one, in seven separate judgments totalling almost 160 printed pages. Latham C.J. dissented and Webb J.'s reasoning was somewhat idiosyncratic but, notwithstanding some differences among them, the reasoning of the other five justices (Dixon, McTiernan, Williams, Fullagar and Kitto) was essentially similar.

All the judges, including Latham C.J. and Webb J., conceded that the Commonwealth had legislative power to protect itself from subversion, whether the source of the power be the defence power,¹⁷¹ the incidental power applying to executive power or, as Dixon and Fullagar JJ. preferred, an implied legislative power.¹⁷² Accordingly, the Commonwealth could have legislated to prohibit

¹⁶⁸ *Ibid.* 1548-9.

¹⁶⁹ *Ibid.* 1550 (emphasis added). An interesting side-issue was whether it was proper for a former High Court justice to appear as counsel before that court. (Dr Evatt had, of course, already appeared before the High Court since leaving it, in the *Bank Nationalization* case (1948) 76 C.L.R. 1, but, as Attorney-General representing the Commonwealth, he could arguably be seen as virtually a 'party' before the Court.) The *Sydney Morning Herald* published a series of increasingly acrimonious letters from two barristers, Clive Teece and John (later Sir John) Kerr, the former criticizing Dr Evatt, the latter defending him and citing the U.S. Supreme Court appearances of former-Justice (and later Chief Justice) Charles Evans Hughes in support: Letters, *Sydney Morning Herald* (Sydney), 28 October 1950, and 4, 6, 9 and 14 November 1950. The rules of the New South Wales Bar Association prohibit such appearance: Justice Thomas, *Judicial Ethics in Australia* (1988) 65. A similar rule existed in 1950: N.S.W. Bar Association, *Rules and Rulings as to Professional Conduct and Etiquette Adopted by the Council of the Association* (1947), 20 (rule 5).

¹⁷⁰ The *Communist Party* case, *supra* n. 1. Crisp, however, stated that it ran for 23 days to 20 December: Crisp, *Ben Chifley*, *supra* n. 34, 399. For a summary of the argument, see Williams, G., *The Communist Party Case: A Study in Law and Politics* (unpublished LL.B. Honours thesis Macquarie University 1991) ch. 2.

¹⁷¹ Dixon and Fullagar JJ. regarded the defence power (s. 51(vi)) as applying only to defence against external enemies: the *Communist Party* case, *supra* n. 1, 194, 259.

¹⁷² *Ibid.* 187-8, 260.

subversion, as indeed it had in the Crimes Act 1914 (Cth),¹⁷³ and left it to the courts to determine, after criminal trials, whether or not associations or individuals, including the Communist Party and communists, were guilty.¹⁷⁴ But the Communist Party Dissolution Act 1950 (Cth) had not done this. The Act itself had simply declared the Party guilty in its 'recitals' in the preamble and had authorized the Governor-General to 'declare' associations and individuals. Since the relevant constitutional power was the power to prohibit subversion (or protect the Constitution), the validity of the legislation depended on whether it was a law against subversion. But Parliament had simply declared this connection, or authorized the government to do so, with the consequence that the Party would be dissolved and persons and bodies could be 'declared', whether or not there *actually* was any *factual connection* between those bodies or persons and subversion, the *fact* upon which power rested — in other words, the 'constitutional fact'. Hence the law was invalid.

This chain of reasoning is dependent, of course, on the axiom of judicial review, as Fullagar J. noted.¹⁷⁵ The Commonwealth is a polity of limited powers, as section 107 of the Constitution makes clear. Hence the Commonwealth can only exercise powers expressly or impliedly conferred by the Constitution. But the critical question is: who decides whether or not the power exercised has been conferred? The High Court's answer is: the judiciary, ultimately the High Court.¹⁷⁶ This has never been doubted by Australian courts¹⁷⁷ and was clearly intended by the framers of the Constitution.¹⁷⁸ Although it does not expressly authorize it as, for example, in Japan,¹⁷⁹ the Constitution impliedly authorizes judicial review, especially when read against the background provided by American and British colonial practice, including that of nineteenth century Australia.¹⁸⁰

Once it be conceded that the judiciary has the final word on the question whether legislation is within power, it follows that Parliament cannot validly base legislation upon its own declaration (or that of an administrator) that the constitutional fact exists; the constitutional fact or facts must, in the opinion of a

¹⁷³ Crimes Act 1914 (Cth) s. 24C, introduced in 1920.

¹⁷⁴ The *Communist Party* case, *supra* n. 1, 200, 201, 205 *per* Dixon J., 226 *per* Williams J.; Detmold, M. J., *The Australian Commonwealth* (1985) 242; Campbell, *op. cit.* n. 2, 330-1.

¹⁷⁵ The *Communist Party* case, *supra* n. 1, 262 *per* Fullagar J.

¹⁷⁶ *Ibid.* 193 *per* Dixon J., 205-6 *per* McTiernan J., 231-2 *per* Williams J., 262-3 *per* Fullagar J., 271, 273, 274 *per* Kitto J.

¹⁷⁷ See, e.g., *R. v. Kirby, ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254, 276 *per* Dixon C.J., McTiernan, Fullagar and Kitto JJ.; Dixon C.J., 'Speech Upon Being Sworn in as Chief Justice' (1952) 85 C.L.R. xi, xiii. See, generally, Lindell, G., 'Duty to Exercise Judicial Review' in Zines, L. (ed.), *Commentaries on the Australian Constitution* (1977) 150.

¹⁷⁸ Galligan, B., 'Judicial Review in the Australian Federal System: its Origin and Function' (1979) 10 *Federal Law Review* 367; Thomson, J. A., *Judicial Review in Australia: The Courts and the Constitution* (1988) 129, 176; Thomson, J. A., 'Constitutional Authority for Judicial Review: A Contribution From the Framers of the Australian Constitution' in Craven, G. (ed.), *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1986) 173, 176-86.

¹⁷⁹ Constitution of Japan, art. 81.

¹⁸⁰ See Commonwealth Constitution, covering clause 5, ss 74, 76(i). But see Thomson, *Judicial Review*, *supra* n. 178, 129-60, 176-7; Thomson, 'Constitutional Authority', *supra* n. 178, 186 ff.; Lindell, 'Judicial Review', *supra* n. 177, 185-6. See generally Lindell, G., 'The Justiciability of Political Questions: Recent Developments' in Lee, H. P. and Winterton, G. (eds), *Australian Constitutional Perspectives* (1992) 180, 223-9.

court, *actually exist*.¹⁸¹ As Justice Fullagar aptly expressed it, 'a stream cannot rise higher than its source'.¹⁸² This means that:

The validity of a law or of an administrative act done under a law cannot be made to depend on the opinion of the law-maker, or the person who is to do the act, that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity. A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse.¹⁸³

This point, as Dr Evatt noted in his argument,¹⁸⁴ was well-established and had been clearly recognized as long ago as 1925 in *ex parte Walsh and Johnson*,¹⁸⁵ in which Evatt had appeared as counsel. It is, essentially, the rock upon which the Communist Party Dissolution Act 1950 (Cth) foundered, for the purpose of its preamble was, to borrow Justice Fullagar's words, a 'recital into power'. The fundamental constitutional flaw of the legislation proved to be its nature as an Act of Pains and Penalties, to which Dr Evatt, Norman Cowper and others had taken exception from the very beginning.¹⁸⁶

However, there was a complication, namely the notion that the defence power was exceptional, so that the general principle of judicial review noted above did not apply to it, either because it was *sui generis*, presumably on account of its importance, or because the nature of the power, and the requirement of secrecy in defence matters, required that the political branches be given exceptional leeway in determining what matters related to defence.¹⁸⁷

Such a notion underlay Latham C.J.'s long, rather tired, and 'almost incredulous'¹⁸⁸ dissent. In his opinion, the defence and anti-subversion powers are 'essentially different in character from most, if not all, of the other legislative powers'¹⁸⁹ and are, perhaps, the most important of all.¹⁹⁰ Courts do not have the capacity to determine who our enemies are; that, he argued, is a question of policy for the political branches. Just as wartime courts did not purport to review the government's decision that Germany and Japan were our enemies, so, he held, they cannot review the government's decision that communism is.¹⁹¹ The only question for the courts is whether the legislation has a real connection with the dangers Parliament has identified.¹⁹² The Act clearly passed this test, since

¹⁸¹ *The Communist Party case*, *supra* n. 1, 193 *per* Dixon J., 206 *per* McTiernan J., 222, 225, 226 *per* Williams J., 258, 263 *per* Fullagar J., 272-5 *per* Kitto J.

¹⁸² *Ibid.* 258.

¹⁸³ *Ibid.* 258, *per* Fullagar J., who went on to say that '*Parliament cannot recite itself into a field the gates of which are locked against it by superior law*': *ibid.* 263 (emphasis added).

¹⁸⁴ *Ibid.* 49, 51, 57, 59, 60, 119, 120, 121.

¹⁸⁵ (1925) 37 C.L.R. 36, 67-8, 71 *per* Knox C.J., 96 *per* Isaacs J.

¹⁸⁶ See, *e.g.*, *supra* n. 103; Cowper, *op. cit.* n. 132, 12.

¹⁸⁷ Presumably this is why Fullagar J. suggested that *Lloyd v. Wallach* (1915) 20 C.L.R. 299 may only be an 'apparent exception' to the general rule: the *Communist Party case*, *supra* n. 1, 258. But Sawyer is right in arguing that 'the inconsistency is patent': Sawyer, G., 'Defence Power of the Commonwealth in Time of Peace' (1953) 6 *Res Judicatae* 214, 219.

¹⁸⁸ Cowen, Sir Zelman, *Sir John Latham and Other Papers* (1965) 43, 45. Chief Justice Latham clearly knew he would be in the minority when he wrote his judgment: see *e.g.* his reference to Justice Williams' judgment: the *Communist Party case*, *supra* n. 1, 146. On the background to the writing of his judgment, see Lloyd, *op. cit.* n. 2, 199-201. On his later (improper) actions, see Lloyd, *op. cit.* n. 2, 202, and Miller, T., 'Sir John Latham and the Communist Party Dissolution Act: A Research Note' (September 1983) 15 *Australasian Political Science Association Newsletter* 2, 2-3.

¹⁸⁹ *The Communist Party case*, *supra* n. 1, 141.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.* 151-2, 154, 163, 172.

¹⁹² *Ibid.* 154.

dissolution of the enemy 'is the most obvious means of preventing its activity.'¹⁹³ No reference was made to the judicial review and rule of law concerns of the majority; as Sir Zelman Cowen aptly remarked of Latham's judicial record as a whole: 'he leaned towards the State and showed . . . too little regard for quite fundamental liberties.'¹⁹⁴

The exception to the general principle requiring judicial review of the existence of constitutional facts conceded by the majority was that, in time of actual 'hot' war, the connection between action taken under the defence power and the power itself could depend solely upon the opinion of an administrator that the action was for defence purposes. This was supposedly established — 'beyond all doubt' according to Fullagar J.,¹⁹⁵ although Kitto J., alone of the majority (excluding Webb J.), did not concede any such exception to the general rule¹⁹⁶ — by two wartime High Court cases in particular, *Lloyd v. Wallach*¹⁹⁷ and *ex parte Walsh*.¹⁹⁸ This exception was interpreted narrowly, so that it only applied in time of actual war or grave emergency¹⁹⁹ and, at least for Dixon and Fullagar JJ., only extended to the defence power and not to the Constitution-protection power.²⁰⁰ In the event, the Court held the exception inapplicable to the circumstances of the case because, relying upon judicial notice, Australia was not in a real 'hot' war on 20 October 1950 when the Act was enacted, but instead 'in a period of ostensible peace', even though its troops were fighting in Korea.²⁰¹

Since *Lloyd v. Wallach* and *ex parte Walsh* were held inapplicable, the Court did not find it necessary to examine those decisions in detail. But they are surely of weaker authority than the majority judges, apart from Kitto and Webb JJ., recognized. It is true that those cases upheld legislation authorizing the Minister for Defence to detain persons he believed will act prejudicially to the defence of the Commonwealth. But the regulation was upheld in *Lloyd* without any analysis of the constitutional issues, the principal question being whether it was *ultra vires* the Act.²⁰² When the same question arose in the next war, the Court felt 'constrained' by the supposed 'authority of *Lloyd v. Wallach*'²⁰³ to reach the same result, Starke J. going so far as to call the application (for a writ of *habeas corpus*) 'hopeless'.²⁰⁴ The remaining justices (not including Dixon J.) simply concurred.

¹⁹³ *Ibid.*

¹⁹⁴ Cowen, *op. cit.* n. 188, 47.

¹⁹⁵ The *Communist Party* case, *supra* n. 1, 258.

¹⁹⁶ *Ibid.* n. 1, 281-2.

¹⁹⁷ (1915) 20 C.L.R. 299.

¹⁹⁸ (1942) 48 A.L.R. 359.

¹⁹⁹ The *Communist Party* case, *supra* n. 1, 193-5 ('actual or threatened . . . violence'), 197-8 ('war'), 202 ('war and, perhaps . . . the imminence of war') *per* Dixon J., 206 ('grave emergency') *per* McTiernan J., 227 ('grave crisis during hostilities waged on a large scale and . . . even then, . . . limited to such preventive steps as are reasonably necessary to protect the nation during the crisis.'). 230 ('Before ss 4, 5, 9 and 10 of the Communist Party Dissolution Act could be held to be valid, the *Jehovah's Witnesses* case (1943) 67 C.L.R. 116 would need to be in effect overruled') *per* Williams J., 266 ('such enactments may (not that they always will) be valid') *per* Fullagar J.

²⁰⁰ *Ibid.* 192, but *cf.* 193-4 *per* Dixon J., 261, 266 *per* Fullagar J.

²⁰¹ *Ibid.* 202 *per* Dixon J. See also 196 *per* Dixon J., 207, 208 *per* McTiernan J., 227 *per* Williams J., 268 *per* Fullagar J.

²⁰² (1915) 20 C.L.R. 299, 303-4, 307, 310-1. See also Derham, D. P., 'Australian Communist Party v. The Commonwealth' (1950) 33 *Journal of Comparative Legislation* (3d ser.) (Parts III & IV) 40, 43; Sawer, G., *Australian Federal Politics and Law 1901-1929* (1956) 151.

²⁰³ *Ex parte Walsh* [1942] A.L.R. 359, 360 *per* Latham C.J.

²⁰⁴ *Ibid.*

Nevertheless, it is significant that in at least three subsequent decisions it was held that such administrative discretions were, ultimately, subject to judicial review,²⁰⁵ a view shared by Webb and Kitto JJ. in the *Communist Party* case.²⁰⁶ Hence, with respect, it is submitted that the so-called *Lloyd v. Wallach* exception to the general principle requiring judicial review of 'constitutional facts' should not be regarded as established 'beyond all doubt' as Fullagar J. held.²⁰⁷ If Australia is ever unfortunate enough to be involved again in a 'real' war, those decisions ought to be reconsidered.

4. THE SIGNIFICANCE OF THE CASE

The *Communist Party* case is undoubtedly one of the High Court's most important decisions. It may be overshadowed by the *Engineers* case²⁰⁸ from the perspective of impact upon constitutional doctrine, but when all its aspects are taken into account — its confirmation of fundamental constitutional principles such as the rule of law, its impact upon civil liberties, its symbolic importance as a re-affirmation of judicial independence, and its political impact — it was truly an 'epochal'²⁰⁹ decision, probably the most important ever rendered by the Court.

Politically, virtually everyone involved benefited from the nearly unanimous decision. The High Court certainly did: its reputation as a fearless defender of 'liberty under law' was never higher, most importantly with its usual critics on the left.²¹⁰ The *Argus*, which had always been the strongest newspaper critic of the Act, welcomed the decision whole-heartedly, proclaiming 'Thank God for the law'.²¹¹ Interestingly, the High Court's reputation was so high that, in contrast with the situation in the United States, even the newspapers which had supported the Act reported the decision without criticizing the court,²¹² even though they occasionally read the decision as a greater denial of power than it actually was.²¹³

The Communist Party and its members and supporters were the most obvious beneficiaries of the decision, but so were Dr Evatt and the Labor Party and its supporters — indeed anyone with radical or leftist leanings. Later events,

²⁰⁵ *Reid v. Sinderberry* (1944) 68 C.L.R. 504, 511-2 per Latham C.J. and McTiernan J.; *Dawson v. Commonwealth* (1946) 73 C.L.R. 157, 181-2 per Dixon J.; *Little v. Commonwealth* (1947) 75 C.L.R. 94, 103 per Dixon J., discussing *Lloyd v. Wallach*. See also *Shrimpton v. Commonwealth* (1945) 69 C.L.R. 613, 629-30 per Dixon J.

²⁰⁶ The *Communist Party* case, *supra* n. 1, 238, 239, 243 per Webb J., 282 per Kitto J.

²⁰⁷ *Ibid.* 258. Accord *Marcus Clarke & Co. Ltd v. Commonwealth* (1952) 87 C.L.R. 177, 253 per Fullagar J. Professor Sawyer is also critical of *Lloyd v. Wallach* and its progeny: Sawyer, G., *Australian Federalism in the Courts* (1967) 117.

²⁰⁸ *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.

²⁰⁹ Bennett, J. M., *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* (1980) 71.

²¹⁰ Galligan, B., *Politics of the High Court* (1987) 207.

²¹¹ 'Doomed From the Outset' (editorial), *Argus* (Melbourne), 10 March 1951, 2.

²¹² See, e.g., 'High Court Decision' (editorial), *West Australian* (Perth), 12 March 1951, 2; 'The Next Steps' (editorial), *Advertiser* (Adelaide), 12 March 1951, 2; 'Plain English' (editorial), *Bulletin*, 14 March 1951, 7.

²¹³ See, e.g., 'Plain English' (editorial), *Bulletin*, 14 March 1951; 'Labour & the Reds' (editorial), *Courier-Mail* (Brisbane), 12 March 1951, 2. This time the *Bulletin's* cornered rat had become a malicious ape-man (gorilla?: guerilla?), wielding the same baton, now labelled 'communism', about to ravish a maidenly 'civilization': see Norman Lindsay's cover of the 14 March 1951 issue, entitled 'The Throwback'.

including the Petrov Royal Commission, the Labor Party split, and twenty-one more years of Liberal-Country Party government may leave the impression, with hindsight, that Dr Evatt's court victory was pyrrhic: that he won the battle but lost the war. However, that is an over-simplification. The Labor split was obviously the cumulative result of countless actions and events, which undoubtedly included the *Communist Party* case and the September 1951 referendum on communism, but the causal connection, especially with the case, is surely weak. A great deal of water flowed under the Labor bridge in the four years between the *Communist Party* case and the split.

Had the validity of the Act been upheld and the Act enforced unscrupulously by the government, its effect upon the Labor movement would surely have been disastrous. It was noted earlier that Menzies had stated in Parliament that the objectives of the Communist Party and the Labor Party were identical. This made the Australian Labor Party potentially eligible for 'declaration', subject to limited judicial review by a single judge, but without further appeal therefrom.²¹⁴ Justice Kirby has aptly noted that South Africa provides a model of what Australia could have become had the legislation been upheld.²¹⁵

For Dr Evatt personally, as a constitutional lawyer with a high reputation to maintain, his court victory must have been particularly sweet, not only vindicating his oft-repeated objections to the Act and his early suggestion that it be allowed passage and left to the mercy of the High Court, but also avenging his earlier defeats by the now vanquished Barwick in the *Bank Nationalization* case, both in the High Court and the Privy Council.²¹⁶

And what of Menzies and his government? Four days after the decision, Menzies maintained that, while he had 'no legal criticisms to make' of the High Court's decision,²¹⁷ it nevertheless caused 'grave concern . . . to some millions' of Australians.²¹⁸ He vowed to continue the fight against communism, alluding to a possible reference of power from the States or a constitutional amendment.²¹⁹ The government made no attempt to redraft the legislation to comply with the court's reasoning because it believed the judicial process to be grossly inadequate to tackle the war against communism.²²⁰ As Menzies told the House:

We cannot deal with such a conspiracy urgently and effectively if we are first bound to establish by strict technical means what an association or an individual is actually doing. Wars against enemies . . . cannot be waged by a series of normal judicial processes.²²¹

Accordingly, the government called a special Premiers' Conference on 18 June 1951 to seek a reference of powers to deal with communism, but the Labor governments of New South Wales and Queensland refused to refer power. Leicester Webb has suggested that the Conference was probably only *pro forma*

²¹⁴ Communist Party Dissolution Act 1950 (Cth) ss 5(1)(c), 5(2) and 23(3).

²¹⁵ Kirby, *op. cit.* n. 110, 100-1.

²¹⁶ *Bank of N.S.W. v. Commonwealth* (1948) 76 C.L.R. 1; *Commonwealth v. Bank of N.S.W.* [1950] A.C. 235.

²¹⁷ Commonwealth, 212 *Parliamentary Debates*, House of Representatives, 13 March 1951, 365 (emphasis added).

²¹⁸ *Ibid.*

²¹⁹ *Ibid.* 367. See Commonwealth Constitution, ss 51(xxxvii), 128.

²²⁰ See Starke, J. G., 'Constitutional Aspects of the Communist Party Dissolution Referendum' (1951) 23:3 *Australian Quarterly* 17, 21-2.

²²¹ Commonwealth, 212 *Parliamentary Debates*, House of Representatives, 13 March 1951, 366 (emphasis added).

anyway.²²² So the government proceeded with its referendum, which it lost, on 22 September 1951, largely due to the courageous and tireless campaign of Dr Evatt.²²³ Crisp remarks that Evatt 'did Menzies a great service by saving his reputation' from being associated in history with a McCarthyite persecution.²²⁴ That is undoubtedly true. Had the legislation been upheld, Australia would have had the dubious distinction of being the only English-speaking democracy to ban the Communist Party. As Kylie Tennant put it (improving upon Crisp): Dr Evatt saved Menzies from being 'known as a combination of McCarthy and Verwoerd'.²²⁵ So even Menzies ultimately benefited from the *Communist Party* case.

The constitutional principle that the Commonwealth cannot recite itself into power, that the stream cannot rise higher than its source, is undoubtedly the central doctrinal legacy of the case, with applications extending beyond Acts of Attainder like the Communist Party Dissolution Act 1950 (Cth). The doctrine predates this decision, of course,²²⁶ for its ultimate foundation is the rule of law,²²⁷ enforced by judicial review of legislation. But the well-reasoned judgments, especially of Dixon, Fullagar and Kitto JJ., greatly clarified and reinforced the doctrine that, as Geoffrey Sawer aptly expressed it:

only the judicial power is permitted to bridge the gap between making a classification and placing a particular within it.²²⁸

Consequently, legislation deeming a constitutional fact will contravene the principle of the *Communist Party* case,²²⁹ although the deeming of non-constitutional facts probably will not.²³⁰ Legislation reversing the onus of proving constitutional facts will generally not contravene the principle, because the court is not deprived of the opportunity of determining the presence of the constitutional fact for itself.²³¹ Of course, it can be difficult to decide whether

²²² Webb, *op. cit.* n. 3, 43.

²²³ See Kirby, *op. cit.* n. 110, 105 ff.

²²⁴ Crisp, *Ben Chifley*, *supra* n. 34, 404 (n. 3).

²²⁵ Tennant, *op. cit.* n. 108, 260.

²²⁶ See, e.g., *ex parte Walsh and Johnson* (1925) 37 C.L.R. 36. Accord Sawer, *Australian Federalism*, *supra* n. 207, 116-7.

²²⁷ The *Communist Party* case, *supra* n. 1, 193 *per* Dixon J.; Walker, G. de Q., *The Rule of Law: Foundation of Constitutional Democracy* (1988) 227.

²²⁸ Sawer, 'Defence Power', *supra* n. 187, 219.

²²⁹ See *In the Marriage of Cormick* (1984) 156 C.L.R. 170, 177; *Re F.*, *ex parte F.* (1986) 161 C.L.R. 376, especially 382-3, 389, 405; *R. v. Cook*, *ex parte C.* (1985) 156 C.L.R. 249; *Actors & Announcers Equity Association of Australia v. Fontana Films Pty Ltd* ('the *Fontana Films* case') (1982) 150 C.L.R. 169, 210-1 *per* Mason J., 214 *per* Murphy J., 223 *per* Brennan J.; *B.L.F. v. Commonwealth* (1986) 161 C.L.R. 88, 95-6; *MacCormick v. Federal Commissioner of Taxation* (1984) 158 C.L.R. 622, 639-41, 646, 658; *University of Wollongong v. Metwally* (1984) 158 C.L.R. 447, 465; *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1, 319.

²³⁰ *R. v. Ludeke*, *ex parte . . . B.L.F.* (1985) 159 C.L.R. 636, 651 *per* Gibbs C.J., Wilson, Brennan, Deane and Dawson JJ. *Cf.* the *Communist Party* case, *supra* n. 1, 201-2 *per* Dixon J. But such provisions could be invalid if the principle of the *Communist Party* case be seen as resting on a broader principle of the separation of judicial power, whereby requiring a court to make a finding possibly not in accord with the true facts is inconsistent with the nature of the judicial power of the Commonwealth conferred by s. 71 of the Constitution. This view appears to have been adopted by Murphy J. in the *Fontana Films* case, *supra* n. 229, 214 and *Polyukhovich v. Commonwealth* (1991) 172 C.L.R. 501, 704 *per* Gaudron J. See also the Full Federal Court decision of *O'Toole v. Charles David Pty Ltd* (1989) 90 A.L.R. 112, 159 *per* Gummow J., Bowen C.J. and Morling J. concurring. The High Court affirmed this decision: (1991) 171 C.L.R. 232.

²³¹ See *Milicevic v. Campbell* (1975) 132 C.L.R. 307; *Williamson v. Ah On* (1926) 39 C.L.R. 95. For good discussions of this issue, see Zines, L., *The High Court and the Constitution* (3rd ed. 1992) 200-7; Lindell, 'Judicial Review', *supra* n. 177, 180-2.

legislation is deeming a constitutional fact or merely reversing the onus of proof.²³² Had the Communist Party Dissolution Act 1950 (Cth) been upheld, it would probably have been on the basis of considerations peculiar to the defence and Constitution-protection powers, in other words the *Lloyd v. Wallach*²³³ exception, so the fundamental doctrine of the *Communist Party* case would probably not have been greatly impaired, although the symbolic, rule of law, aspect of the decision would have been very different.

This feature of the case is, of course, its greatest legacy. For unelected judges to invalidate legislation enacted unanimously, and for which the government had a clear electoral 'mandate', would itself demonstrate judicial independence of a high order. To do so at a time of national hysteria against an 'enemy', the subject of the legislation, whose supposed overseas allies were fighting and killing Australian troops, is surely a remarkable, virtually unique, achievement.

In explaining politically significant judicial decisions, commentators sometimes ascribe to judges the most Machiavellian motives; this is the case, for example, of Marshall C.J.'s opinion in *Marbury v. Madison*,²³⁴ in which the Supreme Court denied itself a small power by exercising a much greater one.²³⁵ In its *Communist Party* decision, the High Court was no doubt glad to have the opportunity to invalidate a critical piece of Liberal legislation after years of doing the same to some of Labor's most valued statutes.²³⁶ But, while a decision to uphold the Communist Party Dissolution Act 1950 (Cth) on *Lloyd v. Wallach* grounds would not have been beyond the accepted boundaries of constitutional principle, there is no reason to suspect ulterior motives and not take the decision at face value.

Indeed, many judicial observations reveal that the Court found this kind of *ad hominem*, Act of Attainder, legislation obnoxious. 'Today the communists, tomorrow us?',²³⁷ seems to underly many remarks. During the argument, Williams J., for example, asked:

Does this mean that Parliament could say that the existence of John Smith, an ordinary citizen, is a menace to the security of Australia and require that he be shot at dawn?²³⁸

Kitto J., likewise, remarked during argument:

²³² See, e.g., the *Fontana Films* case which was, with respect, decided correctly, for the reason stated clearly by Mason J.: *supra* n. 229, 210-1.

²³³ *Supra* n. 197 and accompanying text.

²³⁴ 5 U.S. 137 (1803).

²³⁵ See, e.g., McCloskey, R. G., *The American Supreme Court* (1960) 40; Johnstone, R. M., *Jefferson and the Presidency* (1978) 179. However, many commentators reject this interpretation of Marshall's decision: see, e.g., O'Fallon, J. M., 'Marbury' (1992) 44 *Stanford Law Review* 219; Clinton R. L., *Marbury v. Madison and Judicial Review* (1989).

²³⁶ See, e.g., *Att.-Gen. (Vic.), ex rel. Dale v. Commonwealth* (1945) 71 C.L.R. 237 ('the *Pharmaceutical Benefits* case'); *Australian National Airways Pty Ltd v. Commonwealth* (1945) 71 C.L.R. 29; *Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31 ('the *State Banking* case'); *Bank of N.S.W. v. Commonwealth* (1948) 76 C.L.R. 1 ('the *Bank Nationalization* case'); *British Medical Association v. Commonwealth* (1949) 79 C.L.R. 201. See generally Galligan, *High Court*, *supra* n. 210, ch. 4.

²³⁷ Eighty-seven year old retired Justice Rich expressed this concern in a letter to Latham announcing his forthcoming wedding: 'I hate the Commos . . . but I'll fight for liberty and justice and the old principle of innocence of the accused. *Tomorrow one of us may be in the dock* and you must prove your innocence and so on.'; Letter to Latham, 11 November 1950, quoted in Lloyd, *op. cit.* n. 2, 199 (emphasis added). But see Sawyer, *Australian Federalism*, *supra* n. 207, 55-6.

²³⁸ Quoted in Tennant, *op. cit.* n. 108, 265.

You cannot have punishment that is preventive. You can't remove his tongue to stop him speaking against you. *That is wide open to a totalitarian State.*²³⁹

In a remarkable passage in his judgment, Dixon J., a friend of Menzies (who was his first pupil at the bar) explicitly warned of the danger of subversion of liberty by the government itself, which was why he preferred to derive the legislative power to protect the Constitution directly from the Constitution itself, rather than through the medium of executive power.²⁴⁰ 'History', he noted,

and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected. . . . [T]he power to legislate for the protection of an existing form of government ought not to be based on a conception . . . adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend.²⁴¹

Nevertheless, the civil liberty aspects of the decision should not be overstated. The judgments contain nothing, for example, suggesting that the States could not have enacted identical legislation; on the contrary, many remarks suggest that they could.²⁴² Moreover, comparison adverse to the United States is sometimes made²⁴³ by contrasting the *Communist Party* case with *Dennis v. United States*,²⁴⁴ decided only three months later, which upheld provisions of the Smith Act 1940 (U.S.) making it a crime for any person knowingly or wilfully to advocate the overthrow or destruction of any government in the United States by force or violence.²⁴⁵ Occasionally, the point is taken even further by inferring from the fact that the Smith Act was upheld notwithstanding the First Amendment to the United States Constitution, while the Communist Party Dissolution Act 1950 (Cth) was invalidated in a nation without a Bill of Rights, a demonstration that Australian rights do not need constitutional protection.

However, such comparisons are grossly misleading. The Australian analogues of *Dennis* are *Burns v. Ransley*²⁴⁶ and *R. v. Sharkey*,²⁴⁷ which upheld the convictions of communists under provisions penalizing seditious utterances, and, as already noted, State legislation banning the Communist Party would almost certainly have been upheld.²⁴⁸ In fact, the High Court's overall record on cases involving communists is mixed, with *Burns* and *Sharkey* as the nadir.²⁴⁹

Moreover, the *Communist Party* case is not inconsistent with the general

²³⁹ *Ibid.* 267 (emphasis added).

²⁴⁰ The *Communist Party* case, *supra* n. 1, 187-8 *per* Dixon J. Fullagar J. agreed: *ibid.* 260.

²⁴¹ *Ibid.* 187-8.

²⁴² See, e.g., *ibid.* 262 *per* Fullagar J.: 'Such a law . . . could clearly be passed by the Parliament of the United Kingdom or of any of the Australian States.'

²⁴³ See, e.g., Coper, M., *Encounters with the Australian Constitution* (rev. ed. 1988) 343.

²⁴⁴ 341 U.S. 494 (1951). See also *Yates v. United States* 354 U.S. 298 (1957); *Scales v. United States* 367 U.S. 203 (1961); Kirby, *op. cit.* n. 110, 98-100.

²⁴⁵ 54 Stat. 670, 671 (1940), now 18 U.S.C. s. 2385.

²⁴⁶ (1949) 79 C.L.R. 101.

²⁴⁷ *Ibid.* 121.

²⁴⁸ Contrast *Switzman v. Elbling* [1957] Supreme Court Reports 285 where the Canadian Supreme Court invalidated the Act Respecting Communistic Propaganda 1937 (Quebec), although on grounds inapplicable to Australia. However, Abbott J. (*obiter*) held that the legislation was beyond the power of the Canadian Parliament as well: [1957] Supreme Court Reports 285, 328. *Cf.* Rand J., 306-7, Kellock J. concurring.

²⁴⁹ See Ricketson, *op. cit.* n. 2, 130-1, 133; Webb, *op. cit.* n. 3, 21-2.

tendency of courts to find in favour of the government during times of crisis,²⁵⁰ while (occasionally) recovering their courage when the danger has passed.²⁵¹ As noted above, the Court regarded 20 October 1950, the date of enactment of the Communist Party Dissolution Act 1950 (Cth) as a time of 'peace', or at least not of 'war', even though Australian troops had been fighting in Korea since June. (Chinese 'volunteers' had entered the war at the very end of October.) In this respect, the American analogue is the *Steel Seizure* case.²⁵²

Courts have always shown exceptional sensitivity to infringement upon their domain; many of the *dicta* suggesting limits upon parliamentary supremacy based upon 'implied freedoms' or 'fundamental law', for example, have arisen in this context.²⁵³ The *Communist Party* case also fits squarely within this tradition of self-preservation by the judiciary. As Galligan has aptly remarked:

[t]he Communist Party case was not primarily about civil liberties but about the limits of legislative and executive power and supremacy of the judiciary in deciding such questions.²⁵⁴

The *Communist Party* case demonstrated that our freedom depends upon impartial enforcement of the rule of law, of which courts are the ultimate guardians. Although, of course, not infallible, impartial and fearless courts determined to exercise their proper powers are our final defence against tyranny. This is, after all, merely an application of Madison's brilliant exposition of 'checks and balances', whereby government is made to 'control itself' through the conflict of its branches, including the judiciary, driven by the personal 'ambition' of their members.²⁵⁵ This vision of impartial justice also underlies Sir Owen Dixon's celebrated remark, only a year after the *Communist Party* case, and no doubt influenced by that experience, that 'in great conflicts' the only 'safe guide to judicial decisions' is 'a strict and complete legalism'.²⁵⁶

²⁵⁰ See, e.g., *Liversidge v. Anderson* [1942] A.C. 206 (H.L.); *Lloyd v. Wallach* (1915) 20 C.L.R. 299; *ex parte Walsh* [1942] A.L.R. 359; *Prize Cases* 67 U.S. 635 (1863); *Hirabayashi v. United States* 320 U.S. 81 (1943); *Korematsu v. United States* 323 U.S. 214 (1944).

²⁵¹ See, e.g., *ex parte Milligan* 71 U.S. 2 (1866); *Duncan v. Kahanamoku* 327 U.S. 304 (1946); *Asma Jilani v. Government of Punjab* [1972] Pakistan Legal Decisions (S.C.) 139.

²⁵² *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579 (1952).

²⁵³ See, e.g., *B.L.F. v. Minister for Industrial Relations* (1986) 7 N.S.W.L.R. 372, 383-5, 387 *per Street C.J.*, 421-2 *per Priestley J. A.*; Winterton, G., 'Extra-Constitutional Notions in Australian Constitutional Law' (1986) 16 *Federal Law Review* 223, 235.

²⁵⁴ Galligan, *High Court*, *supra* n. 210, 203. See also *supra* nn. 107, 230.

²⁵⁵ Cooke, J. E. (ed.), *The Federalist* (1961) 349 (No. 51).

²⁵⁶ 'Speech Upon Being Sworn in as Chief Justice' (1952) 85 C.L.R. xi, xiv.