# *Reading the Judicial Mind: Appellate Argument in the Communist Party Case*

GEORGE WILLIAMS*

Williams J: Then does that mean that Parliament could say that the existence of John Smith, an ordinary citizen, was a menace to the security of Australia and require that he be shot at dawn?

Barwick: Oh no, Your Honour.[1]

## *Introduction*

A shadow was cast over Australian society in the early 1950s by a widespread, though largely unfounded, fear of internal subversion by communism. Anti-communist hysteria in the community, churches, trade unions and Parliament was engendered by the onset of the cold war and skilful political manipulation. The tensions and pressures of the era were inflamed by the attempt to suppress communism through the *Communist Party Dissolution Act* 1950 (Cth).

The *Dissolution Act* was significant because in seeking to suppress communism in Australia it compromised the freedom of political speech and association previously enjoyed by the Australian people. The Act may have instilled another, equally intolerant, form of totalitarianism in Australia. One only has to look at the history of nations such as South Africa and Chile in the early 1950s, which passed legislation similar to the *DissolutionAct*, to realise that such legislation may have laid the foundations for a police state.[2] In the jubilee year of Federation the defeat of the *DissolutionAct* in the High Court may thus have been the stumbling block to what could have been Australia's first step into democratic oblivion.

The principal actors in the drama surrounding the *Dissolution Act* were four lawyers. Robert Menzies and Herbert Evatt clashed in the political arena, Owen Dixon led the way on the High Court and Garfield Barwick emerged to

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1 Transcript of *Australian Communist Party v The Commonwealth*, matters 11-17 of 1950 (hereafter Transcript) at 34. See also id at 840.

2 See Kirby, M, "H V Evatt, The Anti-Communist Referendum and Liberty in Australia" (1991) 7 *ABR* 93 at 100-101, 119; *The Doc* (Part 3, 29 July 1988, ABC Radio Tapes).

dominate the New South Wales bar.[3] The *DissolutionAct* was Menzies' first significant piece of legislation after his 1949 election victory.

Other legal figures in the unfolding drama were the members of the High Court, in addition to Dixon J, namely Latham CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ.[4] This Bench heard argument from Barwick and Evatt on the constitutional validity of the *Dissolution Act* in *Australian Communist Party v The Commonwealth* (*Communist Party Case*).[5] The Court, with Latham CJ dissenting, found the Act wholly invalid. While the Court's decision has been the subject of some analysis[6] little attention has been directed to the hearing of the case. This is unfortunate because the arguments of counsel and the reactions of the Bench underline the case's strong links with the preservation of civil liberties and the constitutional position of the High Court. The transcript of the hearing also throws considerable light upon the reasoning used by the members of the High Court in their judgments.

The summary of argument extracted in the *Commonwealth Law Reports* does not convey the interventionist approach adopted by the Bench, nor the depth and range of submissions presented by counsel. Analysis of the transcript of the hearing of the *Communist Party Case* should thus provide an insight into the case from a novel perspective. The reactions of the judges of the High Court to the argument may also permit one to penetrate their thinking. Overall, examination of the transcript of the *Communist Party Case* should contribute to a greater understanding of the significance of the case and how the adversarial system can operate in constitutional cases.

## *The Dissolution Act: A brief outline*

The *Dissolution Act* was prefaced by nine recitals. The recitals embodied the Government's view of the dangers posed by communism. Recital four, for example, stated:

> AND WHEREAS the Australian Communist Party, in accordance with the basic theory of communism, as expounded by Marx and Lenin, engages in activities or operations designed to assist or accelerate the coming of a revolutionary situation, in which the Australian Communist Party, acting as a revolutionary minority, would be able to seize power and establish a dictatorship of the proletariat.

The recitals were devised to shore up the weak constitutional foundations of the attempt, in peacetime, to suppress communism in Australia under the Commonwealth's defence power.[7] While draconian laws had been enacted

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3 See postscript for biographical sketches of the dramatis personae.

4 See id.

5 (1951) 83 CLR 1.

6 See, eg, Winterton, G, *The Significance of the Communist Party Case* (1992) 18 *MULR* 630; Zines, L, *The High Court and the Constitution* (3rd edn, 1992) at 185-212.

7 Section 51(vi) of the Constitution provides:
"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to ...
(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth."

in Australia by the Commonwealth under its defence power in periods of world conflict,[8] such laws had little foundation in times of relative peace. This was the major obstacle to the suppression of communism by the Commonwealth some five years after World War II.[9]

Section 4 of the Act declared the Australian Communist Party (ACP) to be an unlawful association, provided for its dissolution and enabled the appointment of a receiver to manage its property. Section 5 provided the machinery by which the Governor-General could declare other organisations to be unlawful. Section 5(1) targeted certain bodies, namely organisations that supported or advocated communism, were affiliated with the ACP or whose policies were substantially shaped by members of the ACP or communists. Section 5(2) stated:

> Where the Governor-General is satisfied that a body of persons is a body of persons to which this section applies and that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the Constitution or of the laws of the Commonwealth, the Governor-General may, by instrument published in the Gazette, declare that body of persons to be an unlawful association.

Once unlawful, an association would be dissolved under s6 and a receiver of its property appointed under s8.

Under s9(2) the Governor-General could declare any person who was a communist[10] or member of the ACP in the same manner and by applying the same criteria as laid out in s5(2). Once declared, a person could not hold office in the Commonwealth public service or in industries declared by the Governor-General to be vital to the security and defence of Australia.[11] Should a person wish to contest a declaration by the Governor-General he or she could do so under s9(4), but "the burden shall be upon him to prove that he is not a person to whom this section applies".[12]

## *Procedure*

The *Communist Party Case* initially came before Dixon J who posed the following questions for determination by the Full Court:

> 1 (a) Does the decision of the question of validity or invalidity of the provisions of the *Communist Party Dissolution Act* 1950 depend upon a judicial determination or ascertainment of the facts or any of them stated in the fourth, fifth, sixth, seventh, eight or ninth recitals of the preamble of that Act and denied by the plaintiffs, and

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8 See Sugerman, B and Dignam, W J, "The Defence Power and Total War" (1943) 17 *ALJ* 207; Sawer, G, "The Defence Power of the Commonwealth in Time of War" (1946) 20 *ALJ* 295; Derham, D P, "The Defence Power" in Else-Mitchell, R (ed), *Essays on the Australian Constitution* (2nd edn, 1961) at 162-4.

9 See Sawer, G, "Defence Power of the Commonwealth in Time of Peace" (1952-1954) 6 *Res Jud* 214; Derham, above n8 at 168-76.

10 Section 3 of the *Dissolution Act* defined "communist" as: "a person who supports or advocates the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin".

11 Id, s10.

12 Id, s9(5).

(b) are the plaintiffs entitled to adduce evidence in support of their denial of the facts so stated in order to establish that the Act is outside the legislative power of the Commonwealth?

2 If no to either part in question 1 are the provisions of the *Communist Party Dissolution Act* 1950 invalid either in whole or in some part affecting the plaintiffs?[13]

To argue these questions, enough counsel were arrayed before the Full Bench to fill the bar table and the first five rows of the public gallery.[14] The hearing took place in Sydney from 10.30am to 1.00pm and 2.30pm to 4.30pm over 24 days between 14 November to 19 December 1950. One thousand four hundred and sixty five pages of transcript were amassed. The length of the hearing of the *Communist Party Case* is startling compared to the time now taken by the High Court to hear matters of similar complexity. For example, it took the High Court just over two days in March 1992 to hear argument in the *Electoral Advertising Bans* case.[15]

In constitutional cases the party attacking the validity of legislation is normally required to open the proceedings.[16] However, in this case, the fact that Dixon J had submitted two questions to the Court provided difficulty. In response to the first question the plaintiffs wished to adduce evidence to rebut the recitals of the *Dissolution Act*, to which the Commonwealth objected. Latham CJ decided that the "wiser and more convenient course" was for the Commonwealth to begin the hearing by making submissions upon both questions.[17] He stated that if the defence deemed it appropriate to leave much of its material upon question two, the validity of the *Dissolution Act*, to its reply, the Bench would not object. Latham CJ promised to protect the interests of the plaintiffs by allowing them a reply should the defence introduce new material in its reply.[18]

## *The Defence*

Garfield Barwick, supported by four King's Counsel and five juniors, defended the *Dissolution Act* on behalf of the Commonwealth. Barwick was the only barrister for the defence to make submissions to the Bench.[19] Three King's Counsel for the Commonwealth, Alan Taylor, Victor Windeyer and Barwick, were later appointed to the High Court, in 1952, 1958 and 1964 respectively. Four other Commonwealth barristers, Macfarlane, McInerney, Menhennitt and Lush, were later appointed to state Supreme Courts.[20]

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13 Above n5 at 9-10.

14 Marr, D, *Barwick* (1980) at 83.

15 *Australian Capital Television Pty Ltd v The Commonwealth (No 2)* (1992) 108 ALR 577. The case was heard on 17, 18 and 19 March 1992. Argument extended for less than one hour on 19 March.

16 Sawer, G, *Australian Federalism and the Courts* (1967) at 43.

17 Transcript at 15.

18 See id at 1287. The hearing followed the structure outlined by Latham CJ except that after the plaintiffs' reply the Court allowed the Commonwealth a second reply and the plaintiffs a short reply to this second reply.

19 Id at 15-134, 1034-289, 1457-63.

20 Winterton, above n6 at 649.

Barwick's brilliance lay in solving practical legal problems in a simple yet aggressive and penetrating manner. Unlike Evatt, Barwick's major talent was his ability to persuade. Barwick was not one to rely solely upon the strength of his law but followed the maxim "[t]he important thing in life is to know the judge".[21]

Barwick's success at the bar coincided with his drifting away from support of Labor Party principles. He may have become convinced by the laissez faire arguments he put forward on behalf of his clients.[22] Alternatively, it has been suggested that Barwick had no "ideological core" and that his rejection of working class ideals represented a change in attitude rather than a change in belief.[23] Whatever the explanation, in place of his old philosophy he developed a dedicated free-enterprise spirit complete with a hostility towards communism.

In the late 1940s and early 1950s Barwick came to overshadow the Australian legal profession.[24] In particular, his successful advocacy in 1948 in the High Court[25] and in 1949 in the Privy Council[26] against the Chifley Government's attempt to nationalise Australian banking brought him considerable acclaim. In both appearances Barwick gained a decisive victory over Evatt.[27] Barwick's success led him to attract increasingly important clients. Those clients included Menzies.

Barwick came to enjoy an intimate association with Menzies and his Government. In the early 1950s he provided advice to Menzies on many subjects, such as, for example, whether s57 of the Constitution would allow Menzies to call a double dissolution of Parliament.[28]

When it became clear to Menzies that the *Dissolution Act* was going to be the subject of a High Court challenge Barwick must have been his logical

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21 Above n14 at 19.

22 Blackshield, A R, "Barwick — Great and Vague Powers" 21 *Aust Bk Rev* (June 1980) 1 at 3.

23 Id at 3. Sexton, M, "Review of *Barwick*" (1980) 11 *FL Rev* 460 at 460 described Barwick's years as Chief Justice of the High Court as follows: "The most striking feature of Barwick's judgments over these years is the absence of any coherent philosophy in his construction of the Constitution."

24 Above n22 at 1. Kennan, J H, "Review of *Sir John Did His Duty*" (1984) 14 *MULR* 735 at 735 has described Barwick as "the most brilliant advocate of his generation". Cf Sawer, G, "Absolutely Free Man" *Nation* 4 June 1960 at 10.

25 *Bank of NSW v The Commonwealth* (*Banking Nationalisation Case*) (1948) 76 CLR 1.

26 *Commonwealth v Bank of NSW* (1949) 79 CLR 497.

27 Like Evatt, Barwick received his tutelage in constitutional law at Sydney University from Professor John Peden. See Evatt, H V, "Professor Peden as a Teacher of Constitutional Law" in Bavin, T (ed), *The Jubilee Book of the Law School of the University of Sydney 1890-1940* (1940). Peden, as President of the Legislative Council of New South Wales, was named as a defendant in the constitutional matter *Trethowan v Peden* (1930) 31 SR (NSW) 183, in which Evatt and Kitto appeared together. Kitto also appeared in the High Court appeal *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394. Latham appeared with Fullagar when the matter reached the Privy Council (*Attorney-General for New South Wales v Trethowan* [1932] AC 526).

28 While Chief Justice of the High Court Barwick gave a further demonstration of his association with the conservative forces of Australian politics by advising Governor-General John Kerr on the dismissal of the Whitlam Government in 1975. See Barwick, G, *Sir John Did His Duty* (1983); Thomson, J A, "Review of *Sir John Did His Duty*" (1983) 6 *UNSWLJ* 255; Whitlam, E G, "The Labor Government and the Constitution" in Evans, G, *Labor and the Constitution 1972-1975* (1977) at 318-9.

choice to defend the Act. This decision may have been reinforced by Barwick's public support for the suppression of communism.[29]

Barwick's relations with the High Court Bench in 1950 were excellent. His frequent appearances during World War II and in the first *Banking Nationalisation* case[30] meant that he had developed a rapport with the Bench. He was liked with a "special fondness" by McTiernan J,[31] had been a close associate of Kitto J and found a sympathy for his political views in the heart of Latham CJ.

## *The Case for the Commonwealth*

Characteristically, Barwick began his argument by submitting that the Court should accept a simple view of the *Dissolution Act*.[32] He contended that the Act was of limited scope in that it sought only to prevent, and not punish, conduct prejudicial to the defence of Australia.[33] Barwick argued that the Act possessed a rational and logical connection[34] with defence which was sufficient to bring the legislation within the Commonwealth's defence power under s51(vi) of the Constitution. Alternatively, he submitted, the Act could be logically based on either of the following Commonwealth powers:

1. the executive power in s61 of the Constitution, extending as it does to the execution and maintenance of the Constitution and of the laws of the Commonwealth, in combination with the incidental power in s51(xxxix) of the Constitution; or
2. powers arising out of the Commonwealth's existence as a body politic.

Barwick's submission that only a logical or rational connection needed to be established with a head of power for a law to be valid was bold. It relied upon the 1916 High Court decision in *Farey v Burvett*[35] to the neglect of several conflicting 1940s High Court decisions. For example, the 1944 decision of the High Court in *Australian Woollen Mills Ltd v The Commonwealth*[36] established that a connection needed to be real and substantial in order to attract the defence power.

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29 Above n14 at 79.

30 Above n25.

31 Above n14 at 64.

32 See Transcript at 1045.

33 Barwick cited *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 506, 509 to support this submission. By characterising the Act as preventative Barwick may have anticipated that the plaintiffs would seek to classify the *Dissolution Act* as a penal statute in order to show that the Governor-General would exercise judicial power under ss5(2) and 9(2).

34 Barwick also applied tests such as "possible logical" or "rational logical".

35 (1916) 21 CLR 433. See Transcript at 1045 per Barwick.

36 (1944) 69 CLR 476 at 488 per Latham CJ. See also *Victoria v The Commonwealth* (1942) 66 CLR 488 at 506-509; *Dawson v The Commonwealth* (1946) 73 CLR 157 at 179; *Real Estate Institute of New South Wales v Blair* (1946) 73 CLR 213 at 224; *Victorian Chamber of Manufacturers v The Commonwealth* (1943) 67 CLR 413 at 418; above n25 at 162. During argument Webb J stated (Transcript at 1045): "If all we have to be satisfied of is that there is a logical connection between the situation and the legislation it is comparatively simple, and that was not the approach, as I understand it, in many of the cases after Fairy [sic] and Burvett."

McTiernan, Williams and Kitto JJ did not allow Barwick's simple interpretation of the *Dissolution Act* to pass unquestioned given that Australia was then experiencing a period of relative peace. McTiernan J obscurely, and perhaps facetiously, or perhaps seeking to provoke Barwick, commented: "It is one hundred years since the Communist Manifesto was published."[37]

Williams J, in the passage quoted at the head of this article, drew a parallel between banning the ACP and shooting ordinary citizens.[38] Kitto J stated: "You cannot have punishment that is preventative. You can't remove his tongue to stop him speaking against you. That is wide open to a totalitarian state."[39] It was obvious that Barwick was to receive a rough reception.

Interjections from the Bench left Barwick on the back foot. In order to maintain some semblance of flow in his argument Barwick often found himself replying "quite" instead of delving into the question. Barwick was unable to muster the brilliant advocacy that brought him victory in the *Banking Nationalisation* cases.[40] He could not make the transition from his accustomed role of attacking legislation to the unfamiliar role of defence.[41]

Barwick found himself bogged in the mire of questioning which, as it progressed, made it increasingly apparent that the *Dissolution Act* was anything but a simple piece of legislation promoting the defence of Australia. At times, it was only interjections by Latham CJ over the questioning of other judges that enabled Barwick to get back on track. For example, at times of intense questioning Latham CJ asked and stated: "Who determines whether they [defence laws] are essential or not?;"[42] and

> All kinds of extravagant laws may be made by legislative bodies, laws which are condemned by other persons but other persons, if they are not members of the legislative bodies, are not empowered to reject the laws simply because they are unreasonable if the laws are related to the subject matter.[43]

Whether Latham CJ's Dorothy Dix questions were designed to enable Barwick to regain his feet or were out of sympathy for Barwick's subject matter, or both, is unclear. In any event, Latham CJ and Barwick seemed to share a close understanding.[44]

Latham CJ's interjections occasionally led him into difficulty. For example, on one occasion while Latham CJ was questioning Barwick the following exchange took place:

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37 Id at 26.
38 Id at 34.
39 Quoted in Tennant, K, *Evatt, Politics and Justice* (1970) at 267.
40 See above n14 at 65, 71.
41 See Sawer, above n24 at 10.
42 Transcript at 29.
43 Id at 78-79. See also id at 128, 130.
44 See id at 1052 where the following exchange took place immediately before the Court adjourned for the weekend on Friday 8 December 1950:

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| Barwick: | I am going to deal with the consequences because if that [conduct prejudicial to defence] is the subject matter, the matter is plenary. |
| Latham CJ: | Mr. Barwick, the subject matter is so dark... |
| Barwick: | If I cannot take the place of electric light, it is perhaps enough. |

Latham CJ: How do you distinguish that suggested [wartime] regulation from the present one?

McTiernan J: The Japanese were bombing Darwin at the time.[45]

As the hearing developed, Barwick's position came to rest upon three alternate arguments:

1. (a) the plaintiffs should not be allowed to adduce evidence to rebut the allegations contained in the recitals;
   (b) the recitals were conclusive, or alternatively persuasive, as to Parliament's reasons for passing the Act; and
   (c) these reasons established the necessary link between the Act and the defence power;
2. (a) the Court could take judicial notice of certain factors; and
   (b) these factors established the requisite link between the Act and the defence power; or
3. (a) the satisfaction of the Governor-General under ss5(2) and 9(2) of the Act evinced a logical connection between the Act and the defence power; and
   (b) the satisfaction of the Governor-General under the Act was reviewable by the Court, and hence the Parliament was not attempting to "rise above its source".

These submissions are outlined in greater detail below.

### *Submission 1*

Barwick argued that the plaintiffs could not present evidence to counter the statements included in the recitals because:

i. the bona fides of Parliament could not be challenged by the High Court, and thus, logically, neither could the recitals;[46]

ii. evidence produced by each plaintiff may have led to differing findings as to the validity of the legislation;[47] and

iii. only the reasons and motivations of Parliament and not objective facts were relevant in determining whether the Act was within Commonwealth power.[48]

Barwick argued that the recitals should be accepted by the Court unless overborne by contradictory judicial knowledge. He then submitted that the matters contained in the recitals, these being the reasons of Parliament for passing the Act, were sufficient to establish a logical connection with the defence power.

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45 Id at 58.

46 See id at 132 per Dixon J.

47 It could also have been argued that the High Court has no mechanisms for the taking of evidence in constitutional disputes. See Holmes, J D, "Evidence in Constitutional Cases" (1949) 23 *ALJ* 235; Lane, P H, "Facts in Constitutional Law" (1963) 37 *ALJ* 108; Brazil, P, "The Ascertainment of Facts in Australian Constitutional Cases" (1970) 4 *FLR* 65; Kenny, S, "Constitutional Fact Ascertainment" (1990) 1 *Public LR* 134; Bell, A S, "Section 92, Factual Discrimination and the High Court" *(1991) 20 FLR* 240.

48 See Transcript at 1041, 1048.

### *Submission 2*

Barwick asserted that the Court could take judicial notice of 20 factors to support the Act as a defence measure.[49] He cited matters of public knowledge such as:

- China's adoption of communism;
- the Korean War;[50] and
- Soviet influence in Eastern Europe.

Less well-known factors were also contended to be the proper subject of judicial notice, such as:

- Commonwealth munition expansion and the development of secret weapons;
- the increased importance of espionage and sabotage to national security; and
- the sympathy necessarily held by communists with the aims and ambitions of the Soviet Union.

The 20 factors, Barwick submitted, established a logical connection between the *Dissolution Act* and the defence of Australia such that the Act was valid under the Commonwealth's defence power without reference to the recitals.

The plaintiffs' subsequent contention that many of the 20 factors were not public knowledge or even accurate and that the factors were founded upon political judgment meant that Barwick's submission could not be accepted by the Court without controversy. This posed considerable difficulty for the defence given that judicial notice only applied where a subject was devoid of dispute.[51]

### *Submission 3*

Barwick contended that the Governor-General's power of declaration under ss5(2) and 9(2) of the *Dissolution Act* could be used to forge a connection between the Act and the defence power. The sections certainly appeared to provide that the Governor-General could only declare organisations or persons where the defence of Australia was at stake or where the execution or maintenance of the Constitution was threatened. The essence of Barwick's argument may be gleaned from the following exchange:

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| Latham CJ: | And do you not have to go as far as this: that it may be in some matters the opinion of the Government [that] may be the foundation for legislation under a power relating to defence? |
| Barwick: | I do. |
| Latham CJ: | Whatever the facts may be? |
| Barwick: | Whatever the true facts may be. I do go that far.[52] |

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49 On judicial notice generally see Lane, P H, *The Australian Federal System* (1979) at 1086-7; *Cross on Evidence* (Aust edn by Byrne, D and Heydon, J D, 1991) at 3005-56.

50 Only events in the Korean War occurring up to the date of the passing of the *Dissolution Act*, that is 20 October 1950, could be taken into consideration in assessing the Act's validity.

51 *Hollan v Jones* (1917) 23 CLR 149 at 153; *Commonwealth Shipping Representative v P & O Branch Service* [1923] AC 191 at 212.

52 Transcript at 1048.

The powers of declaration given to the Governor-General under ss5(2) and 9(2) were a cause of great concern to the Bench. The sections did not provide an objective test whereby the Court could determine whether the declaration of an organisation or person came within Commonwealth power. The matter was instead left to the satisfaction of the Governor-General.

The sections represented a denial of the High Court's role as the sole arbiter of the limits of Commonwealth constitutional power and thus challenged the Court's position in Australia's federal structure. If valid, the satisfaction of the Governor-General and not that of the High Court would have been determinative of whether the actions of an organisation or person could attract the exercise of the defence power. It appears that Barwick either did not realise or did not initially wish to recognise that the Act breached the constitutional maxim that "a stream cannot rise above its source".[53] The maxim means that, for example:

> A power to make laws with respect to lighthouses does not authorise the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse.[54]

Barwick attempted to counter this difficulty by citing the 1925 High Court decision *Ex parte Walsh and Johnson; In re Yates*.[55] He submitted that the decision stood for the notion that once an Act is found to be a defence Act it is valid despite its operation being dependent upon the opinion of the executive. Thus, in times of stress or emergency an Act could be validly based upon the satisfaction of a Minister or the Governor-General at the expense of the satisfaction of the High Court.

In his reply Barwick recognised the correctness of Evatt's view that *Walsh and Johnson* could not enable the federal Parliament to bypass the High Court's control of the extent of its power. Barwick adroitly reshaped his argument to use the case as support for the notion that the *Dissolution Act* could come within constitutional power where the opinion of the Governor-General was reviewable. In reply Barwick said:

> Walsh and Johnson does not for one moment suggest that you cannot allow the facts to be determined by the Governor-General, if the facts with which he is to deal — and they are objective facts — really exist and relate to a matter within power.[56]

By focussing upon ss5(2) and 9(2) Barwick heightened the concern held by the High Court in relation to Parliament's move to usurp its position.[57] Barwick erred in that he had either underestimated the concerns of the Bench or had failed to realise that the *Communist Party Case* was not merely about establishing a link between the Act and the defence power. The validity of the *Dissolution Act* depended upon his ability to convince the Bench that the Act

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53 See *Heiner v Scott* (1914) 19 CLR 381 at 393; *Shrimpton v The Commonwealth* (1945) 69 CLR 613 at 629-630.

54 Above n5 at 258 per Fullagar J.

55 (1925) 37 CLR 36. *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 was also cited.

56 Transcript at 1186.

57 See id at 74-76; Lloyd, C, "Not Peace But a Sword! — The High Court Under J.G. Latham" (1987) 11 *Adel L R* 175 at 201.

would not compromise the Court's role and, to a lesser extent, would not unduly compromise the civil liberties of the Australian people.

Under intense questioning from the Bench it became clear that the High Court, excepting Latham CJ, was not going to accept that the Governor-General could independently determine the extent of Commonwealth power. Barwick attempted to salvage his argument by submitting, or conceding, that objective, and hence judicially reviewable, criteria could be applied to the satisfaction of the Governor-General in ss5(2) and 9(2). He submitted that the Governor-General's satisfaction could be reviewed where it was:[58]

i. irrational;

ii. arrived at as a result of self-misdirection; or

iii. the result of a misconception as to the law.

Barwick hoped that this submission would placate the Bench as it was consistent with the position of the High Court as Australia's ultimate constitutional arbiter.

Barwick's concession illustrated the fragility of his position, depending as it did upon the High Court finding that it could review a decision of the Governor-General.[59] This dependence was all the more untenable given the 1941 House of Lords decision in *Liversidge v Anderson*.[60] In that case it was held, with Lord Atkin dissenting, that the Secretary of State's decision under s18B of the Defence (General) Regulations 1939 that a person was of "hostile intentions" could not be reviewed despite the Secretary being required by the Act to have "reasonable cause" for his belief.[61]

The following exchange on the 17th day of the hearing demonstrates that Barwick had come to fully realise his predicament:

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| Barwick: | They [the plaintiffs] first say it is committing to the Governor-General an unexaminable determination of the ambit of power, and the argument falls to pieces. |
| Williams J: | Supposing that is right. |
| Barwick: | Then my argument falls to pieces.[62] |

The High Court's finding that the satisfaction of the Governor-General was not reviewable was crucial to it holding the *Dissolution Act* invalid.[63] The

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58 Transcript at 74-6, 1036, 1078.

59 In *R v Governor of South Australia* (1907) 4 CLR 1497 the High Court held that a writ of mandamus could not lie against a state Governor. A declaration might have been available in certain cases. See *Duncan v Theodore* (1917) 23 CLR 510 at 544; Hogg, P, "Judicial review of Action by The Crown Representative" (1969) 43 *ALJ* 215.

60 [1942] AC 206. This decision, though not an appeal from Australia, would have nevertheless bound the High Court to the extent that it dealt with relevant issues (*Piro v W Foster & Co Ltd* (1943) 68 CLR 313; *Morris v English, Scottish & Australian Bank Ltd* (1957) 97 CLR 624). See Blackshield, A R, *The Abolition of Privy Council Appeals* (1978); Renfree, H E, *The Federal Judicial System of Australia* (1984) at 138-41.

61 Lord Atkin's dissent is now accepted in England and Australia as being correct. See *Nakkuda Ali v Jayaratne* [1951] AC 66 at 77; *R v Inland Revenue Commissioners; Ex parte Rossminister Ltd* [1980] AC 952 at 1011, 1025; *R v Home Secretary; Ex parte Khawaja* [1984] AC 74 at 110; *George v Rockett* (1990) 170 CLR 104 at 112-3. According to Lord Scarman in *Rossminister* at 1025 "it [*Liversidge*] need no longer haunt the law".

62 Transcript at 1102.

Commonwealth's case was beyond redemption before Barwick could paint a portrait of Australia on the brink of war against the tide of communism. In his reply Barwick said, not without a hint of frustration:

> let us hope that nobody like Guy Fawkes gets busy here, because we would have to wait until after the gunpowder has gone off before we could do anything about it.[64]

## *The Plaintiffs*

Attacking the *Dissolution Act* were the ACP, ten unions[65] and various union officials, including prominent communists. Although the ACP, as an unincorporated association, was held not to be a competent plaintiff its name remained on the record as the first plaintiff, giving the case its name.[66]

Representing the plaintiffs were six King's Counsel and six juniors. The advocates who made submissions to the Bench were, in order of appearance, Laurie,[67] Evatt,[68] Paterson,[69] Isaacs,[70] Ashkanasy,[71] Weston,[72] Webb[73] and Hardie.[74] Evatt, Isaacs and Hardie were later appointed to the Supreme Court of New South Wales. Evatt's line of reasoning was generally deferred to by the other counsel for the plaintiffs.[75]

Evatt was hostile towards communist ideology and, like Chifley, saw the Labor Party as being the most effective bulwark against communism. Evatt was not against the prosecution of communists where he believed the law had been broken.[76] He did not, however, believe that communism should be countered by compromising the same civil liberties he sought to protect from communism. Evatt's philosophy was summed up by his statement at an election meeting in 1946: "Communists are fellow citizens. Let them have freedom of expression unless they break the law of the country".[77]

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63 See Menzies, R, *Central Power in the Commonwealth* (1967) at 69-73.

64 Transcript at 1048.

65 Namely, the Waterside Workers' Federation of Australia, Australian Railways Union, Building Workers' Industrial Union, Amalgamated Engineering Union (Australian Section), Seaman's Union of Australia, Federated Ironworkers' Association of Australia, Australian Coal and Shale Employees' Federation, Ship Painter and Dockers' Union, Sheet Metal Workers' Union and the Federated Clerks' Union of Australia.

66 See Anderson, R, "*Australian Communist Party v The Commonwealth*" (1951) 1 *UQLJ* 34 at 34.

67 Transcript at 134-225.

68 Id at 226-567, 1289-421, 1463-5.

69 Id at 567-744, 1425-57.

70 Id at 744-806/7.

71 Id at 806/7-901.

72 Id at 901-67, 1457.

73 Id at 967-1010.

74 Id at 1011-34.

75 See id at 806/7 per Paterson, 967 per Webb, 1034 per Hardie; above n39 at 265.

76 Evatt did not, however, order the prosecution for sedition of several well-known communists, including Gilbert Burns and Lance Sharkey (see *Burns v Ransley* (1949) 79 CLR 101; *R v Sharkey* (1949) 79 CLR 121). It appears that these politically motivated actions were ordered by Nicholas McKenna, who was the acting Attorney-General of the Commonwealth while Evatt was engaged as President of the United Nations. See Maher, L W, "The Use and Abuse of Sedition" (1992) 14 *SydLR* 287 at 295-311.

77 Webb, L, *Communism and Democracy in Australia* (1954) at 12 extracted in Winterton, above n6 at 636.

In the 1949 federal election the Labor Party lost its grip on power to the recently formed Liberal Party led by Menzies. The suppression of communism had been an important election issue.[78] After a vicious Parliamentary fight over the *DissolutionAct*,[79] Evatt, then the Deputy Leader of the Opposition, surprised Parliament, the Labor Party and his supporters by announcing that he would represent the communist-led Waterside Workers' Federation and its communist official, James Healy, in the High Court challenge to the validity of the Act. The fact that Evatt was prepared to attack Menzies' anti-communist measure, despite the obvious political ramifications[80] for himself and the Labor Party, shows that Evatt was prepared to fight for principle at the expense of political survival.[81] Harold Holt, a member of the Government and future Prime Minister of Australia, summed up what could be the only result of Evatt's decision:

> rightly or wrongly the people of Australia will read into the appearance of the right honourable gentleman a sympathy and support for the cause which he seeks to defend.[82]

Evatt moved in great bursts of mental and physical energy.[83] While this could be a weakness, as it meant that Evatt was incapable of consistent effort,[84] it contributed to his success at opposing Menzies' anti-communist measures.[85] Evatt's victory in the *Communist Party Case* was a personal triumph. However, he soon reached a watershed for his success undermined his burning ambition to become Prime Minister and relegated the Labor Party to the opposition benches until 1972. The mere mention of communism

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78 Menzies had joined the Country Party in arguing for a ban of the ACP in late 1948 or early 1949. The Country Party had been particularly strong in its attacks on the ACP. Its 1946 election statement, extracted in McKinlay, B, *A Documentary History of the Australian Labor Movement 1850-1975* (1979) at 691, stated: "The Country Party regards the Australian communist in the same category as a venomous snake — to be killed before it kills. Therefore, it stands foursquare for declaring the Communist Party an illegal organisation."

79 See Winterton, above n6 at 645-7.

80 The Victorian Branch of the Labor Party even went so far as to pass a motion condemning Evatt's acceptance of the brief (see *Sydney Morning Herald* 14 November 1950).

81 See Kirby, above n2 at 93; Kirby, M, *H V Evatt: Libertarian Warrior* in Evatt Foundation, *Seeing Red* (1992) at 5-6. Justice Meagher of the New South Wales Court of Appeal in "Evatt and Civil Liberties" in Evatt Foundation at 184 took the opposite view. He argued that Evatt's internment of members of the fascist Australia First Movement during World War II demonstrated that: "The sad truth seems to be that Dr Evatt was vigorous in upholding the civil liberties of his friends and equally vigorous in denying the civil liberties of his enemies."
Justice Meagher also argued that (id at 185): "The test of a true civil libertarian is one who insists on upholding the civil liberties of all citizens, friend and foe. Dr Evatt does not pass that test."
Justice Meagher's paper is criticised in Evatt Foundation by Cain, F, "Dr Evatt and his Times: A Response to Mr Justice Meagher's Paper" and Gietzelt, A, "Truth Distorted: A Rejoinder to Justice Meagher".

82 *Commonwealth Parliamentary Debates*, 25 October 1950 at 1391-3

83 Dalziel, A, *Evatt the Enigma* (1967) at 63.

84 Ibid.

85 Evatt was also largely responsible for the defeat in 1951 of Menzies' attempt by referendum to suppress communism in Australia. See Kirby, above n21; Evatt Foundation, above n81.

became enough to send the average voter, and especially many of the new European immigrants, in a mad stampede to the Menzies corner.[86]

Evatt had not been a regular advocate in the years prior to the *Communist Party Case*. Since his appointment to the High Court in 1930 Evatt had appeared at the bar table twice, on both occasions appearing against and losing to Barwick. Both occasions were in support of the Chifley Government's attempt to nationalise Australian banking. The first appearance was in the High Court[87] in early 1948 and the second in the Privy Council[88] in mid 1949.

The first *Banking Nationalisation* case was argued for 39 days and remains the longest High Court hearing ever. Evatt spoke for 18 of those days.[89] Evatt's relationship with the High Court Bench, particularly Starke J, deteriorated.[90] At one stage Evatt found himself in dispute with Latham CJ over whether, on a day of sweltering heat, the windows of the courtroom should be closed to prevent Evatt from catching cold.[91] Evatt followed his High Court appearance with 20 days in the Privy Council, during which two of the Privy Councillors died. Evatt's advocacy had become rusty.

## *The Case for the Plaintiffs*

While the arguments forwarded by the plaintiffs differed in some respects, read together they displayed a surprising degree of coherence given the number of advocates.[92] The arguments of the plaintiffs were structured around eight submissions:

1 (a) Parliament cannot arrogate power to itself by reciting itself into power;

(b) the recitals were at most prima facie evidence of the allegations made against communists and the ACP; and

(c) the recitals should be open to rebuttal by the plaintiffs and an inquiry held by the High Court into their accuracy;[93]

2 (a) the Act was not within Commonwealth legislative power; and

(b) the Act was not brought within power by the recitals as the recitals were inconsistent with fact;

3 (a) High Court authority clearly established that a "real substantial and rational" connection and not merely a logical connection was necessary to attract constitutional power; and (b)Barwick's reliance upon a logical connection was unsound;

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86 Whitington, D, *The House Will Divide* (1969) at preface.

87 Above n25.

88 Above n26

89 Latham CJ in above n5 at 153 said the first *Banking Nationalisation* case was "a case which was fully argued".

90 One should remember, however, that relations between Evatt and Starke had been bitter from the 1930s when the two had sat on the High Court together. See above n57; Fricke, G, *Judges of the High Court* (1986) at 104, 132.

91 See above n14 at 66.

92 But see Transcript at 1034 per Barwick and the conflicting use made of *Walsh and Johnson*, above n55 by Evatt and Laurie.

93 See Transcript at 547-548 per Evatt.

4 (a) judicial notice could not be taken of Barwick's 20 factors because they were subject to dispute; and

(b) at best the factors were widely held opinions or beliefs;

5 the Act conflicted with s71 of the Constitution, which provides for the separation of powers between the legislature, executive and judiciary, because:[94]

(a) under the guise of legislation the Parliament was attempting to vest judicial power in the Governor-General, a member of the executive. The Governor-General was vested with judicial power as the Act enabled the holder of the position to make a conclusive finding of fact that would create liabilities and affect rights irrespective of whether the finding was correct; and

(b) if the recitals were conclusive of the facts alleged there was a clear usurpation of judicial power;

6 the Act was "obnoxious" to s92 of the Constitution as it directly interfered with the political, commercial and industrial activities of the ACP and other declared organisations in a manner that precluded intercourse between the states from being absolutely free;[95]

7 the Act conflicted with s51(xxxi) of the Constitution because it enabled the Commonwealth to acquire the property of the ACP and declared organisations for no value and thus on terms that were not just; and

8 (a) the *Dissolution Act* was interwoven about ss4, 5(2) and 9(2);

(b) the Act was totally invalid should any of the above sections be found to be invalid; and

(c) section 15A of the *Acts Interpretation Act* 1901 (Cth) could not read down or sever any of the sections so as to allow any part of the Act to retain validity.

The most important of these submissions are outlined below.

### *Laurie*

Laurie, counsel for the ACP, opened the argument for the plaintiffs.[96] Laurie's main contention was that the *Dissolution Act* was too wide to be characterised as a law with respect to defence. In his own words:

> The inference I am asking the Court to draw ... is that it is not really a defence law at all; its primary object is the destruction of the Australian Communist Party who are the political opponents of the Government, and the destruction of that Party's political influence in the trade union movement.[97]

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94 In *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 the High Court held that the legislature could delegate law-making power to the Governor-General without breaching the separation of powers doctrine.

95 Transcript at 510. See id per Isaacs. The decisions in above n25 and above n26 were relied upon as the basis of this argument.

96 Paterson was to have opened the argument for the ACP but was ill and could not attend until later in the hearing. Paterson was only able to address the Court after Evatt had concluded his submissions.

97 Transcript at 154.

Laurie's approach was to skirt the nebulous boundary between politics and law. In essence he submitted that the Act should not be characterised as relating to defence but should instead be viewed as an Act designed to crush the Government's political opponents, including the left wing of the Labor Party. While High Court authority suggested that legislation could not be invalidated by a process of "characterisation" where a link with a head of power existed,[98] Laurie's argument was nevertheless powerful as it reinforced that the Act was not primarily about defence and that its defence aspect was little more than a facade.

Latham CJ attacked Laurie's submissions on the basis that they espoused political and not legal principle. He appeared not to appreciate that in the *Communist Party Case* the two were inexplicably intertwined. At several stages argument between the two degenerated into a tussle of political views. At one stage Latham CJ declared that the suppression of an organisation was "a matter of policy rather than law".[99] After the support he gave Barwick, Latham CJ's strong attack on Laurie showed that he strongly favoured the Commonwealth's position.

### *Paterson*

Paterson, also counsel for the ACP, argued that the Constitution embodied a system of representative and responsible government derived from the United Kingdom. He submitted that the Constitution had to be read in such a way that the federal Government could not interfere with the political rights of electors or political organisations. As the *Dissolution Act* sought to ban the ACP, a political party propagating ideas and contending for political supremacy in Australia, the Act was invalid because it was inconsistent with the principles of representative democracy.[100]

Paterson's arguments were radical for 1950 as they ascribed to the Constitution a political basis not readily admitted to in prior High Court decisions. His submissions were rejected by the Bench, by Latham CJ in particular. This may have stemmed from the orthodoxy supposedly established by the High Court in the *Engineers Case*[101] that the Constitution was not to be interpreted by making implications.[102]

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98 According to Dixon J in *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79: "Speaking generally, once it appears that a federal law has an actual and immediate operation within a field assigned to the Commonwealth as a subject of legislative power, that is enough. It will be held to fall within the power unless some further reason appears for excluding it. That it discloses another purpose and that the purpose lies outside the area of federal power are considerations which will not in such a case suffice to invalidate the law."

99 Transcript at 146. See also id at 152, 217.

100 Paterson also argued that as the ACP was a political party taking part in the state political process the *Dissolution Act* was invalid because, in banning the ACP under s4, the Act prevented or impeded the functioning of state self-government. Above n98 was cited to support this submission. See also Transcript per Ashkanasy.

101 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

102 But see *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 681. Referring to id at 681-2, Mason CJ pointed out in above n at 590 that the *Engineers Case* "certainly did not support such a draconian and unthinking approach to constitutional interpretation". Mason CJ then quoted the following dicta of Dixon J in *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 85: "We should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should

It is interesting to note that while Paterson's argument appeared out of place with the constitutional doctrines explicitly recognised in the era of the *Communist Party Case*, they do fall neatly into line with the approach now being adopted by the High Court. The decline of the literalist approach of the *Engineers Case*[103] and the emergence of a new approach to constitutional interpretation in recent decisions such as the *Electoral Advertising Bans Case* makes acceptance of Paterson's ideas today very likely. Indeed, in the *Electoral Advertising Bans Case*[104] Mason CJ described as "incontestable" the notion of Stephen J in *Attorney General (Cth); Ex rel McKinlay v The Commonwealth*[105] that the principles of representative democracy and direct popular election could be discerned in the Constitution. Mason CJ went so far as to imply from the Constitution a "freedom of communication" extending "to all matters of public affairs and political discussion".[106]

The negative reaction of the Bench to Paterson's submissions also arose because, in drawing strength from the necessarily political nature of the Constitution, Paterson frequently lapsed into rhetoric. For this he was strongly attacked, especially by Latham CJ. For example:

Paterson: I am submitting that these facts have got to be shown and that here the Parliament of the Commonwealth is attempting to use far-reaching powers, powers which were recognised as far-reaching by the Courts which dealt with them in the most terrific life and death struggle which had confronted Britain up to that time, and here, as Dr. Evatt says, the Test Match starts this week-end; here in Australia the emergency is so great that we can allow manpower to sell ice-creams, to provide...

Latham CJ: Mr. Paterson, you have misinterpreted a good deal of oratory, but this is all oratory.[107]

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be fearful about making implications."

103 See Craven, G, "The Crisis of Constitutional Literalism in Australia" in Lee, H P, Winterton, G (eds), *Australian Constitutional Perspectives* (1992); Carven, G, "Cracks in the Facade of Literalism: Is There an Engineer in the House?" (1992) 18 *MULR* 540.

104 Above n15 at 593.

105 (1975) 135 CLR 1 at 55-6.

106 Above n15 at 597. It is important to note that Mason CJ found that this freedom was not absolute in that it could be overridden by the "competing interests of the public" (ibid). See also id at 603-4 where Brennan J stated: "For reasons which I give in *Nationwide News Ltd v Wills* (1992) 108 ALR 681, I would hold that the legislative powers of the Parliament are so limited by implication as to preclude the making of a law trenching upon that freedom of discussion of political and economic matters which is essential to sustain the system of representative government prescribed by the Constitution." See also id at 617-8 per Deane and Toohey JJ, 652 per Gaudron J, 664 per McHugh J.

107 Transcript at 1439. Such rhetoric on the part of counsel is as evident in the High Court today as it was in 1950. In argument before the High Court on 8 December 1992 Horton QC stated in referring to what could occur if fundamental privileges were "watered down" (Transcript of *Environment Protection Authority v Caltex Refining Co Pty Ltd*, matter no S74 of 1992 at 78, 79): "But you get courts in some countries: Russia in the days of Stalin, in which they were courts in name, that was all, and even the present-day Russians admit that, with sadness no doubt but they admit it; so it can happen. Your Honours, the Reichstag fire in 1934 or thereabouts, I think, which swept Hitler to power; he had everyone tried overnight and the whole lot were taken out and either shot or put into a concentration camp and look what happened after that."

Paterson's submissions on the points raised by Barwick were similarly founded upon the political aspects of constitutionalism and the *Dissolution Act*. This annoyed the Bench even further. When Paterson was discussing Barwick's 20 factors and referring to international affairs, frustration became apparent on the part of Williams J who, in an interjection spanning most of a page, said:"I do not know why you keep talking about Russia and the Soviet Union so much."[108]

On the last day of the hearing Paterson became animated as his argument degenerated almost completely into a political discourse. This caused him much difficulty as it led to sharp exchanges with Latham CJ. For example:

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|---|---|
| Paterson: | The remarks of every public leader have been to the effect that if Russia wants she can over-run Europe in two or three weeks. She does not want to; she is not ready for war yet. |
| Latham CJ: | You are asking us to take judicial notice of a good deal more than Mr. Barwick ever suggested. |
| Paterson: | No, I am simply saying — |
| Latham CJ: | If you are simply saying it then it does not matter. It is not part of legal argument what every public leader in Europe said. Who in the world would be able to make a competent and truthful statement as to what every public leader in Europe said? What is the usefulness in saying that? |
| Paterson: | I say it is relevant — |
| Latham CJ: | But is it competent to say it? I am referring to your particular statement. You are about to say that every public leader in Europe has said something about the things you are going to mention. I take the liberty to suggest there is nobody who knows what every public leader in Europe has said and it cannot have anything to do with this case.[109] |

No counsel for the plaintiffs attracted the ire of the Bench to the same extent as Paterson and Laurie.[110]

### *Evatt*

With recollections of Evatt's advocacy in the first Banking Nationalisation Case it must have been with trepidation that the judges of the High Court awaited his appearance. As it turned out, they had good reason for their fears. After a confident and powerful beginning in his first days of argument Evatt became repetitive, disjointed and, as a consequence, difficult to follow. Evatt spoke for over 10 days. As the days progressed Evatt's erudite argument faltered as he drifted from his strongest points to areas of lesser relevance. Hours of "unimaginable boredom" were made worse by the unbearable heat.[111]

At times the judges were deferential to Evatt. On one occasion Dixon J apologised to Evatt after asking several questions, saying "I am afraid I was

108 Transcript at 740.
109 Id at 1454.
110 Ashkanasy was the only counsel to have the opportunity to speak for five uninterrupted pages of Transcript.
111 Above n14 at 86.

rather slow".[112] However, such tolerance only belied the annoyance of the Bench at the length of Evatt's argument.[113] Evatt was subject to less frequent interjections than Barwick and often found Dixon J to be supportive of his position. Dixon J's support was surprising given that during Evatt's time on the High Court the two had rarely found themselves in agreement.[114]

While Evatt made submissions upon a multitude of topics of varying relevance, it was his early attack on the *Dissolution Act* that was the most telling. Evatt struck hard at the main weakness of the Commonwealth's case by centring his argument on Barwick's reliance upon ss5(2) and 9(2). Evatt submitted that the sections, and thereby the whole Act, were invalid as the sections did not possess a real and substantial connection with the defence of Australia.[115] He argued that the Act was about the opinion of the Governor-General as to what was prejudicial to the defence of Australia.[116] In his own words:

> I put this to the Court, and I submit it can be driven home and it cannot be answered, it is impossible to base disqualifications and loss of civil rights and expropriation of property, all of which is worked by this Act of Parliament, upon the mere opinion of the Executive Government.[117]

Evatt's argument was founded upon two grounds. First, he contended that the Act bore no real relationship with defence and thus that the Act could not be passed under the Commonwealth's defence power. Second, he argued that the opinion of the Governor-General could not form the basis of the Act's validity. The submissions were linked because by founding the Act upon the satisfaction of the Governor-General the Parliament had provided no specific, tangible or substantial connection with the defence power. Evatt's second contention was supported by the "stream and source" principle and struck at the heart of the Bench's concerns.

Evatt criticised Barwick's use of *Walsh and Johnson*.[118] He argued that Barwick's reliance upon the decision was a complete misconception in so far as Barwick contended that the case could enable the Parliament to by-pass the authority of the High Court. The majority in the case, Evatt submitted, unequivocally stood for the principle that the opinion of the Governor-General could not provide a link with constitutional power.

Evatt submitted that the satisfaction of the Governor-General was not reviewable by the High Court. He sought to head off Barwick's attempt to salvage the Commonwealth position by reinforcing the idea that the Act depended upon the arbitrary and unexaminable satisfaction of the executive and not upon any determination of the High Court. Evatt's argument was dangerous in that, if it was accepted and the High Court found the Act to be valid, the Government would have possessed an unfettered ability to declare

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112 Transcript at 1341. It is also possible that Dixon J was being sarcastic.

113 See Above n14 at 86.

114 *The King v The Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 is one notable exception.

115 Evatt also argued that the onus in constitutional matters rested upon the party seeking to affirm the legislative power of the Commonwealth. Cf Transcript at 1049 per Barwick.

116 See id at 746-747 per Isaacs.

117 Id at 232. See id at 350-353.

118 Evatt had appeared in, and won, this case before the High Court.

organisations and persons under ss5(2) and 9(2). It may have been reasoned that the submission was vital to the integrity of the plaintiffs' argument and that it was better to wholeheartedly attack the Act than to rely upon arguments that might see the Act exist in a limited form. Alternatively, Evatt may have put the argument simply because he believed it to be correct.

Evatt argued for the path that would enable the High Court to continue to review the validity of Commonwealth legislation. High Court acceptance of his argument would prevent the federal Government from enlarging its sphere of power at the expense of the states and of civil liberties. By attacking both the Commonwealth's argument and the weak foundations upon which it rested, Evatt invited the High Court to let Barwick's submissions "fall to pieces"[119] and to hold the *Dissolution Act* invalid.[120]

Evatt also contended that the power to declare organisations and persons under ss5(2) and 9(2) could not be based upon the executive power of the Governor-General in combination with the Commonwealth's incidental power. Citing *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth*,[121] he contended that Parliament could not dispense with the civil, contractual or proprietary rights of its subjects under its executive power.[122] In his own words:

> To say there is a discretion in the Executive Government to condemn property, take away the civil rights of citizens not upon facts established to the satisfaction of the judicial power, which are the only facts that can be recognised, broadly speaking, by the organs of the judicial power of the Commonwealth, but on the mere say-so of the executive that a person is dangerous to the maintenance of the Constitution would introduce from a legal point of view — I am not speaking from any other point of view — an extravagant, fantastic and tyrannical notion into the Constitution of such proportions that I think the proposition only has to be illustrated in a few cases to show that it is completely erroneous.[123]

Evatt described the powers granted under the *Dissolution Act* as being "of the most extreme character, completely unknown to the executive power of the King of England — at any rate since the Petition of Rights and the Bill of Rights".[124] He submitted that the incidental power could never enable the executive to determine the ambit of the legislature's constitutional power, nor could it enable the liquidation of an organisation or the forfeiture of an individual's property.[125]

During argument Evatt, with the stature of an ex-President of the United Nations, took the opportunity to lecture Barwick on post-World War II international politics in order to rebut the accuracy of Barwick's 20 factors. In picking fault with these points Evatt made it clear that the factors could not, without controversy, form the subject of judicial notice.

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119 See id at 1102.
120 See id at 1457 per Weston.
121 Above n55.
122 In 1936 Evatt published a book, based upon his LLD thesis, entitled *The King and His Dominion Governors*. The book dealt with the reserve powers of the King and his representatives in the dominions.
123 Transcript at 233.
124 Ibid.
125 See id at 277.

## *The Decision*

After argument concluded the High Court deliberated for nearly three months. On 9 March 1951 the Court, with Latham CJ dissenting, held the *Dissolution Act* to be wholly invalid. The majority consisted of Dixon, McTiernan, Williams, Fullagar and Kitto JJ, who, in separate judgments, answered "No" to the first question posed by Dixon J and "Yes" to the second. Webb J shared little of the majority reasoning despite also finding the Act invalid by answering both questions "Yes". Latham CJ answered both questions "No". Webb J was thus the only member of the Court to hold that evidence had to be adduced by the Commonwealth to prove the accuracy of the recitals. Latham CJ, on the other hand, was the only member to hold that the *Dissolution Act* was valid without proof of the recitals. In reaching their respective decisions, none of the members of the High Court found the need to stray beyond the arguments put to them by counsel. The common thread in the majority judgments was that the *Dissolution Act* went too far given the dangers facing Australia. There was insufficient judicially noticeable evidence to connect the Act with the defence power and the recitals were not of probative value. It was held that a real or specific, and not logical, connection with defence was required to sustain a law under the defence power. Furthermore, the incidental and executive powers could not be strained to derogate civil liberties in the manner proposed. Most of the arguments of the plaintiffs, such as those relating to ss51(xxxi) and 92 of the Constitution, were ignored by the majority as the legislation could be held invalid without reference to them.

The Act undoubtedly would have been valid had it been passed at a time of national emergency, such as during World War II, but was insupportable as at 20 October 1950, a time of relative peace. Whether the expansion of the defence power during a period of crisis provided an exception to the "stream and source" doctrine or whether the total control accorded to the legislature would make such a doctrine irrelevant was unclear.

The position of the majority was best put by Dixon J. In a crucial passage, he stated:

> History 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. In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based in a conception, if otherwise adequate, 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.[126]

This dicta was reinforced by vague references to the rule of law as it related to the separation of judicial power from the other functions of government.

Underpinning Dixon J's decision was the finding that ss5(2) and 9(2) of the *Dissolution Act* gave to the executive an unexaminable ability to extend the reach of the Commonwealth into fields not otherwise within its power. This mirrored the submissions put by Evatt. Given that Barwick argued that

126 Above n5 at 187-188.

validity stemmed from ss5(2) and 9(2), it amounted to a complete rejection of his approach. According to Dixon J: "I think that it may be said that if the validity of the Act can be supported it is rather in spite of than because of s. 5(2) and s. 9(2)."[127]

The theme propounded by Evatt that the *Communist Party Case* involved a challenge to the constitutional functions of the High Court was adopted by Fullagar J. He stated that while there were people who could not understand why the legislature was not the arbiter of the extent of its own power, the doctrine of judicial review expressed in *Marbury v Madison*[128] was "axiomatic" in Australia.[129]

The views expressed by the majority judges during argument, especially when intervening during Barwick's submissions, were clearly reflected in their separate reasons. The judgments, though clothed in the guise of legalism, reflect clear dislike towards the interference with civil liberties and the role of the High Court achieved by the *Dissolution Act*. Their adoption of the arguments put by Evatt makes this clear, for Evatt's submissions were strongly linked with the issues of political freedom and judicial review.

The judgment of Latham CJ has been described as a "lone, vehement and incredulous dissent".[130] It reads like a startling abdication of High Court power in the area of defence and suggests strongly that Latham CJ's interjections during argument were heart-felt and revealed his own political views. He accepted the submissions put to him by Barwick with regard to the unfettered ability of the Commonwealth to legislate with respect to defence.[131] Quoting Cromwell, Latham CJ asserted "being comes before well-being"[132] and that in times of crisis the High Court must facilitate Parliamentary action. He argued that the question posed by the *Communist Party Case* was, in times of crisis, "[b]y what authority — by Parliament or by a court?".[133] For Latham CJ it was clearly the Parliament.

Latham CJ argued that "[t]he Court should, in my opinion, have no political opinions".[134] He then repudiated Paterson's argument that the *Dissolution Act* was invalid because it abolished an organisation engaged in state and Commonwealth political activity. Stating that it "is difficult to deal with an argument so insubstantial", Latham CJ found that the Commonwealth had "full power" to make laws with respect to "traitorous and subversive" activities, that is the activities, in his view, the ACP engaged in.[135] Latham

127 Id at 189.

128 (1803) 1 Cr 137; 2 Law Ed 118.

129 Above n5 at 262.

130 Cowen, Z, *Sir John Latham and Other Papers* (1965) at 45. Latham CJ knew when he wrote his judgment that he was in dissent. See above n5 at 146 where Latham CJ quotes from the judgment of Williams J.

131 Latham CJ in above n at 161 did however reject Barwick's 20 factors for judicial notice, saying (emphasis in original): "The Court can take judicial notice of notorious facts, and one thing which is notorious about what Mr. *Barwick* has submitted is that the allegations are matters of vigorous dispute. His Honour also rejected Barwick's submission that only a rational or logical connection with defence was required to engendered validity under the Commonwealth's defence power."

132 Id at 141.

133 Id at 142.

134 Id at 148.

CJ's own poetically founded assumption as to the role of the ACP in Australia undermined his strong criticism of Laurie and Paterson.

## *Conclusion*

While the reported decision in the *Communist Party Case* appears to be divorced from the wider political issues, the transcript of argument reveals that this was far from the case. The transcript demonstrates that the Court was fully aware of what was at stake both in terms of its own position and the liberty of the Australian people. These aspects of the case, although not readily apparent in the majority's formalistic reasoning, were borne out in the Courts' objections to Barwick's submissions. There also existed a strong correlation between the interjections and approach to counsel of Latham CJ and his dissent.

Though Barwick and Evatt differed remarkably in the style of their presentation, the transcript of argument provides an insight into the shaping of legal argument by two of Australia's most brilliant lawyers in arguably one of the High Court's most important decisions.[136] The analysis suggests that the victory of Evatt over Barwick was characterised by Evatt's reliance upon the strong and unambiguous principle that accorded with the position most acceptable to a majority of the High Court. Barwick's more tactical approach almost granted Evatt victory by default. The emphasis placed by Barwick upon ss5(2) and 9(2) of the *Dissolution Act* suited Evatt by providing him with a perfect platform for his submissions. Barwick's submissions were effectively neutralised by a combination of the strength of Evatt's contentions and the incompatible views held by a majority of the Bench.

An examination of the transcript of the *Communist Party Case* enables one to penetrate the legalism pervading the judgments in the case. It thus explains a vital part in the process of the High Court's invalidation of an Act that may have undermined constitutional government in Australia by suppressing political ideas and transforming Australia's flirtation with McCarthyism into a dangerous and undemocratic romance.

While the High Court no longer takes weeks to hear argument in cases of great importance, recent decisions have demonstrated that the Court has not shed the mantle of protector of fundamental freedoms earned in the *Communist Party Case*. The Court's decision in the *Electoral Advertising Bans* case was based upon reasoning that explicitly recognised that democratic government is finely enmeshed in the Constitution. Even more importantly, the *Electoral Advertising Bans* case revealed that the High Court continues to concurrently protect its own position at the apex of constitutional interpretation and the political freedoms of the Australian people.

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135 Id at 169.

136 In Winterton, above n6 at 653 the decision in the *Communist Party Case* is described as being "probably the most important ever rendered by the Court".

## *Postscript — Dramatis Personae*

### *Garfield Barwick*

Barwick was born in 1903 in Sydney to a working class Methodist family. The financial problems of various members of his family troubled him for many years. Such problems led to Barwick being the subject of a sequestration order from mid 1930 to early 1931. In 1920 Barwick began studying law at Sydney University. In his later years of study Barwick excelled, jointly taking the university medal (Bavin, above n27 at 245). After practising as a solicitor, Barwick came to the bar in 1927. The Great Depression did not affect Barwick as it did many others. The 1930s saw his first appearances before the High Court, of which Evatt was a member, and some financial security. Barwick's first reported appearance before the Court was in Lowenstein in 1938 (above n114) This was a case on s80 of the Constitution notable for the strong joint dissent of Dixon and Evatt JJ, though on a point not raised by Barwick in argument. Politically, Barwick was active in his support for Jack Lang, the Labor Premier of New South Wales, who fought unsuccessfully to shield his government from emerging financial crisis. World War II established Barwick at the top of the Sydney bar. His frequently successful attacks upon the Commonwealth's National Security Regulations and his spirited challenge of William Dobell's entry into the Archibald Prize made him a public figure. Barwick joined Menzies' Government in 1958 as the member for Parramatta. In 1960, as Attorney-General, he introduced amendments to the *Crimes Act* 1914 (Cth) which dealt with offences such as treason, sabotage and harbouring spies. The "known character" provisions of the amendments enabled the construction of criminal intent for some offences where a person was, for example, a known communist (see above n14 at 158). Barwick was appointed Chief Justice of the High Court by Menzies in 1964. He retired from the Court in 1981.

### *Owen Dixon*

Owen Dixon is still regarded by some as "arguably the greatest judge that the common law system has produced" (McHugh, M, "The Law-making Function of the Judicial Process" (1988) 62 *ALJ* 15 (part I), 116 (part II) at 127. See also Stephen, N, *Sir Owen Dixon* (1986) at 20-1). One of the most effusive celebrants of Dixon's career was his first pupil, Robert Menzies (see Menzies, R, *The Measure of the Years* (1970) at 240-1). Dixon was a career lawyer. Born in 1886, he went to the Victorian bar in 1910 and was appointed an acting judge of the Supreme Court of Victoria in 1926. Dixon came to the High Court in 1929 at the age of 42. He remained on the Bench for 35 years, being appointed Chief Justice in 1952 and retiring in 1964. Initially, Dixon spent much of his time in dissent, as in the 1930s transport cases on the meaning of section 92 of the Constitution. However, time generally saw Dixon's line of reasoning prevail (see, for example, *Hughes and Vale Pty Ltd v New South Wales (No 1)* (1954) 93 CLR 1). Dixon died in 1972.

### *Herbert Evatt*

Evatt was born in New South Wales in 1894. He studied arts and law at Sydney University and is still regarded as one of the institution's most

brilliant students. Evatt gained university medals upon graduation in philosophy and law. He also received the rare distinction of being awarded the university medal upon the award of his LLD (see *Daily Telegraph* 28 May 1924 extracted in Evatt, H V, *The Royal Prerogative* (1987) at preface; above n83 at 5, 71; above n39 at 35). After an associateship with the Chief Justice of New South Wales, William Cullen, Evatt went to the bar and established himself as one of the foremost industrial advocates in New South Wales. In 1925, while continuing his practice as a barrister, Evatt was elected the member for Balmain in the government of Jack Lang. Despite being expelled from the Labor Party in 1927 after clashing with Lang, Evatt retained his seat at the subsequent election as an independent Labor member. In 1930, at the age of 36, Evatt was appointed to the High Court by the Scullin federal Labor Government. Evatt's relations with the other judges, especially Starke, were uncongenial (see above n58; above n90 at 104, 132). Professor Leslie Zines, in "Mr Justice Evatt and the Constitution" (1969) 3 *FL Rev* 153 at 185, has described Evatt's approach to constitutional law while on the Bench as follows:

> [M]uch of the reasoning of Evatt J was aimed at protecting the independence and integrity of the States ... Evatt J combined his anti-centralism with a sympathy for social legislation and civil liberties. He saw legislation as a medium of social reform and welfare.

In 1940 Evatt resigned from the High Court to successfully contest the marginal federal seat of Barton for the Labor Party. Within a short period of his election Evatt played an undisguised and crucial role in the toppling of Menzies' first Government in 1941. From 1941 to 1949, under Prime Ministers John Curtin and Ben Chifley, Evatt concurrently held the posts of Attorney General and Minister for External Affairs. His achievements as Minister for External Affairs were considerable, capped by his election as President of the United Nations General Assembly in 1948. Evatt was elected leader of the federal Labor Party following Chifley's death on 13 June 1951. He led the Labor Party through its 1955 split and unsuccessfully in the elections of 1954, 1955 and 1958. Evatt became Chief Justice of New South Wales in 1960. He died in 1965.

### *Wilfred Fullagar*

Wilfred Fullagar was born in 1892 and served in World War I. In 1922 he joined the bar and soon developed a prosperous commercial and constitutional law practice. In 1945 he was appointed to the Supreme Court of Victoria. He joined the High Court five years later. Fullagar was a great judge (see Gibbs, H, "Eleventh Wilfred Fullagar Memorial Lecture: The Constitutional Protection of Human Rights" 4 *Mon LR* 1 at 1; above n90 at 166). His powerful expositions of the law and the strength of his intellect made his judgments convincing and memorable (see *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446 at 472). In combination with Dixon in areas such as section 92 of the Constitution, Fullagar formed part of a formidable team (see *McCarter v Brodie* (1949) 80 CLR 432; *Hughes and Vale Pty Ltd v New South Wales (No 1)* (1953) 87 CLR 49; *Hughes and Vale Pty Ltd v New South Wales (No 1)* (1954) 93 CLR 1). Together with Kitto, Dixon and Fullagar formed a triumvirate that had a tremendous influence upon the High Court. Fullagar died in 1961 while still a member of the Court.

### *Frank Kitto*

Frank Kitto was born in 1903 and came to the bar in 1927. He practised almost exclusively in equity and, with Barwick, participated in some of the great constitutional struggles of the 1940s. He joined the High Court in 1950, six months before the *Communist Party Case* was heard. Kitto was a firm believer in legalism and, even more than Dixon, espoused that form of reasoning in his decisions. At the time of the *Communist Party Case* the relationship between Dixon, Fullagar and Kitto must still have been in its formative stages. The triumvirate was yet to take shape. Kitto retired from the Court in 1970.

### *John Latham*

John Latham was born in 1877. He graduated in law from the University of Melbourne in 1902. Latham was Attorney General in the federal Bruce Government from 1925 to 1929, opposition leader until 1931 and then Attorney General and Minister for External Affairs in the Lyons Government until 1934. Latham once remarked that his finest achievement as Attorney General was to persuade Dixon to accept a seat on the High Court (above n130, 136 at 34). Latham possessed a loathing of communism grounded in his belief that communists were covertly aiming to incite a violent revolution to overthrow the political and constitutional structures he cherished. This enmity was reflected during Latham's time as Attorney General through, for example, the 1926 amendments to the *Crimes Act* 1914 (Cth). The amendments sought to restrain industrial conduct, facilitate deportation of agitators and generally negative the capacity of the ACP to orchestrate revolutionary action (see above n130,136; above n57; above n33). In October 1935 Latham was appointed Chief Justice of the High Court after the retirement of Frank Gavan Duffy. Latham's time on the Court coincided with rampant antagonisms that dominated relationships between judges. The relationship between Evatt and Starke was particularly sour. Latham retired from the High Court in 1952 and died in 1964.

### *Edward McTiernan*

Edward McTiernan was appointed to the High Court in 1930, one day after Evatt. He remained on the Bench until 1976, a record 46 years. McTiernan was born in 1892 and died in 1990 (see Kirby, M, "Sir Edward Aloysius McTiernan 1892-1990 — Parliamentarian and Judge" (1990) 64 *ALJ* 320; Kirby, M, "Sir Edward McTiernan — A Centenary Reflection" (1991) 20 *FL Rev* 165). He was admitted to the bar in 1916 and in 1920 became a Labor member of the Legislative Assembly of New South Wales. At the age of 28 he had the distinction of being appointed Attorney General before speaking in Parliament. He served as a minister from 1920 to 1922 and from 1925 to 1927. In 1929 he was elected to the federal Parliament where he remained until the federal Labor caucus, with himself as a member, voted to appoint Evatt and himself to the High Court. While McTiernan mellowed towards Dixon's brand of neutralism after Evatt left the High Court in 1940 his decisions remained strongly anti-conservative compared to his judicial brethren (see Douglas, R N, "Judges and Policy on the Latham Court" (1969) 4 *Politics* 20 at 26-27; Blackshield, A R, "Quantitative Analysis: The High Court of Australia, 1964-1969" (1972) 3 *Lawasia* 1 at 12, 55).

### *Robert Menzies*

Robert Menzies was born in 1894. He went to the Victorian bar in 1918. As a barrister Menzies achieved his greatest victory in 1920, at the age of 25, in the *Engineers Case* (above n101). In 1928 Menzies was elected to the Victorian Parliament. He became Deputy Premier and Attorney General in 1932. In 1934 he entered federal Parliament as a member of the United Australia Party by contesting the seat of Kooyong, in Victoria. Kooyong had been held by John Latham. On 26 April 1939 Menzies became Prime Minister of Australia in coalition with the Country Party. On 29 August 1941 Menzies resigned after mounting pressure from Labor Party members urged on by Evatt. Despite his loss of power Menzies remained in politics and emerged as the main opponent to the Labor Party when he was elected as the leader of the newly formed Liberal Party in 1945. He led the Liberal Party into government on 10 December 1949, where it remained for 23 years. Menzies became Australia's longest serving Prime Minister by serving in the position from 1939 to 1941 and 1949 to 1966. Menzies died in 1978.

### *William Webb*

William Webb was Evatt's only appointee to the High Court. He was a cautious, colourless man of a conservative mould. It has been suggested that Webb was selected in order to "court the Catholic vote" (Calwell, A, *Be Just and Fear Not* (1972) at 197). Webb was born in 1889 and died in 1972. He came to the bar in 1913 and in 1925 joined the Queensland Arbitration Court. In 1940 he became Chief Justice of Queensland. After World War II Webb chaired the Australian War Crimes Board of Inquiry before being appointed to the High Court in 1946. Little has been written of Webb's contribution to law either on the Queensland Supreme Court or on the High Court. Tributes have instead, perhaps unkindly, focussed upon his "equable and kindly temperament" (quoted in Fricke, above n90 at 158).

### *Dudley Williams*

Dudley Williams was appointed by Menzies to the High Court in 1940 to replace Evatt. He had only been made a judge of the Supreme Court of New South Wales some three months before. Williams had no political affiliations or Parliamentary experience but was conservative in outlook (see Evans, G, "The Most Dangerous Branch? The High Court and the Constitution in a Changing Society" in Hambly, A D, Goldring, J L, (eds), *AustralianLawyers and Social Change* (1976) at 60). Williams was born in 1889 and died in 1963. He served in World War I before coming to the bar in 1921, where he developed an extensive equity practice. Regular appearances in the High Court preceded his appointment to the Bench. Fricke, in above n90 at 152, has written of Williams: "He did not set the legal world on fire, but he had been a diligent craftsman who had helped maintain the prestige of the court."