THE SIGNIFICANCE OF THE COMMUNIST PARTY CASE

BY GEORGE WINTERTON*

[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, 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. But the Party had survived, assisted no doubt by the hardship of the Depression and the rise of fascism.

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. 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.

These regulations were eventually held invalid by the High Court in the Jehovah’s Witnesses case three years later, almost to the day. 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. 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’.

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


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.


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.


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.

sympathizers\textsuperscript{11} — and subjected communists to surveillance,\textsuperscript{12} but Party activities do not seem to have been greatly disrupted.\textsuperscript{13} Party meetings continued to be held, albeit disguised as book or tennis club meetings,\textsuperscript{14} communists continued to hold union offices,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 numerously 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’\textsuperscript{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.\textsuperscript{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

\textsuperscript{11} See Brown, W. J., \textit{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 \textit{Parliamentary Debates}, House of Representatives, 14 November 1941, 467.

\textsuperscript{12} Cain, \textit{op. cit.} n. 5, 269-76.

\textsuperscript{13} See Webb, \textit{op. cit.} n. 3, 7; Carment, \textit{op. cit.} n. 10., 253-4; Cain, \textit{op. cit.} n. 5, 274. Jupp regarded the ban as ‘extremely ineffective for most of its operation’: Jupp, J., \textit{Australian Party Politics} (2nd ed. 1968) 91.


\textsuperscript{15} Webb, \textit{op. cit.} n. 3, 7.

\textsuperscript{16} Ibid. 7-8; Cain, \textit{op. cit.} n. 5, 274.


\textsuperscript{18} Hasluck, \textit{op. cit.} n. 4, 591.

\textsuperscript{19} Ibid.
The Communist Party

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

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. There are few impartial assessments of how the Party fared during those 2½ years, but communist claims that its position strengthened have some credibility. 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. 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.

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, 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. The New South Wales branch of the Country Party resolved in favour of a ban in April 1946, a policy thereupon 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’. This image must have struck a sympathetic chord, for three years later Fadden’s erstwhile colleague and now Liberal, Archie Cameron, who, as Minister for Commerce,
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

\[\text{[we] 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.\(^{45}\)

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\(^{32}\) Cain, \textit{op. cit.} n. 5, 266.


\(^{35}\) Menzies, 13 February 1946, quoted in Webb, \textit{op. cit.} n. 3, 12, and Fadden, \textit{op. cit.} n. 29, 99.


\(^{37}\) \textit{Supra} n. 34.

\(^{38}\) See Abrams v. \textit{United States} 250 U.S. 616, 630 (1919), \textit{per} Holmes J., dissenting.

\(^{39}\) \textit{Supra} n. 34 and accompanying text.

\(^{40}\) David Carment 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: Carment, \textit{op. cit.} n. 10, 251-2.


\(^{42}\) As Menzies claimed, when announcing his change of view upon returning from overseas in January 1949: Webb, \textit{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, \textit{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., \textit{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, \textit{op. cit.} n. 14, 129.

\(^{44}\) Cain and Farrell, \textit{op. cit.} n. 14, 112.

\(^{45}\) Ricketson, \textit{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. The proposed ban was supported by several newspapers, including the Sydney Morning Herald, 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.

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. Meredith Burgmann has remarked that

[for 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.

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,

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.
50 Burgmann, op. cit. n. 49, 64.
51 See Webb, op. cit. n. 3, 4, 9-12.
seditious, or other offences against the state). This policy had been enunciated at
the 1945 Triennial Conference of the Party, 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.

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.

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.’

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 democ-

racy 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:

[The 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:

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.

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,
And indeed the Labor government did. As Crisp has noted:

[Although his opponents sought to minimize and deprecate it, the record of anti-Communist action during Chifley’s Prime Ministership was substantial.]

The government secured special legislation to protect the Anglo-Australian experimental rocket project at Woomera from boycotts by communist-led unions, and to prevent fraud in union ballots. It prosecuted several communists for uttering seditious words and for contempt of court, and established the Australian Security Intelligence Organization (ASIO). 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. During that period, the government secured special legislation to prohibit unions from financially assisting the strikers, leading to the imprisonment of four unionists for contravening court orders under that Act, police and security officers raided Marx House, the Sydney headquarters of the Communist Party, on 8 July 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). 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.

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. 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.
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.


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 receiver who was to realize the Party’s assets, discharge its liabilities, and pay the balance to the Commonwealth. 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. 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. The Bill also made it an offence, punishable by five years imprisonment, for a person knowingly to be an officer or member of an unlawful association which included the Communist Party and ‘declared’ bodies.

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. It was the committee’s consideration of the evidence, however, and not its approval which was a precondition of declaration.

Secondly, the body could apply to a court for a declaration that it was not affiliated with the Communist Party. 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. ss5(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).
93 Ibid. 1995.
94 Ibid.
95 Ibid. 1996.
96 Ibid. 1996.
The Communist Party Case

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, as Crisp remarked, Menzies had 'thrust a burning brand — the Communist Party Dissolution Bill — deep into the Labour undergrowth.'

Chifley's own view, in line with the 1948 Federal Conference policy noted earlier, was that the Bill should be rejected. 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 'why damage yourself to help the Comms?'

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. 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.

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, the fact that the legislation was aimed at specific persons and bodies, rather than regulating or proscribing specific conduct, underlay its constitutional invalidity. In fact, Dr Evatt was so convinced of the Bill's

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98 Supra n. 43.
99 Crisp, Ben Chifley, supra n. 34, 384.
100 Supra n. 54 and accompanying text.
105 Ibid. 2268.
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. 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, as did Chief Justice Latham, and many were surprised when the High Court’s decision was announced. 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, 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. 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. 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.

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:

> [The 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.]

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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 ‘constitution-al 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.)
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.
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 Australian117 and the Adelaide Advertiser118 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.
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.
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...*
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. He cautioned the government not to destroy the liberties it was seeking to defend: 'Why oppose Satan if we are going to adopt his ways?' 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-Vivisection Society?

He recalled that during the war Justice Starke had branded such regulations 'arbitrary, capricious and oppressive', 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.' 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.' 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.

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. This was particularly worrying because an Australian Gallup Poll in May 1950 had found that 80% of voters favoured banning the Communist Party, 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.
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.’

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:

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.

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.’

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. 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. When it did, on 16 October, after the Bill had been passed by the House and again reached the Senate, the Western Australian delegation changed sides and supported passage of the Bill. Accordingly, the Federal Executive voted (probably ultra vires) by 8 votes to 4 to direct the Federal Parliamentary Labor Party to allow

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143 Ibid. 110-1.
144 Ibid. 113.
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. In a humiliating statement — 'wretched and abject' Crisp called it — 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.

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.'

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, having already announced their intention to challenge two days earlier. 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. 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'.

151 Crisp, Ben Chifley, supra n. 34, 395.
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 dissen-sion 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

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\(^{158}\) 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.


\(^{164}\) As Chifley intimated to the House: ibid. 1393.

\(^{165}\) Crisp, Ben Chifley, supra n. 34, 398-9.


\(^{167}\) 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).\textsuperscript{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.’\textsuperscript{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.\textsuperscript{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,\textsuperscript{171} the incidental power applying to executive power or, as Dixon and Fullagar JJ. preferred, an implied legislative power.\textsuperscript{172} Accordingly, the Commonwealth could have legislated to prohibit

\textsuperscript{168} Ibid. 1548-9.
\textsuperscript{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).
\textsuperscript{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.
\textsuperscript{171} Dixon and Fullagar JJ. regarded the defence power (s.51(vii)) as applying only to defence against external enemies: the Communist Party case, supra n. 1, 194, 259.
\textsuperscript{172} Ibid. 187-8, 260.
subversion, as indeed it had in the Crimes Act 1914 (Cth), 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. 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. 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. This has never been doubted by Australian courts and was clearly intended by the framers of the Constitution. Although it does not expressly authorize it as, for example, in Japan, 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.

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.
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.
179 Constitution of Japan, art. 81.
court, actually exist. As Justice Fullagar aptly expressed it, ‘a stream cannot rise higher than its source’. 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.

This point, as Dr Evatt noted in his argument, was well-established and had been clearly recognized as long ago as 1925 in ex parte Walsh and Johnson, 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.

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.

Such a notion underlay Latham C.J.’s long, rather tired, and ‘almost incredulous’ 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 and are, perhaps, the most important of all. 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. The only question for the courts is whether the legislation has a real connection with the dangers Parliament has identified. The Act clearly passed this test, since

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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 Sawer is right in arguing that ‘the inconsistency is patent’: Sawer, 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.'\textsuperscript{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.'\textsuperscript{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.,\textsuperscript{195} although Kitto J., alone of the majority (excluding Webb J.), did not concede any such exception to the general rule\textsuperscript{196} — by two wartime High Court cases in particular, \textit{Lloyd v. Wallach}\textsuperscript{197} and \textit{ex parte Walsh}.\textsuperscript{198} This exception was interpreted narrowly, so that it only applied in time of actual war or grave emergency\textsuperscript{199} and, at least for Dixon and Fullagar JJ., only extended to the defence power and not to the Constitution-protection power.\textsuperscript{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.\textsuperscript{201}

Since \textit{Lloyd v. Wallach} and \textit{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 \textit{Lloyd} without any analysis of the constitutional issues, the principal question being whether it was \textit{ultra vires} the Act.\textsuperscript{202} When the same question arose in the next war, the Court felt 'constrained' by the supposed 'authority of \textit{Lloyd v. Wallach}'\textsuperscript{203} to reach the same result, Starke J. going so far as to call the application (for a writ of \textit{habeas corpus}) 'hopeless'.\textsuperscript{204} The remaining justices (not including Dixon J.) simply concurred.

\textsuperscript{193} \textit{Ibid}.
\textsuperscript{194} Cowen, \textit{op. cit.} n. 188, 47.
\textsuperscript{195} The Communist Party case, \textit{supra} n. 1, 258.
\textsuperscript{196} \textit{Ibid.} n. 1, 281-2.
\textsuperscript{197} (1915) 20 C.L.R. 299.
\textsuperscript{198} (1942) 48 A.L.R. 359.
\textsuperscript{199} The Communist Party case, \textit{supra} n. 1, 193-5 (‘actual or threatened . . . violence’), 197-8 (‘war’), 202 (‘war and, perhaps . . . , the imminence of war’) \textit{per} Dixon J., 206 (‘grave emergency’) \textit{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 ss4, 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’) \textit{per} Williams J., 266 (‘such enactments may (not that they always will) be valid’) \textit{per} Fullagar J.
\textsuperscript{200} \textit{Ibid.} 192, but cf. 193-4 \textit{per} Dixon J., 261, 266 \textit{per} Fullagar J.
\textsuperscript{201} \textit{Ibid.} 202 \textit{per} Dixon J. See also 196 \textit{per} Dixon J., 207, 208 \textit{per} McTiernan J., 227 \textit{per} Williams J., 268 \textit{per} Fullagar J.
\textsuperscript{203} \textit{Ex parte Walsh} [1942] A.L.R. 359, 360 \textit{per} Latham C.J.
\textsuperscript{204} \textit{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,
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 undoubt-
edly 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.

Justice Kirby has aptly noted that South Africa provides a model of what
Australia could have become had the legislation been upheld.

For Dr Evatt personally, as a constitutional lawyer with a high reputation to
maintain, his court victory must have been particularly sweet, not only vindicat-
ing 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.

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, it nevertheless caused 'grave concern . . . to some millions'
of Australians. He vowed to continue the fight against communism, alluding
to a possible reference of power from the States or a constitutional
amendment. 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.

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.
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 Verwoord’.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

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222 Webb, op. cit. n. 3, 43.
223 See Kirby, op. cit. n.110, 105 ff.
224 Crisp, Ben Chifley, supra n. 3, 404 (n. 3).
225 Tennant, op. cit. n.108, 260.
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.
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. Wallach233 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).


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 Sawer, 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.  

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. ‘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.  

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. Moreover, comparison adverse to the United States is sometimes made by contrasting the Communist Party case with Dennis v. United States, 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. 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 and R. v. Sharkey, 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. In fact, the High Court’s overall record on cases involving communists is mixed, with Burns and Sharkey as the nadir. Moreover, the Communist Party case is not inconsistent with the general

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239 Ibid. 267 (emphasis added).
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.’
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 Communist 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, while (occasionally) recovering their courage when the danger has passed. 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.

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. The *Communist Party* case also fits squarely within this tradition of self-preservation by the judiciary. As Galligan has aptly remarked:

[the 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.]

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. 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’.

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


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