PARACHUTING IN: WAR AND EXTRA-JUDICIAL ACTIVITY BY HIGH COURT JUDGES

Fiona Wheeler[*]

I INTRODUCTION

Reflecting on the involvement of High Court judges in extra-judicial activity, former Chief Justice Murray Gleeson recently observed that '[w]ar seems to create special cases'.[1] The historical record confirms this assessment. While High Court judges have, in peacetime, periodically engaged in government work outside the courtroom, most instances of extra-judicial service by our top judges have occurred during war. Thus, it is only during World War I that members of the Court have conducted Royal Commissions. In 1915, Justice George Rich inquired into the controversy — long forgotten today, but a source of much public concern at the time — over conditions at the Liverpool Military Camp, near Sydney.[2] More surprisingly, in 1918 — only months after the Australian people had, for the second time in little over a year, rejected conscription at referendum — Chief Justice Sir Samuel Griffith inquired into the recruitment levels needed to sustain the Australian Imperial Force.[3] By contrast, between the wars, the Court received many requests from the Commonwealth Government for a judge to serve as Royal Commissioner. These requests were uniformly refused.[4]

---

* ANU College of Law, ANU. This paper was written while I was an Honorary Harold White Fellow, National Library of Australia. I would like to thank the Library and its staff for their generous support. I am particularly indebted to Graeme Powell for his help in locating material on Sir John Latham. I would also like to thank Professor Michael Coper, Sir Anthony Mason and Professor John Williams for their comments on an earlier draft as well as Professor Geoffrey Lindell and the anonymous referee. In these footnotes, 'NLA' refers to the National Library of Australia and 'NAA' to the National Archives of Australia.

1 Chief Justice Murray Gleeson, 'The Right to an Independent Judiciary' (2006) 16 *Commonwealth Judicial Journal* 6, 14.

2 Commonwealth, Royal Commission into Liverpool Military Camp, New South Wales, *Report* (1915).

3 Commonwealth, Royal Commission on the War — Australian Imperial Force, *Report* (1918).

4 J M Bennett, *Keystone of the Federal Arch* (1980) 44–5; Graham Fricke, 'The Knox Court: Exposition Unnecessary' (1999) 27 *Federal Law Review* 121, 127–8. See also J D Holmes, 'Royal Commissions' (1955) 29 *Australian Law Journal* 253, 268, 272. In 1954, Sir Owen Dixon declined a request from Prime Minister Menzies to serve on the Petrov Royal Commission: Philip Ayres, *Owen Dixon* (2003) 243–4.

During World War II, the Court's extra-judicial contribution to the war effort was even greater. As is well-known, both Chief Justice Sir John Latham and Justice Sir Owen Dixon took leave from the Court to serve as Australia's Ministers to Japan and the United States respectively.[5] Dixon also headed a number of government boards and committees concerned with wartime issues — most prominently, the Central Wool Committee — a form of extra-judicial service also undertaken, though to a lesser extent, by Latham.[6] Justice Edward McTiernan joined them in venturing outside the courtroom, conducting a Commonwealth inquiry in 1943 into allegations of misconduct in the testing of materials used in production of the Beaufort Bomber. Prime Minister Curtin placed a censorship ban on reporting of the McTiernan inquiry — it was feared that publicity 'would cause consternation' — and the findings were not made public.[7] It appears, however, that McTiernan found evidence that an employee at the Department of Aircraft Production in Sydney had falsified laboratory records.[8] Justice Sir William Webb also undertook war-related work, serving between 1946–48 as President of the International Military Tribunal for the Far East in Tokyo.[9]

There are at least three respects in which these cases, particularly those from 1939–45, are indeed 'special' as Gleeson suggests. First, the sheer volume of extra-judicial work undertaken by members of the High Court during World War II represents an exceptional commitment of judicial resources, especially from a small apex court, to outside tasks.[10] Dixon, for example, was absent from the Court as Minister to the

---

5 These periods of 'leave of absence' from the Court are noted in 64 CLR iv (Latham) and 65 CLR iv (Dixon).

6 Apart from the Central Wool Committee, Dixon headed the Australian Coastal Shipping Control Board, the Commonwealth Marine War Risks Insurance Board, the Commonwealth Salvage Board and the Allied Consultative Shipping Council: see Ayres, above n 4, ch 7. Latham headed the Advisory Committee on the Welfare and Repatriation of Australian Prisoners-of-War and Internees in Japanese Hands. This Committee was established by Minister for External Affairs, Dr H V Evatt, in 1944 and made recommendations to him and his Department. Evatt decreed that the Committee should have 'no publicity': Committee Minutes, 14 September 1944: Papers of Sir John Latham, NLA MS 1009/78/9.

7 NAA: SP109/3, 301/16 (Air Services and Aircraft. Inquiry Conducted by Hon Justice McTiernan into Alleged Falsification of Records in Connection with Aircraft Production). The NAA file suggests the censors were aware of the McTiernan inquiry prior to Curtin's intervention and had already acted to impose a censorship order the night before the Prime Minister's direction. McTiernan's appointment to conduct a government inquiry from 1 March to 10 July 1943 was, however, noted in 66 CLR iv. See also Justice Michael Kirby, 'Sir Edward McTiernan: A Centenary Reflection' (1991) 20 *Federal Law Review* 165, 177–8.

8 The employee was later prosecuted in closed court for fraud, but acquitted. See NAA: A2700, 939 (Summary of the Report and Findings of Mr Justice McTiernan as to the Affairs of the Pyrmont Laboratory).

9 See Dayle Smith, 'Commentary on "Sir William Webb – Hobbesian Jurist"' in Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (2003) 151. While it can be said that Webb's role in Tokyo was judicial (rather than non-judicial) in nature, it is dealt with in this essay on the basis that it was off-court war-related work that did not involve the exercise of conventional domestic judicial authority.

10 It can be argued that the High Court in this period was not truly an 'apex' court since its decisions in non-constitutional matters were still subject to appeal to the Privy Council. However, it is submitted that the Court's role as the final court of appeal in most constitutional cases and as the highest court located in Australia makes the 'top' court

United States for two years between 1942–44. Prior to his departure for Washington, his duties on the Central Wool Committee and other wartime executive bodies occupied much of his working time.[11] Secondly, the 'special' nature of this extra-judicial activity flows from the character of many of the tasks themselves and the extent to which they diverged from the normal work of the courts. This is exemplified by Latham and Dixon's diplomatic appointments which, in a fundamental departure from ordinary standards of judicial autonomy, placed both men at the heart of the executive branch. Thirdly, and again contrary to normal practice, Latham and Dixon, at various times during the war, spontaneously volunteered their extra-judicial services to government. On the outbreak of World War II, Dixon immediately asked Prime Minister Menzies how he (Dixon) could help, an offer Dixon repeated to the Prime Minister on several occasions.[12] As this essay shows, Sir John Latham volunteered, in dramatic fashion, for a share of extra-judicial activity as well.

Of course, one of our basic tenets of government is that judges, especially the most senior members of the judiciary, must not be part of the executive. The principles of judicial independence and separation of powers — whether considered as aspects of our common law inheritance or part of Chapter III of the Australian *Constitution* — necessitate that the judiciary stand apart from the other branches of government.[13] The reasons for this segregation are clear. It promotes public confidence in judicial impartiality, especially in cases involving government or persons associated with, or opposed to, government interests. The separation of the judiciary from the legislature and executive also allows the judiciary to subject the government to legal control and ensure that the rule of law is upheld.[14] Yet during World War II, the judiciary's separation from the other branches of government was significantly abridged as key members of the High Court were seconded into executive service. As Gleeson has remarked: '[p]lainly, in all but extraordinary circumstances' such a situation 'would not be contemplated'.[15]

Against this backdrop, this essay explores the extent to which war justifies 'special cases' of extra-judicial service by High Court judges. It does so by focusing on a remarkable exchange of correspondence between Chief Justice Sir John Latham and Prime Minister Menzies in June 1940.[16] In that correspondence, discussed in the section that follows, Latham proposed to Menzies that, as Chief Justice, he should play a truly extraordinary extra-judicial part in government decision-making in the event that the nation's worst fears of defeat in Europe were realised. The role that Latham envisaged for himself did not, as events transpired, come about. Nonetheless, it raises intriguing questions, considered in later sections of this essay, about the extent to which wartime

---

description apposite for present purposes. On any view, the High Court has always occupied a position of leadership in the Australian judicial hierarchy.

11 Ayres, above n 4, ch 7 (esp 125–6, 129, 132, 134).

12 Ibid 115–17, 120.

13 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (Wilson's Case)* (1996) 189 CLR 1; *Kable v DPP (NSW)* (1996) 189 CLR 51.

14 *Wilson's Case* (1996) 189 CLR 1, 10–13 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 684–5 (Toohey J).

15 Gleeson, above n 1, 14.

16 This exchange is little-known amongst legal commentators. It has, however, been noted in a different context by historian David Day: see, eg, David Day, *Menzies and Churchill at War* (1993) 25.

or emergency conditions can transform established constitutional understandings concerning the relations between leading members of the judiciary and government.

II SIR JOHN LATHAM AND AUSTRALIA'S RESPONSE TO THE FALL OF BRITAIN

On 21 May 1940, Richard (Dick) Latham — lawyer, Fellow of All Souls College Oxford and elder son of High Court Chief Justice, Sir John Latham — wrote from London, where he was working in the British Foreign Office, to his father in Australia.[17] These were anxious times. The German blitzkrieg had overwhelmed large parts of western Europe; German forces were approaching the English Channel and the invasion of Britain loomed. The unthinkable, the fall of Britain to the enemy, now became a distinct possibility. While publicly Dick Latham was optimistic, privately he was deeply worried about what would happen in the event of defeat, including the repercussions for Australia. He told his father that he was writing to him:

> assuming the worst, because if the centre of the Empire is taken the periphery of it will have some big decisions to take and you may be one of those who has to take them.

Specifically, Dick Latham was concerned that Germany, if victorious, would install a 'puppett' [sic] government in Britain. This new government would, in turn, seek the loyalty of the Empire. But for Australia to heed such calls of 'allegiance', wrote Dick to his father, would be disastrous. If placed by fate in this terrible situation, Dick believed that Australia's duty was clear: she should resist the siren call of a lackey British Government and look across the Pacific to 'alliance or confederation' with the United States. In this context, Dick's appeal to his father was explicit: to 'do all you can … to see that freedom is not extinguished'.[18]

Sir John Latham responded to his son's appeal by sending a confidential letter dated 20 June 1940 — the day that France fell to Germany — to the Prime Minister, Robert (Bob) Menzies. Latham and Menzies were well-known to each other. Both hailed from Melbourne and moved in similar social circles there. Prior to Latham's appointment as Chief Justice in 1935, he had spent over a decade in federal Parliament, holding ministerial office in the Bruce and Lyons Governments, including the position of Deputy Prime Minister. When Latham left Parliament in 1934 to return to the bar, his seat of Kooyong in Melbourne went to state politician and barrister, Bob Menzies.[19] Once elected, Menzies was given the federal Attorney-General's portfolio, held up to

---

17 For a brief account of Dick Latham's life, prematurely ended by the war, see Stuart Macintyre, 'Latham, Sir John Greig (1877–1964)' in *Australian Dictionary of Biography* (1986) vol 10, 2, 6. For a longer account, focusing on Dick Latham's academic career and acclaimed essay, 'The Law and the Commonwealth', see Peter Oliver, 'Law, Politics, the Commonwealth and the Constitution: Remembering RTE Latham, 1909–43' (2000) 11 *King's College Law Journal* 153 (I am grateful to Leslie Zines for drawing this article to my attention). Dick Latham joined the RAF in 1941 and died when his plane went missing in 1943.

18 Letter (copy) from Richard Latham to Sir John Latham, 21 May 1940: Papers of Sir John Latham, NLA MS 1009/1/5460.

19 Macintyre, above n 17, 3–5. The association between Latham and Menzies preceded their political careers. Latham taught Menzies at the University of Melbourne Law School and they later appeared together at the bar: 'Tributes to Late Sir John Latham', *The Age* (Melbourne), 27 July 1964, 5.

then by Latham, leading to claims that the two men had 'literally changed places' with each other.[20] Menzies was Attorney-General when Latham was made Chief Justice.

Latham sent Menzies an extract from Dick's letter. In his own letter, he went straight to the point. If a German controlled British Government were to seek Australia's support, wrote Latham senior, then my son's suggestion that Australia should consider shifting her allegiance from Britain to a bond with the United States 'would probably be the best course'. To canvass this possibility was not to be 'defeatist', he assured Menzies, but rather to make ready in case crisis should befall. Having proffered this radical advice to the Prime Minister — itself a questionable extension of the judicial role — the Chief Justice did not retreat, but, remarkably, ventured further into the political domain. If Australia were forced to reconsider her allegiance to Britain, continued Latham, then the Chief Justice, along with the Governor-General, could potentially play a part in the government's deliberations. Specifically, Latham proposed that the government consider associating both himself and the Governor-General:

> openly and personally with the Cabinet in the consideration of the question before a decision is actually reached.

By this Latham seems to have been contemplating that, as Chief Justice, he would help Cabinet make the fateful decision whether to repudiate a proxy German Government in Britain. Thus '[i]n normal times', conceded Latham, the idea that the Chief Justice 'would have any share' in such a decision 'would be quite out of place'.[21]

That these were not normal times is evident from Menzies' response to the Chief Justice. In a brief letter sent two days later, Menzies thanked Latham for his suggestion about confederation with the United States and hinted vaguely at government planning for a range of contingencies were Britain to be defeated. On the idea of a role for the Chief Justice in deliberations over a possible break with Britain, however, Menzies was clear, specifically endorsing Latham's view on 'the value of associating … the Chief Justice in the consideration of the question'.[22]

Potentially, at his own initiative, and with the imprimatur of the Prime Minister, Latham was parachuting into the work of Cabinet.

III 'SPECIAL' NATURE OF HIGH COURT EXTRA-JUDICIAL ACTIVITY DURING WAR

Britain did not fall to Germany and the scenario foreshadowed in this correspondence did not come to pass. However, the 'fall of Britain' exchange between Latham and Menzies provides a dramatic demonstration of how the war had, in the minds of some — including, it seems, the Chief Justice and the Prime Minister — transformed the constitutional landscape. The values served by the separation of the judiciary from the

---

20 Latham's friend, senior British civil servant Maurice Hankey, quoted in Alan Martin, *Robert Menzies: A Life* (1993) vol 1, 127.

21 Letter (copy) from Sir John Latham to Prime Minister Menzies, 20 June 1940: Papers of Sir John Latham, NLA MS 1009/1/5459. In this letter, Latham suggested the State Premiers might also join these discussions.

22 Letter ('Personal') from Prime Minister Menzies to Sir John Latham, 22 June 1940: Papers of Sir John Latham, NLA MS 1009/1/5461.

political branches of government were being trumped, at least temporarily, by larger, and more pressing, interests.

In particular, the fall of Britain exchange, when examined in further detail, serves to illuminate each of the three 'special' features of the record of wartime extra-judicial service by High Court judges outlined above: the volume of that activity, its proximity to core executive functions and the element of judicial volunteerism. This is especially so when account is taken of several other behind-the-scenes contacts, discussed below, that also took place between Latham and Menzies at this time.

A Volume of extra-judicial activity

In considering the volume of extra-judicial activity undertaken by members of the High Court during World War II, the first thing to note is that Latham's act of tendering policy advice to the Prime Minister on events in Europe — even leaving aside the role envisaged for himself in that advice — itself took the Chief Justice outside the judicial domain. It is well-known that Latham, while Chief Justice, frequently volunteered his opinion on a range of policy matters to political figures, including federal government ministers.[23] He did this before, during and after the war.[24] This practice, whatever might be said about its propriety, which was surely open to question,[25] was not without parallel at the time. In the United States, Supreme Court Justice Felix Frankfurter maintained a close advisory relationship with President Franklin Roosevelt that pre-dated the United States' entry into the war.[26] Nearer to home, Dixon, in the early years of the war advised a variety of people associated with government, including Prime Minister Menzies, on war-related issues.[27] After the war, Dixon did not eschew behind-the-scenes government advising entirely, though his involvement in the practice was more limited.[28]

---

23 See Clem Lloyd, 'Not Peace But a Sword! − The High Court Under JG Latham' (1987) 11 *Adelaide Law Review* 175, 195–6, 202.

24 For a flavour of Latham's post-war advising while on the Court, see ibid 195–6, 202. For examples of Latham's pre-war advising, see Letter ('Personal') from Prime Minister Lyons to Sir John Latham, 25 March 1938: Papers of Sir John Latham, NLA MS 1009/1/5183 (Lyons saying that the government would consider 'your suggestion that a military road be built up the east coast'); Letter from Prime Minister Lyons to Sir John Latham, 8 December 1938: Papers of Sir John Latham, NLA MS 1009/1/5245 (Lyons thanking Latham for his 'comments' on a wireless address by Lyons; also that he would contact Latham concerning 'your ideas on mandated islands and aliens'). Examples of Latham's wartime advising are discussed in this essay.

25 Justice J B Thomas, *Judicial Ethics in Australia* (3rd ed, 2009) 185–8, 191–2, 298–9. Thomas argues that Latham's back-channel political involvement while on the High Court was improper when assessed against both the standards of the time and those of today.

26 Louis Jaffe, 'Professors and Judges as Advisors to Government: Reflections on the Roosevelt-Frankfurter Relationship' (1969) 83 *Harvard Law Review* 366, 373–5; Bruce Allen Murphy, 'Elements of Extrajudicial Strategy: A Look at the Political Roles of Justices Brandeis and Frankfurter' (1980) 69 *Georgetown Law Journal* 101; Bruce Allen Murphy, *The Brandeis/Frankfurter Connection* (1982).

27 Ayres, above n 4, ch 7 (esp 117–21).

28 Laurence Maher, 'Owen Dixon: Concerning His Political Method' (2003) 6 *Constitutional Law and Policy Review* 33 esp at 38–40 concerning Dixon's backroom dealings with Prime Minister Menzies over the Petrov Royal Commission. See also, eg, Ayres, above n 4, 243–4. Executive advising also occurred in earlier periods of the High Court's history: see Don

Interestingly, Latham did not confine his extra-judicial attempts to influence public policy to contact with individuals on his own side of politics. Thus, after the fall of the Menzies Government in the latter half of 1941, Latham wrote on several occasions to Labor Prime Minister John Curtin with suggestions for government action on topics ranging from military service[29] to constitutional reform.[30] On 16 June 1940, only days before Latham's fall of Britain letter to Menzies, Latham wrote to Curtin, then Leader of the Opposition, suggesting to Curtin — as historian David Day has pointed out — that the military situation in Europe was now so grave that Labor should join Menzies in a national government.[31] These letters indicate that both sides of Australian politics were aware, at least to some extent, of Latham's willingness to inject himself into government affairs. One can only speculate, however, what British Prime Minister Winston Churchill made of Latham's telegram, sent on 19 July 1940, suggesting how Churchill might forestall a German attack on London.[32]

The extent to which Latham's energies were directed towards extra-judicial matters in this period is further highlighted by the fact that Latham's proposal that he participate in Cabinet's discussions over Australia's fealty to a German controlled Britain, and Menzies' agreement to this, came only days before Menzies formally asked Latham to become Australia's first Minister to Japan. Indeed, at one point, Latham seems to have regarded himself as faced with a choice between the two roles. By mid-1940, the opening of an Australian mission in Japan had been under discussion for some time.[33] Latham was one of a small number of prominent Australians with an established interest in Japan and was frequently mentioned as a possible envoy.[34] In particular, in 1934, while still in Parliament, Latham had visited Japan as the leader of an official Australian goodwill mission. There he had met the Emperor and many senior politicians and business people.[35] While other names were also considered for

---

Markwell, 'Griffith, Barton and the Early Governor-Generals: Aspects of Australia's Constitutional Development' (1999) 10 *Public Law Review* 280.

29 Letter ('Personal and Confidential' with High Court letterhead crossed out) from Sir John Latham to Prime Minister Curtin, 14 December 1942 in NAA: M1415, 168/119 (Personal Papers of Prime Minister Curtin, Correspondence 'L').

30 Letter ('Personal') from Sir John Latham to Prime Minister Curtin, 6 December 1943 in NAA: M1415, 307/134–9 (Personal Papers of Prime Minister Curtin, Correspondence 'L'). For another example of Latham advancing views on policy matters to Curtin, see Letter (copy) from Sir John Latham to Prime Minister Curtin, 21 September 1943 in NAA: A433, 1945/2/5960/5–6 (Correspondence files, Class 2 (Restricted Immigration)) (Latham to Curtin on immigration policy).

31 David Day, *John Curtin: A Life* (2006) 419 and see Letter (copy and marked 'Personal') from Sir John Latham to John Curtin, 16 June 1940: Papers of Sir John Latham, NLA MS 1009/1/5456.

32 A pencilled copy of this telegram annotated by Latham 'sent 19th(?) July 1940' is contained in the Latham papers on the reverse of an unrelated document: Papers of Sir John Latham, NLA MS 1009/1/5470.

33 P G Edwards, *Prime Ministers and Diplomats: The Making of Australian Foreign Policy 1901–1949* (1983) 116–24.

34 Macintyre, above n 17, 5.

35 Commonwealth of Australia, *The Australian Eastern Mission, 1934: Report of the Right Honorable J G Latham* (1934) 16–18. See also Zelman Cowen, *Sir John Latham and Other Papers* (1965) 25; Edwards, above n 33, 124.

the post, in the view of at least one newspaper, Latham was 'the obvious choice'.[36] In all probability, by June 1940, Latham had long been expecting that this difficult and sensitive task — Japan and the Allies were not yet at war — could be his.

However, when on 27 June 1940 Menzies finally offered Latham the Tokyo position, Latham declined. As the offer was first put to him, the appointment was for five years and would involve his resignation from the High Court, a step Latham was reluctant to take in uncertain times.[37] Thus he wrote to Menzies thanking the government for the honour of asking him to go to Japan, but, in an apparent reference to their remarkable exchange just a week earlier, suggested that his talents might best be deployed on the home front. '[I]n certain contingencies', Latham told Menzies, 'I may be able to serve … better in Australia'.[38] Yet, shortly after writing this, Latham agreed to accept the position in Japan and thereby to forego any putative domestic role. In a turnaround, the government now indicated that it was prepared, exceptionally, for Latham to take leave from the High Court to embark on his diplomatic venture.[39] The appointment was made public on 18 August 1940. Latham's leave of absence from the High Court commenced on 12 November 1940, the day he departed for Japan.[40]

Clearly, however, this alternative course did not avert the separation of powers problems presented by the fall of Britain arrangements. Rather, Latham simply 'parachuted into' executive service on another front. In so doing, he paved the way for Dixon's later appointment as wartime Minister to the United States and set a precedent for McTiernan and Webb's subsequent war-related off-court work as well.

B Proximity of extra-judicial activity to the Executive

The second 'special' feature of the extra-judicial activity undertaken by members of the High Court during World War II was the proximity of much of that work to the heartland of executive power and, correspondingly, its distance from ordinary judicial work. Modern Australian case law on extra-judicial service by federal judges draws a distinction between non-judicial functions performed independently of the legislature and executive as opposed to those in which a judge is absorbed, in actuality or appearance, into government itself. The former category is illustrated by the continuing practice of individual Federal Court judges sitting as members of the Administrative Appeals Tribunal.[41] This contrasts with situations in which a judge is

---

36 'Minister for Japan: May be Mr Spender', *The Argus* (Melbourne), 25 June 1940, 4. This press cutting was kept by Latham in his personal papers: Papers of Sir John Latham, NLA MS 1009/65/1. See also P Brian Murphy, 'Opening Australian Diplomatic Relations with Japan' (1977) 31 *Australian Outlook* 406, 416.

37 Ayres, above n 4, 122 (conversation between Latham and Dixon recorded in the Dixon Diaries).

38 Letter from Sir John Latham to Prime Minister Menzies, 27 June 1940 in NAA: CP290/2 (CP290/2), BUNDLE 1/16. For a copy of this letter, see Papers of Sir John Latham, NLA MS 1009/65/9.

39 Ayres, above n 4, 122. The *Judiciary Act 1940* (Cth) was passed to provide legislative support for Latham's appointment as Minister to Japan.

40 Cowen, above n 35, 26–7; Telegrams between Prime Minister Menzies and Sir John Latham, 12 November 1940 in NAA: CP290/2 (CP290/2), BUNDLE 1/16; 64 CLR iv.

41 *Wilson's Case* (1996) 189 CLR 1, 17–18 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

embedded within the executive itself, serving, for example, as a government adviser.[42] In terms of the consistency of extra-judicial service with judicial independence and separation of powers, functions, like those of the Administrative Appeals Tribunal, that are performed openly, impartially and at arms length from government, are much more likely, for obvious reasons, to pass constitutional muster than those that are not.[43]

Viewed from this perspective, the dealings between Latham and Menzies in mid-1940 show how far the war had broken down the wall of separation between the judiciary and the executive. It had long been settled in England and Australia that it was fundamentally inconsistent with judicial independence for a serving judge to hold ministerial office and to sit in Cabinet.[44] Now Latham was contemplating joining Cabinet's deliberations over one of the most difficult decisions Australia as a nation would have to face. A move further into the heart of the political affairs of the nation is hard to imagine. Latham's concession in his letter to Menzies that '[i]n normal times', his participation in such a major government decision 'would be quite out of place', was an understatement, to say the least.

Latham and Dixon's diplomatic appointments, as well as Dixon's extensive wartime committee responsibilities, show that involvement by Australia's top judges in functions at the centre of executive power was not simply canvassed during the war, but became reality. Focusing on Latham's role as envoy to Japan,[45] his acceptance of that office transformed the Chief Justice into a senior agent of the Australian Government abroad. In that capacity, Latham was subject to the direction of the Minister for External Affairs, initially Sir Frederick Stewart and later, in a bizarre twist of fate, Latham's former High Court colleague, Dr H V Evatt.[46] As Minister to Japan, Latham necessarily provided high level policy advice to the government.[47] Indeed, it has been said that in the outpost of Tokyo — far removed from the small and over-stretched Department of External Affairs in Canberra — Latham 'virtually dictated his own policy'.[48] Thus, on becoming Prime Minister in late 1941, Curtin wrote to ambassador Latham expressing his 'pleasure' that they would 'be working together'

---

42 Ibid 17–20.

43 Ibid 45 (Kirby J). See generally Fiona Wheeler, 'Federal Judges as Holders of Non-judicial Office' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 442.

44 Thomas, above n 25, 292–3; *Kable v DPP (NSW)* (1996) 189 CLR 51, 118 (McHugh J) (as McHugh J notes, the traditional position of the Lord Chancellor in England is a 'historical anomaly').

45 For an account of Dixon's wartime committee work and his role as Minister to the United States, see Ayres, above n 4, chs 7–8.

46 Edwards, above n 33, 193.

47 In addition, prior to the commencement of Latham's High Court leave, it seems that, as ambassador-in-waiting, he attended at least one federal Cabinet meeting. See Ayres, above n 4, 124 recording a diary entry by Dixon for 1 October 1940: 'Tea with Latham who came from the Cabinet: sd (1) Menzies thought he was beaten. (2) All in fear of Japan … The Jap. treaty with Germany meant that she believed that we were beaten.' As Ayres notes, the reference to Menzies thinking he 'was beaten' relates to the then uncertain result of the September 1940 election.

48 Edwards, above n 33, 127 (and generally at 126–8, 130).

and acknowledging his government's 'dependence on your information and guidance'.[49]

The secret government inquiry undertaken by Justice McTiernan into the integrity of the materials used to construct Australia's Beaufort Bombers also deserves mention in this context. As already noted, a censorship ban prevented the press from reporting on the inquiry and McTiernan's findings, delivered to Attorney-General Evatt,[50] were suppressed. Even after the war, Cabinet specifically decided not to table McTiernan's 70-page report in Parliament.[51] Given the centrality of 'open justice' to the work of the courts and the rule of law,[52] the McTiernan inquiry was, like Latham and Dixon's wartime extra-judicial activities, significantly removed from the exercise of judicial power.[53] The repeated refusal of High Court judges to serve as Royal Commissioners in peacetime further highlights the exceptional nature of McTiernan's extra-judicial contribution to victory.[54] Assuming that the inquiry followed quasi-judicial procedures, however, it was necessarily closer to the ordinary judicial function than Latham and Dixon's tasks.[55]

C Judicial volunteerism for extra-judicial work

A third 'special' feature of the extra-judicial work undertaken by members of the High Court during World War II is the fact that certain judges — Latham, Dixon and, in somewhat different circumstances, Webb — directly volunteered their services to government. One of the distinguishing characteristics of the judiciary as a branch of government is the long-established principle that, save in special circumstances, judges do not initiate their own work, but rather hear and decide cases brought before them

---

49 Copy of decoded telegram from Prime Minister Curtin to Sir John Latham, 12 October 1941: Papers of Sir John Latham, NLA MS 1009/65/563. Latham readily provided such 'guidance', sending the Prime Minister policy memoranda on topics such as securing Australia against invasion and British military preparedness in Singapore: see Memorandum ('Secret') 'Invasion of Australia', 15 August 1941: Papers of Sir John Latham, NLA MS 1009/65/648–50; Telegram from Sir John Latham to Department of External Affairs (undated, sent from Singapore in late 1941): Papers of Sir John Latham, NLA MS 1009/65/626; Letter (copy) from Sir John Latham to Prime Minister Curtin, 16 December 1941: Papers of Sir John Latham, NLA MS 1009/65/638–9. In relation to the description in this paragraph of Latham's role as a diplomat, cf *Wilson's Case* (1996) 189 CLR 1, 17–20.

50 McTiernan's instrument of appointment directed he report to Attorney-General Evatt. See NAA: SP109/3, 301/16 (Air Services and Aircraft. Inquiry Conducted by Hon Justice McTiernan into Alleged Falsification of Records in Connection with Aircraft Production).

51 NAA: A2700, 939 (Memorandum Cabinet Secretary to Hon J A Beasley, Acting Attorney-General, 25 September 1945). To this day, the McTiernan inquiry is not included in lists of Commonwealth Government inquires: see, eg, D H Borchardt, *Checklist of Royal Commissions, Select Committees of Parliament and Boards of Inquiry: Part I, Commonwealth of Australia 1900–1950* (1965); Sir Murray McInerney and Garrie Moloney, 'The Case Against' in Glenys Fraser (ed), *Judges as Royal Commissioners and Chairmen of Non-Judicial Tribunals: Two Views Presented at the Fourth Annual Seminar of the Australian Institute of Judicial Administration* (1986) 83–7; Scott Prasser, *Royal Commissions and Public Inquiries in Australia* (2006) 255–77.

52 See, eg, *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496–7 (Gaudron J).

53 Cf, however, the outcome in *Grollo v Palmer* (1995) 184 CLR 348.

54 See above n 4 and accompanying text.

55 *Wilson's Case* (1996) 189 CLR 1, 17. I am grateful to Sir Anthony Mason for a helpful discussion on this issue.

by others. As Alexander Hamilton famously said, the judiciary has 'no direction either of the strength or of the wealth of the society, and can take no active resolution whatever'.[56] It is widely accepted today that if the executive seeks a judge for an extra-judicial purpose it should, in the first instance, discuss the matter with the relevant Chief Justice. In particular, to avoid any suggestion of executive favouritism or partiality, government officials should not make direct overtures to an individual judge.[57] The converse — for judges to take the 'active resolution' of contacting the executive to offer their services — runs contrary to conventional notions of judicial detachment.

Yet, as indicated above, Latham, Dixon and Webb each specifically volunteered for wartime extra-judicial service. In the case of the Latham-Menzies fall of Britain exchange, Latham did far more than this — he actually suggested the exceptional function that he should discharge. Latham's friendship with Menzies may have encouraged him to make this offer, but this is not the only explanation for Latham's conduct. After his resignation as Minister to Japan on 31 December 1941 — a decision that followed the Japanese attack on Pearl Harbor earlier that month — Latham signalled to Prime Minister Curtin his willingness to do further off-court work. Thus Latham told Curtin that he was available for 'any service anywhere which you think that I can usefully give'.[58] Likewise, following the outbreak of war with Germany in 1939, Dixon told Prime Minister Menzies of his willingness 'to do anything … for the war'.[59] Dixon had no qualms about the propriety of his offer, repeating it on several occasions and also letting it be known in the press at the time of his appointment, by the Curtin Government, as Minister to the United States.[60]

Sir William Webb, by contrast, was not appointed to the High Court until 1946 by which time he was already engaged in the Tokyo war crime trials. However, in the early stages of the war, while still Chief Justice of Queensland, Webb wrote to Prime Minister Menzies 'offering to serve anywhere in the World during the War'.[61] Webb later undertook substantial extra-judicial wartime work for the Commonwealth, including an investigation into alleged Japanese war crimes.[62] This led, after the Japanese surrender, to his appointment by General Douglas MacArthur as President of

---

56 Alexander Hamilton, 'Federalist No 78' in Clinton Rossiter (ed), *The Federalist Papers* (1961) 464, 465.

57 Gleeson, above n 1, 15 discussing the *Guide to Judicial Conduct* (as to which, see Australian Institute of Judicial Administration, *Guide to Judicial Conduct* (2nd ed, 2007) 21). See also, eg, McInerney and Moloney, above n 51, 51–2 on the impact of the mode of recruitment of judges for non-judicial work on internal court management.

58 Letter from Sir John Latham to Prime Minister Curtin, 16 December 1941: Papers of Eric Tonkin, NLA MS 3668, Box 28, Folder 3 (my thanks to Graeme Powell who alerted me to this letter). In response, Curtin told Latham he appreciated 'the offer of your further services which will be borne in mind': see Letter from Prime Minister Curtin to Sir John Latham, 22 December 1941: Papers of Sir John Latham, NLA MS 1009/65/642.

59 Ayres, above n 4, 116 quoting from Dixon's diary entry for 7 September 1939.

60 Ibid 115–17, 120, 123; 'Sir O Dixon: New Minister to United States', *The Age* (Melbourne), 20 April 1942, 2.

61 Letter from Sir William Webb to Prime Minister Menzies, 20 March 1964: Papers of Sir Robert Menzies, NLA MS 4936, Series 1, Personal Correspondence 'Webb' (Webb recounting his wartime offer to Menzies).

62 Ian Callinan, 'Webb, William Flood' in Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (2001) 706, 707.

the International Military Tribunal for the Far East.[63] Since the Tokyo trials were not concluded until late 1948, Webb — in another 'special' situation — was largely absent from Australia for the first two years of his tenure as a High Court judge.[64]

IV DOES WAR JUSTIFY 'SPECIAL CASES'?

This analysis of the Latham-Menzies fall of Britain exchange and of the collective features of the High Court's wider extra-judicial contribution to victory in World War II raises the question whether war does indeed justify such significant departures from ordinary standards of judicial independence and separation of powers. This question presents itself in acute form in the case of an apex court, like the High Court of Australia, with its unique legal responsibilities, especially in relation to the *Constitution*.[65] The remainder of this essay explores this important, though little-discussed, matter.

A Role of changing standards

One response to the question whether war justifies 'special cases' of extra-judicial service might be to suggest that it is only by applying contemporary standards to past events, such as those described above, that a perceived constitutional problem emerges. Justice J B Thomas in *Judicial Ethics in Australia*, for example, argues that as the result of a range of factors, including 'the increased politicisation of society',[66] the expectation that serving judges will distance themselves from governmental and political affairs is now stronger than it was just 50 years ago.[67] This assessment is consistent with developments over the same period which have seen the High Court take an increasingly strict approach to the doctrine of separation of powers contained in the Australian *Constitution*.[68] In particular, the Court's decision in 1996 in *Wilson's Case*[69] makes it clear that the appointment of a serving High Court judge to, for example, an ambassadorial post, would today be invalid as contrary to the separation doctrine.[70] In the tranquil conditions of the 1990s, the majority in *Wilson's Case* did not consider whether war or a similar emergency would justify any loosening of this stricture.[71]

Shifting standards, however, provide only part of the answer. Were it not for the war, the nature and scale of High Court extra-judicial service during the early 1940s would have been unthinkable, even then. The evidence to this effect is considerable. Only a few years before the war, Dixon refused a request from Menzies — then Commonwealth Attorney-General — to conduct a Royal Commission on Banking and

---

63 Smith, above n 9, 153.
64 Callinan, above n 62, 707.
65 *Wilson's Case* (1996) 189 CLR 1, 46 (Kirby J).
66 Thomas, above n 25, 200.
67 Ibid 298–9 (and see also at 188–92, 195–211).
68 See generally Fiona Wheeler, 'The *Boilermakers Case*' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 160.
69 (1996) 189 CLR 1.
70 Ibid 17–20; Wheeler, 'Federal Judges as Holders of Non-judicial Office', above n 43, 470.
71 Though Kirby J claimed in dissent that '[u]nusual circumstances may call forth unusual needs' referring, among other things, to Latham and Dixon's wartime diplomatic service: (1996) 189 CLR 1, 45.

Finance, claiming it would be incompatible with his role as a judge.[72] More tellingly, only a decade after the war, Dixon observed, in a surprisingly candid public confession, that 'in retrospect' he did not 'altogether approve' of his wartime extra-judicial activity.[73] If Latham had similar belated misgivings about his wartime conduct, however, he kept them to himself.[74]

Even in the midst of the war there were signs that the High Court was stretching constitutional principle, possibly to breaking point. Following the announcement of Latham's appointment as Minister to Japan, an editorial in *The Canberra Times* argued that, in the interests of judicial independence, he should first resign as Chief Justice.[75] *The Sydney Morning Herald*, by contrast, strongly supported Latham's temporary move into the executive. Nonetheless it felt constrained to point out that there was a 'precedent' for Latham's 'leave of absence' from the High Court in Lord Chief Justice Reading's service during World War I as a British diplomat to the United States.[76] When Parliament amended the *Judiciary Act 1903* (Cth) in 1940, and again in 1942, to provide for Latham and Dixon's overseas postings, the government maintained on each occasion that the judge's secondment to non-judicial work was 'a wartime measure'.[77] This did not prevent some Members of Parliament from expressing concern, however, at the threat the appointments posed to judicial independence.[78]

Most directly, and as already discussed, in his fall of Britain correspondence with Menzies, Latham recognised that '[i]n normal times', the offices of Chief Justice and Cabinet decision-maker would be fundamentally incompatible.[79]

B 'Special Cases' and their limits

It seems, therefore, that there was a widespread, though not necessarily universal, view in 1939–45 that the war had modified the principles of judicial independence and separation of powers, at least to some extent.[80] As a matter of law, this shift was certainly possible. Neither principle is a constitutional absolute and both have shown themselves capable, in varying contexts, of accommodating other societal interests and

---

72 Ayres, above n 4, 62–3, 70.

73 Holmes, above n 4, 272.

74 McInerney and Moloney, above n 51, 33.

75 Editorial, 'Politics and the High Court', *The Canberra Times* (Canberra), 20 August 1940, 2. Latham preserved a copy of this in his personal papers: Papers of Sir John Latham, NLA MS 1009/65/519.

76 Editorial, 'Sir John Latham for Japan', *The Sydney Morning Herald* (Sydney), 19 August 1940, 8. On Lord Reading's wartime extra-judicial service, see Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (1976) 351–2. There is some suggestion in archival records that the Menzies Government may have sought to engineer favourable press coverage of Latham's appointment to Japan: see Letter from John McEwan to Prime Minister Menzies, 27 July 1940 in NAA: CP290/2 (CP290/2), BUNDLE 1/16.

77 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 August 1940, 521 (William Hughes, Attorney-General). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 6 May 1942, 921 (John Beasley, Acting Attorney-General).

78 A J Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48, 51–2.

79 Letter (copy) from Sir John Latham to Prime Minister Menzies, 20 June 1940: Papers of Sir John Latham, NLA MS 1009/1/5459.

80 See also Ayres, above n 4, 117.

needs. The position of military tribunals in Australia provides a relevant example. While under the *Constitution*, federal judicial power must ordinarily be exercised by independent courts, it has long been accepted that for historical and practical reasons, bodies that do not meet normal standards of judicial autonomy can conduct trials of certain military offences, notably in times of conflict.[81] The *Constitution* also adapts to the imperatives of war in other respects. The Commonwealth's defence power, for example, expands during total war to, in effect, eclipse the federal division of powers.[82] In terms of general principles of judicial independence, it is relevant that a body like the Supreme Court of Victoria — which has traditionally opposed the use of its judges for non-judicial work — has recognised that a 'matter of national importance arising in times of national emergencies' may justify a different view.[83]

Accepting then that war can blunt the full effect of judicial independence and separation of powers, does it follow that the High Court's extra-judicial activity during World War II was legitimate when assessed against relevant constitutional standards, past and present? Unless war dissolves the separation of powers entirely — an unlikely proposition[84] — the answer depends on the extent to which, in any particular case, the demands of war override the ordinary divisions between the judiciary and the other branches of government. Yet, given the nature of the conflicting values involved, different minds will almost inevitably disagree over the point at which judicial independence 'give[s] way' to defence need.[85] While 'precedents and experience' may ultimately resolve such dilemmas,[86] in the case of extra-judicial work, the High Court in 1939 had few practical examples to guide it apart from its World War I Royal Commissions. The now famous instances of World War II extra-judicial service by United States Supreme Court judges lay in the future. Justice Owen Roberts'

---

81 See, eg, *White v Director of Military Prosecutions* (2007) 231 CLR 570.

82 Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (1987) 126–30. As Galligan notes, during World War II, the High Court also accepted the validity of extensive delegations of legislative power to the executive suggesting another respect in which the separation of powers is elastic during war. Cf, however, *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

83 McInerney and Moloney, above n 51, 17 (and generally 10–19); Gleeson, above n 1, 15; Murphy, *The Brandeis/Frankfurter Connection*, above n 26, 9–10 (noting how war 'tend[s] historically to loosen any standards of propriety governing extrajudicial activities'), 302. More generally see, eg, H P Lee, *Emergency Powers* (1984) 3–4; Geoffrey Stone, 'Civil Liberties in Wartime' (2003) 28 *Journal of Supreme Court History* 215; Richard Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (2006); H P Lee, '*Salus Populi Suprema Lex Esto*: Constitutional Fidelity in Troubled Times' in H P Lee and P Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (2009) 53.

84 Though as H P Lee points out (Lee, '*Salus Populi*', above n 83, 53–4), in *Gratwick v Johnson* (1945) 70 CLR 1, 12 Latham CJ left open the possible application in Australia of the maxim *silent leges inter arma*, albeit (in Latham CJ's words) 'in times of the gravest crisis and emergency, when the necessity of preserving the community and the lives of the people takes precedence over all other considerations'. Was Latham thinking in these terms in his fall of Britain exchange with Menzies?

85 Peter Russell, 'Towards a General Theory of Judicial Independence' in Peter Russell and David O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (2001) 1, 5 (making this point in relation to the tension between judicial independence and judicial accountability).

86 Ibid 5.

inquiry into the Pearl Harbor attack, for example, came 18 months after Latham's fall of Britain exchange with Menzies and a full two years after Dixon began his wartime committee work.[87]

A further difficulty in determining the limits of 'special cases' of extra-judicial service by High Court judges flows from the fact that judicial independence and separation of powers have traditionally been given much of their content in Australia by our leading judges. Thus, if members of the High Court agree to serve as wartime diplomats or to undertake a secret defence inquiry, by what measure is this contrary to law or convention when the Court is the main arbiter of constitutional validity and has a vital role in modelling standards of professional behaviour for all Australian judges?[88] It is true that High Court judges make decisions in their judicial capacity, notably on Chapter III of the *Constitution*, that affect their own institutional position and in which there may be an unavoidable 'sense' that they 'are acting as judges in their own case'.[89] However, such decisions are made after argument in open court and are explained in written reasons. In contrast, a decision by a member of the Court, arrived at in consultation with the executive, that war justifies their service in a role that normally would be regarded as incompatible with judicial office, is invariably made in private and without published reasons. It is also unlikely, especially in wartime, to be subject to legal challenge.[90]

In short, there is a risk of a self-legitimating cycle by which High Court judges produce shifts in the constitutional landscape, which in turn produce their own normative consequences, without exposure to the usual mechanisms of judicial accountability. Had Britain fallen to Germany in 1940 and had Latham publicly joined with Cabinet to consider transferring Australia's allegiance from Britain to the United States, he would have been neither politically nor, for all practical purposes, legally accountable for his assessment that war had so diluted the separation of powers that he could, with propriety, take this radical step. The same can be said of the extra-judicial work actually undertaken by members of the High Court in this period. It could be argued that because these judges were nominally entering executive service in their personal — as opposed to their judicial — capacity,[91] their assessment of constitutional 'rights' and 'wrongs' carried no more weight than for any other

---

87 William Rehnquist, *Centennial Crisis: The Disputed Election of 1876* (2004) 229–35. The propriety of the extra-judicial service by United States Supreme Court justices during World War II was not undisputed at the time: see Alpheus Mason, 'Extra-Judicial Work for Judges: The Views of Chief Justice Stone' (1953) 67 *Harvard Law Review* 193.

88 See, as raising a similar conundrum in a parallel context, Laurence Maher, 'Tales of the Overt and the Covert: Judges and Politics in Early Cold War Australia' (1993) 21 *Federal Law Review* 151, 195. See also, as hinting at this issue, Murphy, *The Brandeis/Frankfurter Connection*, above n 26, 10–11. Of course, this issue arises whenever a High Court judge enters executive service, though the radical shift between what has been deemed acceptable in war, as opposed to peacetime, throws the spotlight on the former period.

89 Russell, above n 85, 23.

90 Geoffrey Sawer, *Australian Federalism in the Courts* (1967) 165. Though a legal challenge could occur, especially today in light of expansion in the scope of justiciable controversies. Any suggestion that not all members of the Court had supported the decision of a particular judge to engage in non-judicial work might help prompt a legal challenge, though the converse would doubtless have a dampening effect on litigious fervour.

91 On the so-called 'designated person' doctrine, see Wheeler, above n 43.

individual. But that flies in the face of reality and, pushed to its logical conclusion, could justify any venture by a High Court judge into the other branches of government.

V 'PARACHUTING IN' V REMAINING ON THE BENCH

These considerations — of which members of the High Court in World War II could not have been unaware — suggest that considerable caution is required before a High Court judge 'parachutes in' to a 'special case' of wartime extra-judicial activity, rather than continuing to serve the nation throughout the conflict from the bench.[92] The High Court, functioning as a court, has continued to play a crucial role in national life amidst Australia's most intense battlefield struggles. Seminal constitutional cases decided during World Wars I and II include *Farey v Burvett*,[93] *New South Wales v Commonwealth* (*Wheat Case*)[94] and *South Australia v Commonwealth* (*First Uniform Tax Case*).[95] War also invariably requires apex courts to adjudicate on the difficult balance, in a period of conflict, between state power and individual liberty. In Australia, High Court decisions from both wars such as *Lloyd v Wallach*[96] and *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*[97] exemplify this as does *Liversidge v Anderson*[98] in the United Kingdom. This simple fact — that leadership in the discharge of the functions of the third branch of government is required in both peace and war — underscores the need for restraint on the part of individual High Court judges before deciding to make a contribution to the war effort that would breach (or arguably breach) normal standards of judicial independence and propriety.[99] Moreover, judicial absences from the bench due to extra-judicial work are not trivial — had Dixon sat on the *First Uniform Tax Case* in 1942, rather than serving abroad, it could have been differently decided.[100]

In this context, there is a shadow over much of the High Court's World War II extra-judicial activity and should have been, even then. Diplomatic appointments that take High Court judges away from the bench to the heart of executive power for lengthy periods must be suspect. Such a judge sheds their independence from government for executive skin. Only compelling wartime necessity could justify this. Yet it is hard to see that it was essential that Dixon, as opposed to someone else, should have been Australia's wartime representative in the United States,[101] though a stronger

---

92 See also Stone, above n 83, 242 arguing, in the United States constitutional context, that 'we have a long history of over-reacting to the perceived dangers of wartime'.

93 (1916) 21 CLR 433.

94 (1915) 20 CLR 54.

95 (1942) 65 CLR 373.

96 (1915) 20 CLR 299.

97 (1943) 67 CLR 116.

98 [1942] AC 206. On *Liversidge v Anderson* and judicial review of wartime executive detention, see Lee, *Emergency Powers*, above n 83, 303–21 and generally Lee, '*Salus Populi*', above n 83, 62–6.

99 See also Mason, above n 87, 206 noting that in World War II, Chief Justice Stone of the United States Supreme Court resisted — with varying degrees of success — extra-judicial service by judges, in part because of the need to maintain the wartime operation of the courts.

100 Cheryl Saunders, 'The Uniform Income Tax Cases' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 62, 74–6.

101 Ayres, above n 4, 134–5.

case for necessity can be made, given his previous contacts there, for Latham's posting to Japan. Latham and Dixon's extensive executive advising also required justification in terms of genuine necessity, rather than simply a desire to contribute to the war. McTiernan's inquiry arguably presented a less significant challenge to established norms of judicial behaviour, though its secrecy remains troubling. In all cases, for a judge, on their own initiative, to volunteer in general terms for extra-judicial work must be wrong: in war or peace, the risk it poses of collaboration — as opposed to comity — between the branches, is too great. In particular, once a judge has volunteered for 'any' extra-judicial work, it must necessarily become all the more difficult — perhaps in some cases impossible — for that judge to refuse the request of a Prime Minister or Attorney-General to perform a task at the outer limits of judicial acceptability.[102]

Viewed in this light, Latham's fall of Britain approach to Menzies did not pass constitutional scrutiny then and would not now. For the Chief Justice to secretly suggest to the Prime Minister what course the nation should take in the event of the mother country's defeat and that he should, albeit overtly, participate in Cabinet's decision on the question was not warranted by the demands of war. There were other wise heads available to help make the critical decision whether to maintain Australia's fealty to a defeated Britain or to switch Australia's ties to the United States (an issue that surely would have been under consideration by the Australian Government whether Latham had suggested it or not). To the extent that a display of national unity, including from the High Court, may have been called for in the event of a break in, or change of, allegiance — in effect, the establishment of a new grundnorm — there were other ways that the Court could have responded, most notably by continuing to perform its orthodox judicial role under the new order.[103]

VI CONCLUSION

Yet, in writing this from the relatively comfortable perspective of Australia 70 years on, one cannot help wondering whether it is all too easy to make these assessments about the past.[104] Had Germany, in Hitler's grip, overrun Britain as well as much of continental Europe — a prospect that seemed very real in May and June 1940 — who can imagine how history might have unfolded.

Dick Latham, in his letter from London to his father in May 1940 added a postscript. In that postscript he explained that he had held his letter back for a time hoping that he would not need to send it. But that hope had proved in vain since

---

102 But cf ibid 130 (Dixon declining a wartime request to oversee compulsory Commonwealth acquisition of State railways on the basis that such action would inevitably result in High Court litigation).

103 See also Oliver, above n 17, 185 noting that one of the insights of Dick Latham's constitutional scholarship was, in Oliver's words, 'that the (shifting) content of the basic norm is determined by the allegiance of the relevant courts'.

104 As Professor Geoffrey Stone has said of the observance of civil rights in the United States during war '[i]t is, of course, much easier to look back on past crises and find our predecessors wanting, than it is to make wise judgments when we ourselves are in the eye of the storm': Stone, above n 83, 245.

England was in undoubted peril.[105] Three years later, after joining the RAF, Dick gave his life in the fight against the enemy, a loss that his father felt for the rest of his days.[106] There is no doubt that Sir John Latham believed that the war posed an epochal struggle for Australia and that he was bound to do all he could to assist the nation in this. The only question is whether he and his fellow judges made the right call in deciding how best to do so.

105 Letter (copy) from Richard Latham to Sir John Latham, 21 May 1940: Papers of Sir John Latham, NLA MS 1009/1/5460.

106 Macintyre, above n 17, 6.