Not a suicide pact?: judicial power and national defence and security in practice

*The Hon Justice John Logan RFD**

In his 2006 work *Not a Suicide Pact: The Constitution in a Time of National Emergency*,[1] the American jurist and academic Judge Richard Posner undertakes a critical analysis of United States constitutional issues relating to measures adopted in and from that country in response to the religiously motivated terrorist attacks which occurred on 11 September 2001. His provocative title is not confected. Instead, it is inspired by the concluding paragraph of a pointed, dissenting judgment delivered by Jackson J in the United States Supreme Court in *Terminiello v Chicago*.[2]

In *Terminiello v Chicago*, the Supreme Court, by a bare 5:4 majority, reversed a judgment of the Supreme Court of Illinois which had affirmed a conviction for disorderly conduct, contrary to an ordinance of the City of Chicago. The conduct concerned was the use by the petitioner, Reverend Father Arthur Terminiello, of highly inflammatory language attacking Jews, President Franklin Roosevelt and First Lady Eleanor Roosevelt, Communists and others at a public meeting in Chicago of the Christian Veterans of America. The municipal law as construed and applied by the state courts was held to violate the First Amendment to the United States Constitution which, materially, prohibits abridgement of the freedom of speech. In concluding his dissenting judgment, Jackson J stated:

> The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.[3]

Judge Jackson was then but recently returned to the court from leave of absence granted to him so that he could undertake the duty of lead prosecutor for the United States at the principal war crimes trial before the International Military Tribunal at Nuremberg.[4] If one is aware of this role, and it would have been well known at the time, his Honour's particular reference in his judgment[5] to a present obstacle in the United States to a strategy adopted by the Nazis for assuming power, 'mastery of the streets', being the authority of freely elected municipal authorities to make laws prohibiting the inciting of riots, is not just understandable but persuasive.

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1 R Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press, 2006).

2 337 US 1 (1949).

3 337 US 1, 37.

4 Encyclopaedia Britannica, 'Robert H Jackson', <https://www.britannica.com/biography/Robert-H-Jackson>.

5 337 US 1, 23–4.

Yet also persuasive is this observation in the judgment of Douglas J for the majority:

> The vitality of civil and political institutions in our society depends on free discussion.[6]

Even so, the majority view is not, with respect, readily reconcilable with the 'fighting words' exception to the First Amendment then but recently earlier established by a unanimous Supreme Court in *Chaplinsky v New Hampshire*.[7]

Mr Chaplinsky was a Jehovah's Witness lay preacher who had been handing out pamphlets and preaching from the footpath before an ever-increasing crowd in the centre of a New Hampshire municipality. The crowd started to spill over onto the road, blocking traffic, and a commotion was developing in response to some of Mr Chaplinsky's language (he referred to organised religion as a 'racket'). Upon noticing this, the town marshal asked Mr Chaplinsky to tone down his language and avoid causing a commotion. Mr Chaplinsky persisted and, upon noticing this, a police officer took him to police headquarters to the town marshal. There, Mr Chaplinsky shouted at the town marshal, allegedly, 'You are a God-damned racketeer' and 'a damned Fascist'. He was arrested and charged under a state law prohibiting the use of offensive language. Mr Chaplinsky admitted stating all of the words charged, with the exception of 'God'. He was convicted and fined. The Supreme Court of New Hampshire affirmed that conviction. Mr Chaplinsky's petition for certiorari was dismissed by the Supreme Court. In delivering the Court's judgment, Murphy J stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any *Constitution*al problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[8]

The recently decided *Dobbs v Jackson Women's Health Organisation*,[9] in which the United States Supreme Court held that there was, in that country, no constitutionally entrenched right to abortion, is presently noteworthy for the view expressed by the majority that such a right was not supported by the concept of 'ordered liberty', which has long been regarded in that Court's jurisprudence as a feature of the United States Constitution. Writing for the majority, Alito J stated, 'Ordered liberty sets limits and defines the boundary between competing interests'.[10]

The difference of opinion evident in *Terminiello v Chicago* is really a difference as to where lies a boundary between personal liberty and public peace and order.

What has all this to do with Australia?

In the broadest sense of constitutional law, Australia does have a Bill of Rights — the *Bill of Rights 1689* (Eng), which forms part of our legal inheritance from the United Kingdom. The stipulation, found in Art 9 of that statute, that a proceeding in parliament may not be impeached or questioned in any court or place outside parliament underpins freedom of

6 337 US 1, 4.
7 315 US 568 (1942).
8 315 US 568, 571–2.
9 597 US 1 (2022).
10 597 US 1, 31.

speech in parliament. But we do not have any equivalent in the Australian Constitution of the Bill of Rights entrenched by amendment in the United States Constitution, of which the free speech guarantee forms part.

My purpose in referring to the origins of the inspiration for the title to Judge Posner's work is not to embark upon a survey of United States First Amendment jurisprudence or to advocate, one way or the other, whether a like, so-called 'Bill of Rights' should or should not be entrenched in our *Constitution*. Rather, it is to explore whether, in our jurisprudence, there are like competing themes in relation to the approach of the judicial branch to issues concerning national defence and security and whether it can be said that the Australian judiciary have approached our *Constitution* as if it were a 'suicide pact'.

I have not sought to undertake this task by reference to the dense thicket of legislation which the Commonwealth Parliament has enacted since 2001 with the avowed purpose of responding to what has been termed the 'War on Terror'. To do so would not only yield an article of intolerable length but also very likely result in losing sight of the underlying jurisprudential wood for all of the legislative trees.

While what constitutes the 'War on Terror' might be regarded as having its origins in the attack on the United States on 11 September 2001[11] and in the responsive wars in Iraq and Afghanistan earlier this century, in truth, depending on one's historical perspective and level of abstraction in examination, it is possible to see a recurring, historical theme in the motivations for that attack. For example, this is how the then Lt Winston Churchill, attached to the Malakand Field Force on operations in the late 19th century on the north-west frontier of then British India, now Pakistan, bordering Afghanistan, described the foe that force faced:

> Every influence, every motive that provokes the spirit of murder among men, impels these mountaineers to deeds of treachery and violence. … That religion, which above all others was founded and propagated by the sword — the tenets and principles of which are instinct with incentive to slaughter … stimulates a wild and merciless fanaticism.[12]

I take the 'War on Terror' presently to mean, for Australia, the 'threat of religiously motivated violent extremism from Sunni violent extremist groups [which] persists, with the violent narrative espoused by terrorist groups — such as the Islamic State of Iraq and the Levant, and al-Qa'ida', as defined and assessed by the Australian Security and Intelligence Organisation ('ASIO').[13] That same understanding was adopted by Kiefel CJ, Keane and Gleeson JJ in the recently decided *Alexander v Minister for Home Affairs*[14] ('*Alexander's case*') concerning the purported revocation of a dual-national's Australian citizenship, a case to which I shall return later in this article.

11 George H Bush Presidential Library, 'Global War on Terror', <https://www.georgewbushlibrary.gov/research/topic-guides/global-war-terror>.

12 WS Churchill, *The Story of the Malakand Field Force*, originally published by Longmans Greens & Co in 1898, quote from reprint by Leo Cooper, in association with Octopus Publishing Group. London, 1989, pp 3–4.

13 Australian National Security, Current National Terrorism Threat Level, available at <https://www.nationalsecurity.gov.au/national-threat-level/current-national-terrorism-threat-level> ('National Terrorism Threat Level Assessment').

14 [2022] HCA 19.

ASIO assesses current Australia's current National Terrorism Threat Level to be 'Probable'.[15] The current National Terrorism Threat Level assessment by ASIO does not separately assign any threat to Australia arising from our support for the Ukraine in its resisting the latest invasion of its territory by Russia on and from 24 February this year.

The present assessed threat is very different from that presented by conventional wars — the First World War, the Second World War and the Korean War — and to the counter-insurgency operations in Malaya, Borneo and South Vietnam in which Australia participated in the 20th century. It is also very different from the domestic espionage and subversion threat faced by Australia during the Cold War, which ran from the late 1940s to the collapse of the Berlin Wall and Soviet hegemony in Eastern Europe in 1989.

I undertook my voluntary military service in the Army Reserve[16] in the immediate aftermath of the cessation of Australian involvement in South Vietnam and the fall of that country's government in 1975 and in the closing stages of the Cold War. In those days, training for first appointment as an Army officer still had the flavour of commanding an infantry platoon in operations abroad against a guerrilla force which had some conventional military support. Later training for duties as an intelligence staff officer on a formation headquarters also had its focus on operations abroad, against a foreign enemy in conventional warfare, albeit with some exposure to the nature and extent of domestic counter-intelligence duties. The foreign enemy was unidentified but the weapons characteristics and tactics with which I gained some familiarity resembled those of Group Soviet Forces Germany.

In contrast, the presently assessed threat entails, and has entailed, not just operations abroad against identified terrorists and their sponsors but also the prospect of religiously motivated violence in Australia. The occasion for such operations abroad and that domestic prospect may frequently be related.

It is and always will remain a moot point whether the Lindt Café incident in Martin Place, Sydney, in December 2014 was a manifestation of Mr Man Monis' motivation by Islamic State or whether that professed association aggrandised the action of a deeply troubled individual.[17] More certain is that the terrorist activity detected, exposed and forestalled by Operation Pendennis, then Australia's longest running terrorism investigation, which culminated in the arrest of members of two self-starting militant Islamist cells in late 2005, was so motivated.[18] Later in time was the successful foiling in 2009 of a Melbourne-based self-starting cell, similarly motivated, which had planned to attack Holsworthy Army Barracks in New South Wales.[19] And these are but examples.

15 National Terrorism Threat Level Assessment (n 13). [Editor's note: downgraded to 'possible on 27 November 2022 <www.skynews.com.au/australia-news/defence-and-foreign-affairs/australias-national-terrorism-threat-leve>.]

16 I enlisted in the Australian Army as an Officer Cadet in January 1975 and was commissioned into the Australian Intelligence Corps in the Army Reserve in July 1976. I transferred in the rank of Major in that Corps to the Standby Reserve in 1993 and am now on the Retired List.

17 State Coroner of New South Wales, *Inquest Into the Deaths Arising from the Lindt Café Siege* (New South Wales Government, 2017) ('Lindt Café Coroner's Report'), Pt IV, Ch 10, para 71 <https://www.lindtinquest.justice.nsw.gov.au/Pages/Findings.aspx>.

18 Bart Schuurman, Shandon Harris-Hogan, Andrew Zammit and Pete Lentini, 'Operation Pendennis: A Case Study of an Australian Terrorist Plot, Perspectives on Terrorism' (2014) 8(4) *Perspectives on Terrorism* 9 <https://www.jstor.org/stable/26297199?seq=1>.

19 This and other incidents are mentioned in Schuurman et al (n 18).

That such a threat has not gone away in Australia is evident every time one travels by air and experiences airport screening, in the present strict control of entry into military bases and in the bollards which line entry points into our major public squares and shopping malls.

In 2014, the apprehended threat of such terrorism, based on the experience of a uniformed Australian Army officer at a Sydney railway station, was such that members of the Australian Defence Force ('ADF'), and even school cadets, were advised via their chains of command to 'carefully consider wearing their uniforms in public'.[20] In London the year before, in a religiously motivated attack, a soldier wearing a 'Help for Heroes' t-shirt, jogging back to an Army barracks, was viciously attacked and killed by two terrorists.[21] Not once, in the better part of two decades of Active List service in the Army Reserve, did I ever have any apprehension about being wounded or killed because I wore our country's uniform or military sports attire in public. In the mid-1970s, it was possible to drive into many military bases in Australia without any let or hindrance; not so now.

It is conventional to view the ADF as having three arms: the Royal Australian Navy, the Australian Army and the Royal Australian Air Force. That view is formalised in the *Defence Act 1903* (Cth).[22] In a uniformed sense, it is correct. However, three other agencies have national defence and security as their sole raison d'être. These are:

a. ASIO;[23]

b. the Australian Security Intelligence Service ('ASIS');[24] and

c. the Australian Signals Directorate ('ASD').[25]

In my view, it is accurate to regard these agencies as, respectively, the fourth, fifth and sixth arms of our wider ADF, the non-uniformed arms.

In relation to domestic defence and security, the ADF, ASIO and the ASD operate in cooperation with the Australian Federal Police, the Australian Border Force and state and territory police services. However, the primary role of the police services is the maintenance of the King's Peace. Indeed, the several states are expressly forbidden by the *Constitution* from raising any naval or military force without the consent of the Commonwealth.[26] That has never been given.

20 ABC, 'ADF personnel cautioned on wearing uniforms after Sydney attack reported', 25 September 2014, <https://www.abc.net.au/news/2014-09-25/uniformed-adf-officer-attacked-by-men-in-sydney-nsw-police-say/5769874>.

21 ABC, 'London terrorist attack: Man hacked to death with meat cleavers outside Woolwich army base', 23 May 2013, <https://www.abc.net.au/news/2013-05-23/man-hacked-to-death-in-suspected-london-terrorist-attack/4707506?nw=0&r=Map>.

22 Defence Act *1903* (Cth) s 17.

23 Continued in existence by s 6 of the *Australian Security Intelligence Organisation Act 1979* (Cth).

24 Continued in existence by s 16 of the *Intelligence Services Act 2001* (Cth).

25 Ibid.

26 *Constitution*, s 114.

In contrast, the primary role of the ADF is to kill the King's enemies, thereby protecting the states from invasion, with a secondary role of protecting the states from domestic violence, if so requested by a given state.[27] There is support in authority, discussed below, relating to the breadth of Commonwealth executive authority with respect to the preservation of the nation, and related incidental legislative power, for the position that this domestic protective role may be undertaken on the initiative of the Commonwealth executive government, even in the absence of a request from a particular state.[28]

The present authority for the existence of each of these six arms of the ADF is statutory. That was not always so in relation to ASIS. It was initially established in the exercise of Commonwealth executive power, as found in s 61 of the *Constitution*.

Since the Commonwealth assumed responsibility for naval and military defence in the aftermath of federation,[29] the authority for the existence of the uniformed arms of the ADF has always been statutory. The reason for that is deeply rooted in our constitutional inheritance from the United Kingdom. There, the experience during the 17th century of the end, by civil war and regicide, of the Divine Right of Kings and the replacement of the latter by the dictatorship of Lord Protector Oliver Cromwell, backed by the New Model Army, resulted in the firm and continuing belief that a standing army should only be tolerated by parliamentary authority; hence the first *Mutiny Act 1689* (Eng). The enactment of that statute at the same time as the Bill of Rights was no coincidence.

Given the statutory foundation for all arms of the ADF, uniformed and otherwise, I propose first to address how the judiciary have approached the nature and extent of Commonwealth legislative power with respect to defence. That legislative power with respect to defence is found in s 51(vi) of the *Constitution*.[30]

The prevailing judicial approach, from early in the life of our federation, has been that:

a. the power has an elastic quality, the extent of the legislative remit it confers upon the parliament being inherently related to the threat presented to Australia at a given time;[31] and

b. the adjectives 'naval and military' which govern 'defence' are not words of limitation but, rather, of extension, present only so as to emphasise that defence comprehends all types of warlike operations.[32]

27 *Constitution*, s 119.

28 A detailed treatment of the subject of ADF aid to the civil power both in relation to protection from domestic violence and more widely — for example, in relation to natural disasters — is beyond the scope of this article. For a comprehensive discussion of the topic, I refer the reader to Samuel White, *Keeping the Peace of the Realm* (LexisNexis Australia, 2021).

29 *Constitution*, s 69.

30 The power to make laws 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'.

31 *Farey v Burvett* (1916) 21 CLR 433, 443 (Griffith CJ), 448 (Barton J), 452–3 (Isaacs J); Powers J agreeing.

32 Ibid 440 (Griffith CJ).

A noteworthy feature of the First World War era case which established these propositions, *Farey v Burvett*, is an observation by Isaacs J, the underpinning sentiment in which resembles Jackson J's 'not a suicide pact' observation in *Terminiello v Chicago*, set out above:

> The *Constitution*, as I view it, is not so impotent a document as to fail at the very moment when the whole existence of the nation it is designed to serve is imperilled.

So it was that, in *Farey v Burvett*, the Commonwealth Parliament's legislative power with respect to defence was held to extend to the enactment of legislation conferring on the executive a power to make regulations which extended to commodity price controls, even though the control of prices was not a specific head of Commonwealth legislative power. *Farey v Burvett* demonstrates that the phenomenon of 'total war', not just direct military operations, was well understood by the judiciary very early in the history of our federation as a legitimate incident for the exercise of legislative power with respect to defence.

Earlier in the First World War, the High Court had held that the defence power extended to an ability of the parliament lawfully to enact legislation which supported the making of a regulation providing not just for the wartime internment of enemy aliens but also of any naturalised person in respect of whom the Minister for Defence 'has reason to believe is disaffected or disloyal'.[33] A like conclusion was reached during the Second World War as to Commonwealth legislative competence with respect to defence supporting a conferral of power to make a regulation to enable the detention of a person if a Commonwealth Minister was 'satisfied with respect to any particular person, that with a view to prevent that person acting in any manner prejudicial to the public safety or the defence of the Commonwealth it is necessary so to do'.[34]

The effect of *Farey v Burvett* is that, while it is necessary for there to be discerned a relevant connection between a legislative or subordinate legislative measure and defence to support its validity, with the court enabled to take judicial notice of prevailing circumstances as to the nature and extent of a threat to Australia, once such a connection is discerned, it is not for the judiciary to question the necessity for the measure adopted either by the parliament or, as the case may be in relation to subordinate legislation, the Governor-General in Council.[35]

That this is the position was confirmed in the immediate post-Second World War era case, *Dawson v Commonwealth of Australia* ('*Dawson*'), in which Latham CJ stated:

> [It] is not the duty or a function of the Court itself to consider whether in its opinion such Regulations are 'necessary' for defence purposes. Questions of legislative policy are determined by the legislature, not by the Courts. If it can reasonably be considered that there is a real connection between the subject matter of the legislation and defence, the Court should hold that the legislation is authorized by the power to make laws with respect to defence.[36]

Although that particular pronouncement in *Dawson* was not, and is still not, controversial, a six-member court split equally and sharply in that case as to whether s 51(vi) of the *Constitution* had ever supported the general regulation-making power in the *National*

33 *Lloyd v Wallach* (1915) 20 CLR 299.
34 *Ex parte Walsh* [1942] ALR 359.
35 *Farey v Burvett* (1916) 21 CLR 433, 442–3.
36 (1946) 173 CLR 157, 173.

Security Act 1939 (Cth) ('NSA') so as to permit the lawful making of a provision in the *National Security (Economic Organization) Regulations 1942* (Cth)[37] that 'a person shall not, without the consent in writing of the Treasurer, purchase any land' in Australia. With respect, just to state the subject of those regulations is to engender a counter-intuitive reaction as to the existence of a 'real connection' with defence.

Ironically, perhaps, the occasion for there being an evenly numbered court was that the remaining judge, Webb J, was, at the time, on leave of absence so as to undertake the role of President of the International Military Tribunal for the Far East in Tokyo.[38] The validity of the provision was upheld on the basis of the Chief Justice's opinion to that effect in accordance with the then position under the *Judiciary Act 1903* (Cth).[39]

Many more cases concerning the extent of the legislative power with respect to defence in peace and war might be cited. Suffice it to say that the more sweeping and permanent in effect a legislative or subordinate legislative measure, the more a subject of application is consigned to executive satisfaction; and the more removed that subject is from obvious assistance in the prosecution of a major, subsisting war in which Australia is engaged, the less likely it is to be supported by the defence power.

After a comprehensive survey of authority, two learned members of the academy made this observation concerning the breadth of knowledge which the judiciary must bring to bear in relation to the extent of the defence power, with the whole of which I respectfully agree:

> It is obvious that in determining whether a law is or is not within the defence power, judges are required to have a very wide knowledge of human affairs outside the narrow confines of the law. As economics are a vital factor in war and defence today they must have a broad knowledge of economic matters. In so far as the defence of Australia may be vitally linked with the defence of the United Kingdom, the Commonwealth, Asian countries and Pacific countries, they may be required to have some knowledge of broad international defence strategy. And they must necessarily have some knowledge of international affairs generally. These are all matters on which genuine differences of opinion are possible, matters which, in a unitary State, are essentially problems for the executive and legislative authorities to decide.[40]

These days of course, the defence of Australia would more accurately be said to be vitally linked with the United States, although defence ties with the United Kingdom remain strong.

Viewed against this body of jurisprudence, and as I further expose later in this article, the difficulty presented by the presently ongoing 'War on Terror' is that the related threat to domestic peace and good order is not one which fits neatly into established categories concerning the ambit of the legislative power conferred by s 51(vi) of the *Constitution*. These categories were established last century against a background of wars conducted between state actors. The nature of the 'War on Terror' is such that it cannot even be assimilated with a threat of domestic espionage and subversion, which was a feature of the Cold War.

37 Reg 6(1).

38 HA Weld, 'Webb, Sir William Flood (1887–1972)', *Australian Dictionary of Biography* (National Centre of Biography, Australian National University) <https://adb.anu.edu.au/biography/webb-sir-william-flood-11991/text21499> published first in hardcopy 2002, accessed online 23 June 2022.

39 *Judiciary Act 1903* (Cth) s 23(2)(b).

40 RD Lumb and KW Ryan, *The Constitution of the Commonwealth of Australia Annotated* (3rd edition, 1981) pp 130–1 [246].

To conceive of what is or is not a legitimate subject for the exercise legislatively of the defence power as capable of classification according to whether Australia is in a period of profound peace, preparing for the prospect of war between state actors, engaged in war with one or more state actors or winding down from such a war is just not apt to cover indefinitely continuing circumstances where what are, superficially, isolated, random acts of domestic violence are incited by non-state actors at home and abroad, supported by foreign state actors with whom Australia is not formally at war. And such incitement has never been more readily possible than in the digital age.

In relation to the ambit of the defence power and at the margin, but particularly in periods of international tension short of general hostilities, and in the aftermath of general hostilities, there may be more scope for the admission of evidence as to the need or continuing need for particular measures.[41] The recently decided *Alexander's case*[42] indicates that there is probably like scope for the admission of such evidence in relation to the validity of measures adopted in response to the 'War on Terror'. Even so, much is left in practice to judicial notice in determining whether a particular law can be said to be one with respect to defence.

Alexander's case highlights both the permissible use, and the limits of use, of evidence in the resolution of cases concerning the limits of Commonwealth legislative competence in matters touching upon national security.

At issue in *Alexander's case* was the validity of s 36B of the *Australian Citizenship Act 2007* (Cth), which provided that the Minister for Home Affairs may make a determination that a person ceases to be Australian citizen if satisfied, among other matters, that the person engaged in specified conduct demonstrating repudiation of allegiance to Australia. Acting, amongst other things, on advice from ASIO about Mr Alexander's activities abroad and the threat of domestic terrorist acts presented by the return to Australia of foreign fighters, the Minister revoked the Australian citizenship of this hitherto dual Australian–Turkish citizen. Some of the references to ASIO assessments in the judgments are evidently references to material before the Minister; other references to ASIO and other intelligence community views are not.

The issue in *Alexander's case* was not the extent of Commonwealth legislative power with respect to defence but rather the reach of the separate head of legislative power to make laws with respect to naturalisation and aliens[43] and whether the power conferred by statute on the Minister was punitive such that it could only validly be conferred on a court exercising Commonwealth judicial power, pursuant to Ch III of the *Constitution*.

41 As in *Jenkins v The Commonwealth* (1947) 74 CLR 400 and *Sloan v Pollard* (1947) 74 CLR 445.
42 [2022] HCA 19.
43 *Constitution*, s 51(xix).

In their joint judgment, Kiefel CJ, Keane and Gleeson JJ made the following references to intelligence community material, which extended beyond that emanating from ASIO to a report of the Independent National Security Legislation Monitor:

> 57. The risk posed by foreign fighters, defined by ASIO as 'Australians who have participated in foreign conflicts or undertaken training with extremist groups overseas', is an aspect of this general threat. While relatively few returned fighters have posed a direct risk to the Australian community, those that did have been responsible for some of the most lethal terrorist attacks.
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> 58. ASIO has reported that, since 2012, around 230 Australians (or former Australians) have travelled to Syria or Iraq to fight with or support groups involved in the Syria–Iraq conflict. Of that number, 50 are estimated to have returned to Australia, the majority before 2016.
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> 59. In a submission to the Parliamentary Joint Committee on Intelligence and Security's 2019 review of the Australian Citizenship Amendment (Citizenship Cessation) Bill, ASIO continued to assess that the return of Australians who have spent time with Islamist extremist groups in Syria or Iraq has the potential to exacerbate the Australian threat environment 'for many years to come'. This is because foreign fighters can be expected to have developed characteristics such as a greater tolerance for and propensity towards violence, and to have established jihadist credentials. Several serious terrorist plots in Australia between 2000 and 2010 each involved at least one returned foreign fighter.
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> …
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> 90. In 2019, a report by the Independent National Security Legislation Monitor ('the INSLM Report') reviewed the operation, effectiveness and implications of the citizenship cessation provisions, including s 33AA. The INSLM Report stated that the 'main focus' of these laws was involvement with the Islamic State, although they were not so limited. The INSLM Report considered that Australia's counter-terrorism framework required a range of mechanisms, and that '[i]n some, possibly rare cases, citizenship cessation reduces the risk of a terrorist act being undertaken by that person in Australia'.
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> 91. However, the INSLM Report concluded that the citizenship cessation provisions, including s 33AA, lacked necessity, proportionality and proper protections for individual rights. The INSLM Report further identified, in addition to the risk of de facto or temporary statelessness, a denial of due process. While s 36D affords a citizen the due process of a criminal trial before the Minister's discretion arises, a significant feature of s 36B is that it operates without due process at all.[44]

In the result, Kiefel CJ, Keane and Gleeson JJ concluded that the power conferred on the Minister by s 36B of the Australian Citizenship Act was punitive and that, in conferring that power on the Minister, rather than a court exercising judicial power, the Parliament had exceeded its legislative competence as conferred by the aliens power.

Justice Gageler concurred with this conclusion and agreed generally with the reasons of Kiefel CJ, Keane and Gleeson JJ. However, in separately delivered reasons for judgment, his Honour elaborated upon why it was that the forfeiture of citizenship was punitive, not protective. His Honour also addressed the use and limits of legislative pronouncements as to

44 [2022] HCA 19.

purpose and of evidence from the intelligence community in resolving issues as to the limits of legislative competence. The relevant passages concerning these latter subjects should be set out in full:

> 20. A legislature of limited powers 'cannot arrogate a power to itself by attaching a label to a statute' and cannot, merely by including a statement of purpose in legislated text, require a court to identify the purpose of a law as something that it is not. Not unknown in our constitutional history is for a law which purports to be designed to achieve a constitutionally permissible purpose to be found on close inspection 'in truth' to pursue a constitutionally impermissible purpose.
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> 21. That said, the constitutional relationship between the judiciary and the legislature is such that a statement of legislative purpose must be treated by a court as a solemn and presumptively accurate declaration of why a law is enacted. The declaration is made by the legislature to itself and to the world.
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> 22. The legislatively declared purpose might well be elucidated with reference to other aspects of the text or context. It might need to be supplemented or qualified in order to explain some detail of the law. It might need to be translated to a level appropriate for constitutional analysis in a particular context. Absent strong reason for concluding that the stated purpose is not a true purpose, however, it must be accepted and respected.
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> 23. When enacting the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth) ('the 2020 Amending Act'), Parliament chose to explain the purpose of the whole of the subdivision within which s 36B is included. Parliament did so in s 36A. Translated to the level appropriate for analysis of the compatibility of s 36B with Ch III of the *Constitution*, the purpose declared in s 36A is properly characterised as one of denunciation and exclusion from formal membership of the Australian community of persons shown by certain conduct to be unwilling to maintain or incapable of maintaining allegiance to Australia. The nature of the conduct understood by the Parliament to be capable of showing that unwillingness or incapacity is elucidated by the operative provisions of the subdivision and is limited to criminal conduct found to have been engaged in by a person in the past. Thus the purpose of denunciation and exclusion from formal membership of the Australian community is solely on the basis of past criminal conduct. That purpose can only be characterised as 'punitive'.
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> 24. The revised explanatory memorandum for the Bill for the 2020 Amending Act contains nothing to cast the purpose of s 36B as declared by s 36A in a different light. Nor does the second reading speech.
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> 25. The Bill for the 2020 Amending Act had its origin in a report to the Attorney-General in 2019 by the Independent National Security Legislation Monitor. The parliamentary process which resulted in the Bill's enactment included an inquiry in 2019 and report in 2020 by the Parliamentary Joint Committee on Intelligence and Security ('the PJCIS').
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> 26. The defendants did not seek to draw on anything in either of those reports to support their submission that the purpose of s 36B is appropriately identified as the protection of the Australian community. Rather, they sought to draw on a submission made to the PJCIS in the course of its inquiry.
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> 27. The submission was made by the Australian Security Intelligence Organisation ('ASIO'). The thrust of that submission was that ASIO considered 'citizenship cessation' to be 'a legislative measure that works alongside a number of other tools to protect Australia and Australians from terrorism'. The submission implied that ASIO saw those 'other tools' as including prosecution for terrorism offences, which it said would sometimes result in 'the better security outcome'. The concept of 'protection' which ASIO employed in its submission was therefore one that encompassed invocation of a judicial process by way of prosecution for an offence.

28. The language of 'security' and 'protection' in which ASIO cast its submission is explicable by reference to ASIO's statutory charter. The statutory functions of ASIO centrally include obtaining, correlating, evaluating and communicating intelligence relevant to 'security'. The definition of 'security' relevantly includes 'the protection of, and of the people of, the Commonwealth' from politically motivated violence.

29. A submission made by a responsible government agency to a parliamentary inquiry cannot be dismissed as beyond the scope of the material which might properly inform judicial identification of the purpose of a law. In the context of examining the compatibility of s 36B with Ch III of the *Constitution*, however, the ASIO submission to the PJCIS is of no analytical utility whatsoever. ASIO's frame of reference is such that even prosecution which results in the imposition of punishment by a court for a terrorism offence is regarded as being for the protection of the Australian community. That is not the frame of reference within which determining whether a statutory purpose is 'protective' needs to occur in the context of the doctrine of separation of judicial power enshrined in Ch III of the *Constitution*. The concept of 'protection' as employed in ASIO's submission to the inquiry therefore does not assist in identifying the purpose of s 36B in the context of the constitutional inquiry.

[Footnote references omitted]

These statements by Gageler J are not, with respect, idiosyncratic but well supported by authority. They are not confined in their application to a case concerning the legislative power to make laws with respect to naturalisation and aliens but apply generally in relation to exercises of Commonwealth legislative power. They highlight that there may be scope for the admission of evidence as to the existence of a relevant connection between a head of legislative power and its purported exercise. However, in a constitution which not only distributes sovereign national power between three branches of government — legislative, executive and judicial — but also limits the nature and extent of legislative power, it is just not possible for one branch to assume the function of the other or for the legislature itself to define the limits of its legislative competence.

Apart from the inability itself to define the limits of its legislative competence, a limitation on the legislative branch is, as *Alexander's case* highlights, an inability to confer the exercise of judicial power other on courts constituted by persons enjoying the tenure and related independence for which s 72 of the *Constitution* provides. Another illustration of this limitation, arising directly in relation to the ADF, is *Lane v Morrison*.[45] The Parliament's endeavour to consign the adjudication and punishment of service offences to a court foundered in that case not because it was not possible, in an exercise of the defence power, to consign that function to a court established pursuant to Ch III of the *Constitution* but because the members of the court established for that purpose by amendments to the *Defence Force Discipline Act 1982* (Cth) were not appointed pursuant to s 72 of the *Constitution*. Thus, it would have made no difference to the outcome in *Alexander's case* if the function of deciding whether to revoke citizenship had, for example, been consigned to the Administrative Appeals Tribunal or even to an institution termed a court but whose members were not appointed pursuant to s 72 of the *Constitution*.

45 (2009) 239 CLR 230.

A Second World War era case which repays present reading, given the religiously motivated nature of the presently identified and ongoing terrorist threat and measures adopted to address that threat, is *Adelaide Company of Jehovah's Witnesses v The Commonwealth* ('*Jehovah's Witnesses*').[46]

That is not, of course, because that branch of the Christian faith is in any way a motivator of present terrorism, which is not to say that one reason for recalling *Jehovah's Witnesses* is not for its unanimous conclusion that the prohibition in s 116 of the *Constitution* in respect of laws preventing the free exercise of any religion does not prevent the Commonwealth Parliament from making laws prohibiting the advocacy of doctrines or principles which, though advocated in pursuance of religious convictions, are prejudicial to the prosecution of a war in which the Commonwealth is engaged. That same conclusion would seem necessarily to follow in respect of a measure which addressed the espousing of doctrines or principles of any religion or branch thereof which motivate those who engage in or plan, in or in relation to Australia, acts of terrorism.

Another, and perhaps more important, reason for recalling *Jehovah's Witnesses* is for the fate of measures adopted via the *National Security (Subversive Organisations) Regulations 1940* (Cth), purportedly authorised by the NSA, to address a threat apprehended not just by religiously motivated advocacy but also by any organisations considered by the Governor-General to be prejudicial to the conduct of the war. The case was decided in 1943, at the height of an intense war between Australia and state actors, during which mainland Australia had, the previous year, been directly attacked by conventional enemy forces for the first time ever.[47]

This case, too, saw a sharp difference of opinion in the High Court as to the validity of the measures adopted. Those differences resemble the differences in the United States Supreme Court in *Terminiello v Chicago*. While the validity of all the measures was at issue, it is instructive to consider the fate of four particular provisions in those regulations. That is because the observations made about their validity have ramifications for the present day.

Regulation 3 of those regulations provided:

> Anybody corporate or unincorporated the existence of which the Governor-General, by order published in the Gazette, declares to be in his opinion, prejudicial to the defence of the Commonwealth or the efficient prosecution of the war, is hereby declared to be unlawful.

Regulation 4 provided:

> Anybody in respect of which a declaration is made in pursuance of the last preceding regulation shall, by force of that declaration, be dissolved.

46 (1943) 67 CLR 116.

47 Notably, Darwin was first bombed on 19 February 1942 with air raids continuing until November 1943: <https://www.awm.gov.au/collection/E84294>; Japanese midget submarines had conducted an attack on shipping in Sydney harbour on the evening of 31 May – 1June 1942: <https://www.navy.gov.au/history/feature-histories/japanese-midget-submarine-attack-sydney-harbour>; Wyndham, Broome, Townsville and Cairns were also bombed during the war: <https://www.awm.gov.au/articles/encyclopedia/air_raids>.

Regulation 6A provided:

> Any house, premises or place or part thereof which was occupied by a body immediately prior to its having been declared to be unlawful may, if a Minister by order so directs, be occupied in accordance with the provisions of the order so long as there is in the house, premises or place or part thereof any property which a Minister is satisfied belonged to, or is used by or on behalf of, or in the interests of, the body, and which was therein immediately prior to the body having been declared to be unlawful.

Regulation 6B provided that all property taken possession of, or delivered to a person thereunto authorised by a person in pursuance of the regulation shall be forfeited to the King for the use of the King and shall, by force of the regulation, be condemned.

In relation to these particular regulations, Latham CJ and McTiernan J concluded that regs 3, 4 and 6B were supported by the defence power in s 51(vi) of the *Constitution* but reg 6A was not. In contrast, Rich and Williams JJ considered that each of these four regulations (and more) was not validly so supported. The remaining member of the court, Starke J, considered that the regulations were wholly invalid.

In my view, the key judgments, in terms of wider, present relevance, are those of Williams J (with whom Rich J agreed) and of Starke J. I propose therefore first to analyse the reasons of Williams J and to offer some reflection on those reasons in the context of the current 'War on Terror'.

Justice Williams commenced his consideration of the attack made other than on the basis of transgression of s 116 of the *Constitution*, with this observation, 'A state of war, however prolonged the duration of a conflict such as the present war may be, does not continue indefinitely'.[48] Underpinning this observation is an understanding of warfare as a conflict between state actors resulting from a formal declaration, 'a state of war'. This did accord with not just the experience of Williams J of the then current Second World War but also of his Honour's direct, personal experience of military service during the First World War.[49]

The notion of an indefinitely continuing threat of religiously motivated violence in mainland Australia, outside the confines of a war between state actors, would have been completely foreign to Williams J and his contemporaries. At that point in Australia's history as a federation, the only example on Australian soil, even of a possibly religiously inspired attack on civilians, had occurred during the First World War at Broken Hill on 1 January 1915, when two Muslim immigrants sympathetic to the Ottoman empire had fired at close range on a train carrying residents to the annual picnic, killing three and wounding seven.[50] That was in the course

48 (1943) 67 CLR 116, 161.

49 Sir Dudley Williams served in the Royal Field Artillery on the Western Front during the First World War, was awarded the Military Cross for gallantry and was twice mentioned in dispatches: see Graham Fricke and Simon Sheller, 'Williams, Sir Dudley', *Australian Dictionary of Biography* (National Centre of Biography, Australian National University) <https://adb.anu.edu.au/biography/williams-sir-dudley-12031>.

50 One, Mullah Abdullah had been born in Afghanistan; the other, Gool Mohammed, was an Afridi tribesman from the North West Frontier who had served in the Ottoman army before migrating to Australia. They raised the Turkish flag over the position from which they fired on the train. Three civilians were killed and seven wounded in their attack on the train. Mullah Abdullah and Gool Mohammed were killed later in the day at their fallback position in an exchange of gunfire with a group of soldiers, police and local rifle club members: M Dash, 'The Battle of Broken Hill', *Smithsonian Magazine*, 20 October 2011 <https://www.smithsonianmag.com/history/the-battle-of-broken-hill-113650077/>.

of a war between state actors, relevantly the nations of the then British empire and the Ottoman empire. Very shortly after the start of that war, one of the two perpetrators had written to the Minister of War in Istanbul, offering to re-enlist, and actually received a reply by post in Australia. That reply encouraged him to 'be a member of the Turkish Army and fight only for the Sultan', without specifying where or how. The Ottoman sultan was also then the Keeper of Holy Places for the Islamic faith. For some of that faith, loyalty to the sultan and one's religion were therefore intertwined. Such intertwining was far from universal, as many members of the Islamic faith loyally served the king emperor in the United Kingdom's Indian Army in that same war.

Having made this observation, Williams J immediately allowed, 'Because war promotes abnormal conditions, abnormal means are required to cope with them, and this justifies the Parliament of the Commonwealth under the defence power enacting many laws in times of war which would be beyond its scope in times of peace'.[51] This, with respect, exactly encapsulated the orthodox conception of the elastic nature of the defence power. In keeping with this conception, his Honour cited[52] with approval this statement by Dixon J in *Andrews v Howell*:

> The existence and character of hostilities, or a threat of hostilities, against the Commonwealth are facts which will determine the extent of the operation of the power. Whether it will suffice to authorize a given measure will depend upon the nature and dimensions of the conflict that calls it forth, upon the actual and apprehended dangers, exigencies and course of the war, and upon the matters that are incident thereto.[53]

Also in keeping with this conception, Williams J added:

> A state of war, therefore, justifies legislation by the Commonwealth Parliament, in the exercise of the defence power, which makes many inroads on personal freedom, and which places many restrictions on the use of property of an abnormal and temporary nature which would not be legitimate in times of peace.[54]

Once again, an understanding of war as having a quality of formality about it, a 'state of war', is evident in this statement. That aside, the understanding evident in this statement exemplifies a by then conventional judicial recognition that the defence power can, during war, support intrusions on civil liberties which would be invalid during peacetime. At present, and ever since 11 September 2001, the West, not just the United States, has, in a very real sense, been in a state of war thrust on it and undeclared by it — a state of war with religiously motivated extremists.

In keeping with the then state of Australian and also overseas authority, Williams J allowed that wartime internment measures grounded on a state of ministerial satisfaction as to likely interference with the prosecution of the war were supported by the defence power.

51 (1943) 67 CLR 116, 161.
52 Ibid.
53 (1941) 65 CLR 255, 278.
54 (1943) 67 CLR 116, 161.

Especially in hindsight, the way in which his Honour discussed what was and was not constitutionally permissible is presently instructive:

> It is recognized that the internment of such persons on mere suspicion without trial for some period not exceeding that of the war upon the opinion of a Minister that their liberty is prejudicial to the safety of the realm is a valid exercise of a plenary administrative discretion. The justification for what would be in times of peace an unwarranted interference with the liberty of the subject is that in many instances it would be against the public interest for the Minister to have to disclose to a court the confidential information upon which he acted (*Liversidge v Anderson*; R *v Secretary of State for Home Affairs; Ex parte Budd*). It is the exercise of an administrative discretion to interfere with the freedom of individuals by conscripting them for service in the armed forces of the Commonwealth, or by compelling them to labour in some particular locality at some particular form of work connected with the prosecution of the war. It is also an interference with the freedom of individuals in somewhat different but no more extreme form necessitated by the same emergency to compel them to undergo internment. Such an interference was described by Lord MacMillan in *Liversidge's Case* to be, a comparison with conscription, a relatively mild precaution. … But an Act which said that if, in the opinion of a Minister, the existence of any body of individuals was considered to be, prejudicial to the defence of the Commonwealth during the war, these individuals were forthwith to be cremated and all their property confiscated to the Crown, would be such a complete destruction of the personal and proprietary rights of individuals for an offence of such an indefinite nature that it would go far beyond anything that could conceivably be required for the purposes of meeting the abnormal conditions created by the war.[55]

At the time, and over a pointed and now famous dissent by Lord Atkin, the House of Lords had concluded in the then recently decided United Kingdom internment case, *Liversidge v Anderson*,[56] cited by Williams J in the passage quoted, that the internee, Mr Liversidge, was not entitled to particulars of the basis upon which the Home Secretary, Sir John Anderson, had formed the belief that he was of hostile associations and that his detention was lawful if the Minister had in good faith formed that belief. Hindsight tells us that this understanding that a subjective belief held in good faith was sufficient to constitute 'reasonable cause to believe' is no longer regarded as correct, either in the United Kingdom[57] or Australia.[58]

While internment based on executive determination for some or all of the period of a major war in which Australia is engaged is soundly supported by authority, albeit now with the caveat that *Liversidge v Anderson* is no longer good law, the ability of the Commonwealth Parliament lawfully to authorise executive ordained detention and compulsory questioning[59] of an Australian citizen for any period on national security grounds is less certain on existing authorities concerning the defence power, if that power is conceived solely on the quadripartite basis established during the 20th century. That such powers were considered necessary by Parliament in the sequel to the 11 September 2001 attacks and Bali bombing

55 Ibid 162 (footnote references omitted).
56 [1942] AC 206.
57 *R v Inland Revenue Commissioner; Ex parte Rossminster Ltd* [1980] AC 952, 1000, 1011, 1017–8.
58 *George v Rockett* (1990) 170 CLR 104, 112.
59 As found in Pt III of the *Australian Security Intelligence Organisation Act 1979* (Cth).

in 2002 is manifest.[60] However, as has been seen, legislative assessment and legislative competence do not necessarily coincide.

Hindsight also provokes the thought that, behind the reference by Williams J in the passage quoted to the impossibility of lawful, executive ordained 'cremation' may well have been at least an inkling by his Honour of the genocide then unfolding in Europe in respect of Jews and others on the initiative of Nazi Germany.

Another thought provoked is that, in modern times, the explosion of a drone-launched guided missile cremates, if not atomises, its human targets. Thus, the emphatic rejection by Williams J of the notion that the defence power would support the validity of legislative authorisation of the killing in Australia of those who were, in the Minister's belief, interfering with the prosecution of a war sounds an interrogative note, absent reconsideration of the scope of the defence power, about the validity of any legislative warrant based on that power for the targeting from Australia during the 'War on Terror' even of persons abroad who are considered by the executive to be threats to Australian security. I offer below some further reflection about such actions when considering the scope of executive power. Even more so, it makes it unlikely indeed that the defence power would support any legislatively sanctioned, pre-emptive killing of such persons in Australia as an adjunct to the current 'War on Terror'.

For Williams J, the occasion for the invalidity of the regulations lay in the sweeping, imprecise field of their potential application, via a ministerial declaration, to 'unlawful doctrines' and the permanent effects of immediate dissolution of an organisation, and related forfeiture of its property, including effects on third parties such as creditors.[61]

Intriguingly, although the subject was unnecessary to decide in light of his Honour's conclusion that the reg 6B was not supported by the defence power, Williams J also considered that it was as clear as 'burning daylight' that 'the determination by police officers or the Attorney-General of the controversies which could arise under regs 6(4) and 6B(1) and (2) as to whether property belonged to an unlawful body or to innocent third parties would be an exercise of judicial power, so that these sub-regulations would be invalid on this ground'.[62] This observation is a reminder that it is not just, as in *Alexander's case*, the punitive that may be beyond valid legislative consignment to the determination by an officer of the executive but also the proprietary.

60 The history and policy position is summarised in an April 2017 submission of the Attorney-General's Department to the Parliamentary Joint Committee on Intelligence and Security, Review of Division 3 of Part III of the Australian Security Intelligence Organisation Act 1979 — Special Powers Relating to Terrorism Offences (2017) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiyxKf55_n4AhUGE7cAHT4jBy4QFnoECCcQAQ&url=https%3A%2F%2Fwww.acic.gov.au%2Fsites%2Fdefault%2Ffiles%2F2020-08%2Fattorney-generals_department_submission-review_of_asios_questioning_and_detention_powers_0.pdf&usg=AOvVaw3-sg97xtURSpCfclC9RSfq>. See also that committee's related report: Parliamentary Joint Committee on Intelligence and Security, *ASIO's Questioning and Detention Powers* (Commonwealth of Australia, 2018) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIO/Report/section?id=committees%2Freportjnt%2F024080%2F24748>.

61 (1943) 67 CLR 116, 164–6.

62 Ibid 167–8.

A similar rationale as to the limits of the defence power is evident in the separate judgment of Starke J in the *Jehovah's Witnesses*. His Honour stated:

> In themselves the Regulations are arbitrary, capacious and oppressive. Bodies corporate and unincorporate are put out of existence and divested of their rights and their property on the mere declaration of the Executive Government.[63]

Interestingly, in the context of any legislative authorisation from Australia of remote targeted killing, his Honour also observed, in highlighting the limits, even in wartime, of the defence power:

> Thus, to suggest, an extravagant illustration, a regulation under the *National Security Act that* any person who the Governor-General declares has acted, in his opinion, in a manner prejudicial to the defence of the Commonwealth or the efficient prosecution of the war shall be executed, could not be supported as a regulation with respect to defence or the safety and defence of the Commonwealth, because of its arbitrary and capricious nature. It would not do to say that it was merely an abuse of power and that the remedy was political, for the regulation would he beyond power: it would not be a regulation with respect to defence or the safety and defence of the Commonwealth.[64]

In contrast to Williams J (and Rich J), Starke J did not consider that reg 6B constituted an invalid conferral of judicial power.[65] The supporting authority cited by Starke J was *Re the Will of Kronheimer; Roche v Kronheimer*[66] ('*Kronheimer*'). In that case, the High Court upheld the validity of a regulation made under the *Treaty of Peace Act 1919* (Cth) which, in the implementation of the economic clauses of the Treaty of Versailles, authorised the confiscation by executive order of property otherwise vested under a will in enemy aliens. The validity of the regulation was upheld primarily on the basis of the defence power but also treated as supported by the external affairs power.[67] In turn, *Kronheimer* provokes the thought that, even were legislative warrant not to be found under the defence power for targeted killing abroad of those considered by the executive to be a threat to Australian national security, such authority may alternatively be found in the external affairs power.

In many ways, *Jehovah's Witnesses* was a jurisprudential predecessor in the High Court to the Cold War era *Australian Communist Party v The Commonwealth*[68] ('*Communist Party case*'). At that time, there was a dimension of that 'war' which was far from 'cold'. Along with those from many other members of the United Nations, each arm of the ADF then had units deployed in Korea in active military operations against the North Korean People's Army, backed by the Chinese 'People's Volunteer Army'.[69]

The *Communist Party case* concerned the validity of the *Communist Party Dissolution Act 1950* (Cth). Over a vigorous dissent by Latham CJ, which echoes a similar dissent by his Honour in *Jehovah's Witnesses*, six members of the High Court concluded that the

63 Ibid 154.
64 Ibid.
65 Ibid 156.
66 (1921) 29 CLR 329.
67 QV *Constitution*, s 51(xxix).
68 (1951) 83 CLR 1.
69 Australian War Memorial, 'Korean War, 1950–53' <https://www.awm.gov.au/articles/atwar/korea>.

legislation was beyond the legislative competence of the Parliament and invalid. Once again, the differences resemble the differences in the United States Supreme Court in *Terminiello v Chicago*. The majority concluded that the legislation could not be supported by s 51(xxxix) of the *Constitution*, as incidental to the executive power found in s 61 of the *Constitution*, or under an implied power to make laws for the preservation of the Commonwealth and its institutions from internal attack and subversion, or under the defence power in s 51(vi) of the *Constitution*.

The present ramifications of views expressed by the majority in the *Communist Party case* are best assimilated by reference to excerpts from two key sections of the impugned legislation, s 5 and s 9, with the addition to them, parenthetically of 'Al-Qaeda' after 'Australian Communist Party', so as to give those views contemporary relevance. So annotated and materially, these sections respectively provided:

> 5(1) This section applies to anybody of persons, corporate or unincorporate, not being an industrial organization registered under the law of the Commonwealth or a State —
>
> (a) which is, or purports to be, or, at any time after the specified date and before the date of commencement of this Act was, or purported to be, affiliated with the Australian Communist Party [Al-Qaeda];
>
> (b) a majority of the members of which, or a majority of the members of the committee of management, or other governing body of which, were, at any time after the specified date on or before the date of commencement of this Act, members of the Australian Communist Party [Al-Qaeda] or of the Central Committee or other governing body of the Australian Communist Party [Al-Qaeda];
>
> (c) which supports or advocates, or, at any time after the specified date and before the date of commencement of this Act, supported or advocated, the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin, or promotes, or, at any time within that period, promoted, the spread of communism [Al-Qaeda], as so expounded; or
>
> (d) the policy of which is directed, controlled, shaped or influenced, wholly or substantially, by persons who —
>
> - were, at any time after the specified date and before the date of commencement of this Act, members of the Australian Communist Party [Al-Qaeda] or of the Central Committee or other governing body of the Australian Communist Party[Al-Qaeda], or are communists[members or sympathisers of Al-Qaeda]; and
>
> - make use of that body as a means of advocating, propagating or carrying out the objectives, policies, teachings, principles or practices of communism, as expounded by Marx and Lenin [Al-Qaeda].
>
> (2) 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.

…

9(1) This section applies to any person —

(a) who was, at any time after the specified date and before the date upon which the Australian Communist Party[Al-Qaeda] is dissolved by this Act, a member or officer of the Australian Communist Party[Al-Qaeda]; or

(b) who is, or was at any time after the specified date, a communist [member or sympathiser of Al-Qaeda].

(2) Where the Governor-General is satisfied that a person is a person to whom this section applies and that that person is engaged, or is likely to engage, in activities 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 GovernorGeneral may, by instrument published in the *Gazette*, make a declaration accordingly.

Of the majority judgments, the most searching analysis of the possible foundations of legislative competence for the Communist Party Dissolution Act is found in the judgment of Sir Owen Dixon. There is nothing in any of the other majority judgments which might occasion any more expansive view of a possible constitutional foundation for that legislation. I propose therefore to confine my analysis of the majority view and its ramifications for the 'War on Terror' to his Honour's judgment.

In detailing why neither s 5 nor s 9 of the Communist Party Dissolution Act was valid, Dixon J first addressed the defence power. He stated that they exhibited 'no apparent connection' with that power.[70] One wonders, with great respect, whether this same lack of apparent connection would then have been found in relation to the Nazi Party or, now, in relation, for example, to Al-Qaeda. His Honour nonetheless returned later in his judgment, as shall I in this analysis, to what support there might be for the legislation via that head of power.

Obviously, with the phrase, 'prejudicial to … the execution or maintenance of the *Constitution*' used in the sections in mind, Dixon J next stated that 'Its apparent reference is to s 61 of the *Constitution* as affording a subject upon which s 51 (xxxix) might operate'. His Honour then stated, 'But it is hardly necessary to say that when the country is, for example, actually encountering the perils of war measures to safeguard the forms of government from domestic attack and to secure the maintenance and execution of at least some descriptions of law might be sustained under the defence power, even if it were thought that their nature took them outside the scope of s 51(xxxix) in its application to s 61'.[71]

As to this apparent combination of the s 51(xxxix) incidental power and s 61 executive power as a legislative foundation, the vice discerned by Dixon J in each of ss 5(2) and 9(2) was that they 'give no … specific or reasonably definite description of any act, matter, thing or event, attending the exercise of the executive power. There is nothing but the vague or intangible conception of the existence of a body or the activities of a man being prejudicial to the executive power'.[72]

70 (1951) 83 CLR 1, 186.
71 Ibid.
72 Ibid.

During the Cold War, there certainly were state actors, the Soviet Union, Communist China and their satellite states. But there was never a formal declaration of war by Australia with any of these state actors. At most, there was a national response to a series of United Nations Security Council resolutions which culminated in a call for Member Nations to 'furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area'.[73]

But the reasoning of Dixon J is not to be dismissed in terms of present relevance on the basis of a naive lack of understanding that a threat to the existence of a nation state and its governance and peace could be found otherwise than in the actions of a hostile state actor. Dixon J was not unaware of the singular challenges presented by a war of ideas and values to pluralist democracies where freedom of political belief and expression are prized. His Honour expressly addressed this in the *Communist Party case* in examining the limits of legislative competence under the incidental power:

> For myself I do not think that the full power of the Commonwealth Parliament to legislate against subversive or seditious courses of conduct and utterances should be placed upon s 51 (xxxix) in its application to the executive power dealt with by s 61 of the *Constitution* or in its application to other powers. I do not doubt that particular laws suppressing sedition and subversive endeavours or preparations might be supported under powers obtained by combining the appropriate part of the text of s 51 (xxxix) with the text of some other power. But textual combinations of this kind appear to me to have an artificial aspect in producing a power to legislate with respect to designs to obstruct the course of government or to subvert the *Constitution*. *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 on 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.[74]

The emphasised observations in this passage have become famous as a defence of liberty to espouse a competing political belief, unpopular to the government of the day. They are analogous to the observation, quoted above, made in the United States Supreme Court by Douglas J in *Terminiello v Chicago*. Equally, in my view, it does no injustice to the dissent of Latham CJ in the *Communist Party case* to summarise it as based on the same premises as those found in the dissent of Jackson J in that United States case.

Although Dixon J was not a member of the court which decided *Jehovah's Witnesses*, the flaw which he found in s 5(2) and s 9(2) of the Communist Party Dissolution Act was the same type of vagueness as that found by Williams J in that earlier case. Justice Dixon stated:

> The extent of the power which I would imply cannot reach to the grant to the Executive Government of an authority, the exercise of which is unexaminable, to apply as the Executive Government thinks proper the vague formula of sub-ss (2) relating to prejudice to the maintenance and execution of the *Constitution* and the laws, and by applying it to impose the consequences which under the Act would ensue.[75]

73 United Nations Security Council Resolutions Nos 83 and 84 of 27 June and 7 July 1950 respectively: <https://digitallibrary.un.org/record/112027?ln=en>.

74 (1951) 83 CLR 1, 187–8 (emphasis added).

75 Ibid 188.

The flaw then lay in the provision for extension of application by executive satisfaction against the vague criterion of likelihood of acting prejudicially to the maintenance and execution of the *Constitution* and the laws of the Commonwealth.

Justice Dixon returned to the limits of the incidental power later in his reasons for judgment, stating:

> Wide as may be the scope of such an ancillary or incidental power, I do not think it extends to legislation *which is not addressed to suppressing violence or disorder or to some ascertained and existing condition of disturbance and yet does not take the course of forbidding descriptions of conduct or of establishing objective standards or tests of liability upon the subject*, but proceeds directly against particular bodies or persons by name or classification or characterization, whether or not there be the intervention of an Executive discretion or determination, and does so not tentatively or provisionally but so as to affect adversely their status, rights and liabilities once for all. It must be borne in mind that it is an incidental or ancillary power, not a power defined according to subject matter.[76]

In the clause emphasised may be found support for legislation addressed to meeting a threats of particular, violent conduct which has been manifest in the 'War on Terror' but a generalised prohibition of a particular organisation and pre-emptive internment of its members based on executive satisfaction would require reassessment of conclusions reached in the *Communist Party case* or at least the reception of evidence which allowed those conclusions to be distinguished.

Later yet, Dixon J elaborated upon the clause I have emphasised so as to indicate what may be within the limit of legislative competence conferred by the incidental power:

> To deal specifically with named or identifiable bodies or persons independently of any objective standard of responsibility or liability might perhaps be possible under the power in the case of an actual or threatened outburst of violence or the like, but that is a question depending upon different considerations.[77]

Extrapolating for a moment from the *Communist Party case* to the present, legislation which, in the way I have annotated s 5 and s 9 of the Communist Party Dissolution Act, just named Al-Qaeda or some other religiously motivated organisation such as Islamic State might only be supported by the incidental power 'in the case of an actual or threatened outburst of violence'. Yet contemporary events instruct that neat organisational adherence or existence is apt to be elusive in relation to apparently religiously motivated violence. The Lindt Café siege offers a case in point.

During the siege, Mr Monis displayed a *shahada* flag but repeatedly sought an Islamic State flag from authorities.[78] He also sought to maintain anonymity, which accorded with a then contemporary exhortation of Islamic State in relation to acts of violence.[79] However, as noted above, the Coroner was unable to conclude whether Mr Monis was motivated by Islamic State to undertake his actions.[80] Even after his violent actions, would it therefore have been lawfully possible, according to the Dixonian conception of the reach of the incidental power,

76 Ibid 192 (emphasis added).
77 Ibid 193–4.
78 Coroner of New South Wales (n 18), Ch 10, para 40.
79 Ibid, Ch10, paras 46 and 47.
80 Ibid, Ch 10, para 88.

just to name Islamic State as a proscribed organisation under a legislative model akin to that adopted for the Australian Communist Party?

What of the position in relation to organisations similar to Al-Qaeda or Islamic State or in advance of any such act of violence in Australia?

On 12 October 2002, in Bali, Indonesia, agents of Jemaah Islamiyah detonated three bombs, two in nightspots — the Sari Club and Paddy's Bar — and one in front of the American consulate. The resultant explosions killed 202 people, 88 of whom were Australian, and wounded hundreds more.[81] Jemaah Islamiyah has never conducted an attack in Australian territory, and no Australians are known to be currently involved with it, although it is assessed by the Australian Government as 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of terrorist acts'.[82] Once again, the observations made by Dixon J in the *Communist Party case* sound an interrogative note about the incidental power as a valid foundation or legislation addressing threat domestically a threat from this organisation.

What further of the defence power in the *Communist Party case*? Dixon J took cognisance of then contemporary events in Korea and that Australian forces were engaged in operations there. But he also noted that Australia was not substantially on a war footing. His Honour therefore considered that the validity of the legislation necessarily fell for assessment 'upon the same basis as if a state of peace ostensibly existed'. His Honour then posed for answering the following question:

> Is it possible, however, to sustain the Act on the ground that under the influence of events the practical reach and operation of the defence power had grown to such a degree as to cover legislation providing no objective standard of liability relevant to the subject of the power but proceeding directly first by the pronouncement of a judgment by means of recitals and then in pursuance of the recitals acting directly against a body named, and bodies and persons described, in derogation of civil and proprietary rights?[83]

Again to interpolate contemporary events, notwithstanding a longstanding but concluded deployment of the ADF to Afghanistan, Australia was even then and is certainly not now on a war footing in the sense understood in the First and Second World Wars. But we live daily in circumstances where the executive has assessed the threat of religiously motivated, domestic terrorist violence as 'Probable'.

In answering, adversely, the existence of any foundation for the legislation in the defence power, Dixon J drew his discussion of that power and its limits together in this way:

> It must be evident that nothing but an extreme and exceptional extension of the operation or application of the defence power will support provisions upon a matter of its own nature prima facie outside Federal power, containing nothing in themselves disclosing a connection with Federal power and depending upon a recital of facts and opinions concerning the actions, aims and propensities of bodies and persons to be affected in order to make it ancillary to defence.[84]

81 Australian National Security, Australian Government, 'Jemaah Islamiyah' (2022) <https://www.nationalsecurity.gov.au/what-australia-is-doing/terrorist-organisations/listed-terrorist-organisations/jemaah-islamiyah-(ji) (Australian National Security, Jemaah Islamiyah) See also: National Museum of Australia, Bali bombings: https://www.nma.gov.au/defining-moments/resources/bali-bombings>.

82 Ibid.

83 (1951) 83 CLR 1, 196.

84 Ibid 202.

In relation to a period of ostensible peace, Dixon J added:

> Whatever dangers are experienced in such a period and however well-founded apprehensions of danger may prove, it is difficult to see how they could give rise to the same kind of necessities. The Federal nature of the *Constitution* is not lost during a perilous war. If it is obscured the Federal form of government must come into full view when the war ends and is wound up. The factors which give such a wide scope to the defence power in a desperate conflict are for the most part wanting.[85]

The *Communist Party case* did not call into question the correctness of the upholding in the then recently decided *R v Sharkey*[86] of offence provisions in the *Crimes Act 1914* (Cth) criminalising sedition; nor did it gainsay the reference by Isaacs J in *R v Kidman*[87] to the executive government's 'inherent right of self-protection'. What it did do was to sound an interrogative note about the reach of Commonwealth legislative competence during periods of predominant domestic peace to deal with threats to national security perceived by the executive government and where the measures adopted in response confer on officers of the executive powers to interfere with civil liberties based on satisfaction as to vague and amorphous criteria.

In my respectful view, in the absence of a reassessment of a neat quadripartite division of periods in which the defence power might fall for consideration, the analysis evident in the *Communist Party case* poses real difficulties in relation to reliance on that head of power for legislative measures to address the 'War on Terror', especially in relation to persons and organisations in Australia. Overwhelmingly, at present, there is ostensible peace in Australia, but acts of religiously motivated violence can and do occur in random ways and at random times. Further, to conceive of such acts as 'lone wolf attacks' is to ignore religious motivation as a unifying theme and, also, that there exist organisations which incite such motivations, even if they do not themselves in Australia engage in organising any act of violence. It is also to ignore that, offshore, there may be both state and non-state actors which not only incite such motivations but also on occasion may organise, facilitate or harbour those disposed to commit such acts.

Yet further, one feature of the 'federal nature of the *Constitution*' is that it is the Commonwealth which, lawfully, has established and is responsible for the operations of each of the six arms of the ADF as more broadly understood. War fighting itself is the responsibility of the Commonwealth, not of the several states. Yet drawing a meaningful 'federal' distinction between war fighting and protection from domestic violence in the 'War on Terror' is not just difficult but fraught with the prospect of lines of responsibility and related capability being mismatched with the threat. A construction of the defence power so as to yield Commonwealth legislative competence to enact a valid, coherent response might, in the event of a validity challenge, require the admission of evidence in the ways described by Gageler J in *Alexander's case.*

There is nothing overtly quadripartite in the statement of the defence power in the *Constitution*. Conception of it as having that quality is, as the foregoing indicates, nothing more than the

85 Ibid 202–3.
86 (1949) 79 CLR 121.
87 (1915) 20 CLR 425, 440.

product of cases concerning the application of that head of power in circumstances where the threat to Australia and the very nature of warfare was very different to the present.

In some ways, although the underlying motivation is obviously very different, the present threat in Australia resembles that presented Great Britain, rather than Northern Ireland, over some 30 years until the Good Friday Peace Accords of 1999. It is a threat of random acts of violence by non-state actors committed in a society otherwise and usually at peace. Since then and in the aftermath of not only events in New York on 11 September 2001 but also in London on 7 July 2005,[88] the United Kingdom has faced a national security threat similar to that in Australia. Legislated measures of the United Kingdom's parliament to deal with this earlier threat,[89] and current threats[90] to UK national security might well, in light of experience of them in practice, commend themselves to our executive government and Parliament for implementation here.[91] The difference, however, is that the United Kingdom's parliament has unlimited legislative competence.[92] In contrast, the Commonwealth Parliament has only specified subjects of legislative competence. Absent an approach to s 51(vi) which recognises that 'defence' is a subject of legislative competence for the ages, not just for the circumstances of conflict as known in the 20th century, some legislated measures found effective in a kindred jurisdiction such as the United Kingdom in defending against the current threat, particularly detention by executive fiat of citizens for investigation or otherwise, may find less sure support for national legislation in s 51(vi) and even s 51(xxxix) of the *Constitution*.

So it is then that, at the end of this perhaps overlong journey through aspects of Commonwealth legislative competence a point of uncertainty is reached on existing jurisprudence as to what measures might validly be enacted by the Commonwealth Parliament to address the ongoing phenomenon of religiously motivated acts of domestic violence.

What then of direct action in the exercise of executive power? On Monday, 2 May 2011, acting on the direct orders of then United States President Barak Obama, as President and Commander in Chief, uniformed members of the United States armed forces entered Pakistan and killed Osama bin Laden.[93] Bin Laden was never tried in absentia by a court exercising the judicial power of the United States under Art III of the United States Constitution, found

88 UK Cabinet Office, Intelligence and Security Committee, *Report into the London Terrorist Attacks on 7 July 2005* (along with the government's response) <https://www.gov.uk/government/publications/report-into-the-london-terrorist-attacks-on-7-july-2005>.

89 Initially, the *Prevention of Terrorism (Temporary Provisions) Act 1974* (UK) (since repealed).

90 The *Terrorism Act 2000* (UK), the *Anti-Terrorism Crime and Security Act 2001* (UK), the *Prevention of Terrorism Act 2005* (UK), the *Terrorism Act 2006* (UK) and, latterly, the *National Security and Investment Act 2021* (UK).

91 See, notably, Parliamentary Joint Committee on Intelligence and Security (PJCIS) Research Paper, 'Counter-terrorism and National Security Legislation Reviews: A Comparative Overview', 7 August 2014 <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/CounterTerrorism>; and, more recently, Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Counter-Terrorism Legislation Amendment (2019 Measures No 1) Bill 2019* (Commonwealth of Australia, October 2019) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/CTLA2019MeasuresNo1/Report>.

92 Previously limited only by obligations arising from that country's now former membership of the European Union.

93 Macon Phillips, 'Osama Bin Laden Dead', White House Archives, 2 May 2011 <https://obamawhitehouse.archives.gov/blog/2011/05/02/osama-bin-laden-dead>.

guilty on admissible evidence of complicity in the attacks which occurred on 11 September 2001 and sentenced to death. His complicity was only ever established by intelligence and then only to the satisfaction of the executive.

More recently, again on the direct orders of a United States President and Commander in Chief, on this occasion President Donald Trump, the armed forces of the United States assassinated the Iranian General Qasem Soleiman, head of Iran's Quds Force of the Islamic Revolutionary Guards Corps, by a drone strike in Iraq on 3 January 2020.[94] That assassination was explained on the basis of not only Soleiman's involvement in attacks on United States forces but also other acts of aggression by the post-1979 Iranian government. In this instance also, Soleiman's involvement was the result of an executive finding based on intelligence, not a judicial determination based on admissible evidence. Yet, if the 'War on Terror' is, as well it might, truly to be regarded as a war, the need for judicial sanction on evidence of the killing of an enemy by an officer of the executive is superfluous.

In a report delivered after Soleiman's assassination, the then United Nations special rapporteur on extrajudicial killings, Agnes Callamard, questioned the legality under international law of the assassination, observing:

> The targeted killing of a State actor in a third State has brought 'the signature technique of the so-called "war on terror" into the context of inter-State relations' and highlighted the real risks that the expansion of the "war on terror" doctrine poses to international peace.[95]

One might, with respect, wonder what the demolition by aircraft strike of the World Trade Centre towers or a wing of the Pentagon was if not a violation of 'international peace'.

The special rapporteur decried the absence of an imminent threat, as opposed to the use of past acts of aggression as justification, stating that this blurred the distinction between *jus ad bellum* and *jus in bello*.[96] Yet, with respect, the very nature of the ongoing phenomenon of religiously motivated foreign state and non-state actor sponsored or supported domestic violence has already blurred, if not rendered meaningless, the distinction between *jus ad bellum* and *jus in bello*.

This distinction apart, a recollection of history shows how nuanced, even at the height of a major conventional war, a distinction between a lawful and unlawful combatant may be. On 27 May, 1942, in Operation Anthropoid, the truly evil Reinhard Heydrich, Chief of the Reich Security Main Office and the Acting Reich Protector of the German Protectorate of Bohemia and Moravia, was attacked in Prague by a team of Czech and Slovak paratroopers, dressed

94 'Remarks by President Trump on Iran' White House Archive, 8 January 2020 <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-iran/>.

95 'A/HRC/44/38: Use of armed drones for targeted killings — Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' ('UN Special Rapporteur Drones Report'), 15 August 2020, para 62 <https://www.ohchr.org/en/documents/thematic-reports/ahrc4438-use-armed-drones-targeted-killings-report-special-rapporteur>.

96 Ibid para 61(c).

in civilian clothes, led by Josef Gabcík and Jan Kubiš.[97] Heydrich died early the following month from the wounds inflicted on him in that attack. Yet Czechoslovakia had ceased to exist as a country in 1939, prior to the outbreak of the Second World War, initially as a sequel to the Munich Agreement of 1938, then by the withdrawal of Slovakia from the rump federated state that followed that agreement and finally by the German occupation of what remained. The attack on Heydrich was one which served geopolitical ends rather than one conducted in the heat of battle. Since 3 September 1939, the United Kingdom had been at war with Germany. By May 1942, the United Kingdom had recognised a Czechoslovak government in exile under the former Czechoslovak president, Edmund Beneš, as had the Soviet Union. In contrast, full United States recognition of a government in exile for Czechoslovakia did not occur until October 1942.[98] Gabcík and Kubiš had been trained in the United Kingdom and deployed from there to the territory of the former Czechoslovakia. Few outside Nazi Germany lamented Heydrich's demise, even in 1942. As at the time of his death and although the United States was by then at war with Germany, it might nonetheless be argued that, from a then United States perspective, Heydrich died as a result of a targeted killing by state (United Kingdom) sponsored non-state actors who were unlawful combatants, just assassins. Equally, of course, one can overanalyse such actions and events and thereby do an injustice to Gabcík and Kubiš and their group of fellow, very brave men. Perhaps, with respect, one can also overanalyse the demises of Osama bin Laden and General Soleiman.

In her report, Special Rapporteur Callamard lamented the tendency of judicial branches of government to hold that targeted assassinations such as that of General Soleiman were not justiciable. She stated:

> 27. Judicial practice is not, however, yet in synch with these normative arguments. Thus far, courts have refused to oversee the use of drones to carry out targeted killings extraterritorially, arguing that such matters are political or relate to international relations between States and are therefore non-justiciable. A blanket denial of justiciability over the extraterritorial use of lethal force cannot be reconciled with recognized principles of international law, treaties, conventions and protocols, and violates the rights to life and to a remedy.[99]
>
> [Footnote reference omitted]

A case cited by Special Rapporteur Callamard as exemplifying a disposition to deny justiciability over the extraterritorial use of lethal force is *Regina (Khan) v Secretary of State for Foreign and Commonwealth Affairs*[100] ('*Khan*').

The leading judgment in *Khan* is that of Lord Dyson MR, with whom Laws and Ellas LJJ agreed. As taken from his Lordship's judgment, the factual background to the case was this. The claimant for leave to issue judicial review proceedings, Mr Noor Khan, lived in Miranshah, North Waziristan Agency ('NWA'), in the Federally Administered Tribal Areas of

97 Milan Hauner, 'Terrorism and Heroism Reflections on the Assassination of Reinhard Heydrich' (2007) *World Policy Journal*, Summer (Hauner) <https://www.academia.edu/35644386/Terrorism_and_Heroism_Reflections_on_the_Assassination_of_Reinhard_Heydrich see also Operation Anthropoid, Jewish Virtual Library: https://www.jewishvirtuallibrary.org/operation-anthropoid>.

98 ZAB Zellman and Milan Hauner, 'Czechoslovak history: The breakup of the republic' Encyclopaedia Britannica, <https://www.britannica.com/topic/Czechoslovak-history/The-breakup-of-the-republic>.

99 UN Special Rapporteur Drones Report (n 95) para 27.

100 [2014] 1 WLR 872.

Pakistan. His father was a member of the local jirga, a peaceful council of tribal elders whose functions included the settling of commercial disputes. On 17 March 2012, the claimant's father presided over a meeting of the jirga held outdoors at Datta Khel, NWA. During the course of the meeting, a missile was fired from an unmanned aircraft, or 'drone', believed to have been operated by the United States Central Intelligence Agency ('CIA'). The claimant's father was one of more than 40 people who were killed by the impact of the missile strike.

An interesting footnote to the case, and perhaps not a coincidental one, is that the general area where the drone strike occurred would once have been known as the North West Frontier of British India and familiar to LT Winston Churchill and the members of the Malakand Field Force.

Mr Khan sought judicial review of a decision by the defendant, the Secretary of State for Foreign and Commonwealth Affairs, to provide intelligence to the United States authorities for use in drone strikes in Pakistan, among other places, by way of, amongst other things, a declaration that:

> a. person who passed to an agent of the United States Government intelligence on the location of an individual in Pakistan, foreseeing a serious risk that the information would be used by the CIA to target or kill that individual (i) was not entitled to the defence of combatant immunity, and (ii) accordingly might be liable under domestic criminal law for soliciting, encouraging, persuading or proposing a murder (contrary to section 4 of the *Offences Against the Person Act 1861* (UK)), for conspiracy to commit murder (contrary to section 1, or 1A, of the *Criminal Law Act 1977* (UK)) or for aiding, abetting, counselling or procuring murder (contrary to section 8 of the *Accessories and Abettors Act 1861* (UK)).

He was refused leave by a Queen's Bench Divisional Court. From that refusal, he appealed to the Court of Appeal.

To give context to a conclusion reached by Lord Dyson, it is necessary to set out his Lordship's summary of a way in which the case for Mr Khan came to be advanced:

> It is true that, if Mr Chamberlain's construction of section 52 of and Schedule 4 to the 2007 Act is correct, the court will not be asked to make any finding that CIA officials are committing murder or acting unlawfully in some other way. Nor will the court be asked to say whether the US policy of drone bombing is unlawful as a matter of US law. As a matter of strict legal analysis, the court will be concerned with the hypothetical question of whether, subject to the defences available in English law, an UK national who kills a person in a drone strike in Pakistan is guilty of murder. The court is required to ask this hypothetical question because, if Mr Chamberlain is right, that is what the 2007 Act requires in order to give our courts jurisdiction to try persons who satisfy the 'relevant conditions' set out in paragraph 1 of Schedule 4.[101]

In rejecting an argument so grounded, his Lordship concluded:

> 37. In my view, a finding by our court that the notional UK operator of a drone bomb which caused a death was guilty of murder would inevitably be understood (and rightly understood) by the US as a condemnation of the US. In reality, it would be understood as a finding that (i) the US official who operated the drone was guilty of murder and (ii) the US policy of using drone bombs in Pakistan and other countries was unlawful. The fact that our courts have no jurisdiction to make findings on either of these issues is beside the point. What matters is that the findings would be understood by the US

101 Ibid [35].

> authorities as critical of them. Although the findings would have no legal effect, they would be seen as a serious condemnation of the US by a court of this country.[102]

An alternative argument for Mr Khan based on an alleged violation of international humanitarian law fared no better, and for like reasons. His Lordship stated:

> I am satisfied that the secondary claim in this case founders on the same rock as the primary claim. The claimant is inviting the court to make a finding condemning the person who makes the drone strike as guilty of committing a crime against humanity and/or a war crime. Since that person is a CIA official implementing US policy, such a finding would involve our courts sitting in judgment of the USA.[103]

As can be seen, influential to the outcome in *Khan* was that the drone strike was executed not by the British military but, rather, by an agency of the government of a foreign power, the United States of America.

Suppose, however, that, in lieu of deciding to revoke Mr Alexander's citizenship but on the same intelligence, the Australian Government had passed that intelligence to the CIA with a request that, such was the threat he posed to Australian national security, and the security of other countries engaged in the 'War on Terror', Mr Alexander should be added to a drone strike target list and, if located in Syria or elsewhere in the Middle East, killed. At common law, would an Australian court entertain a claim like that of Mr Khan's son if Mr Alexander were killed?

Although, in light of *Carter v Egg and Egg Pulp Marketing Board*,[104] it is no longer correct, as was held in *Joseph v Colonial Treasurer of New South Wales*[105] (*Joseph*) to say that the states lack legislative competence with respect to defence, the statement in *Joseph* that the 'war prerogative' vests in the Commonwealth remains good law.[106] Complementing the 'war prerogative', the *Constitution* consigns the command in chief of the ADF to the Governor-General as the King's representative.[107]

That 'war prerogative' might these days more aptly be regarded as falling within the executive power of the Commonwealth which, by s 61 of the *Constitution*, is vested in the King and exercisable by the Governor-General. Although s 61 has already been mentioned above and its interplay with s 51(xxxix) of the *Constitution* considered in relation to an exercise of legislative power, it is desirable now to set out its terms in full, because of the particular purposes for which it consigns executive power to the Governor-General:

> **Executive power**
>
> The executive power of the Commonwealth is vested in the Queen and is exerciseable by the Governor-General as the Queen's representative, *and extends to the execution and maintenance of this Constitution*, and of the laws of the Commonwealth.
>
> [Emphasis added]

102 *Khan* [2014] 1 WLR 872 [37].
103 Ibid [51].
104 (1943) 66 CLR 557.
105 (1918) 25 CLR 32.
106 Ibid 47.
107 *Constitution*, s 68.

In *Victoria v The Commonwealth*[108] ('*Australian Assistance Plan case*'), Jacobs J considered that the words emphasised in s 61 carried this meaning:

> Within the words 'maintenance of this *Constitution*' appearing in s 61 lies the idea of Australia as a nation within itself and in its relationship with the external world, a nation governed by a system of law in which the powers of government are divided between a government representative of all the people of Australia and a number of governments each representative of the people of the various States.[109]

In this statement, one sees the notion of the executive, via s 61, having the constitutional duty of the preservation of Australia as a nation, including via the interaction of the executive with the wider world.

That this part of s 61 carries such a meaning was made explicit by Brennan J in *Davis v The Commonwealth*[110] and by Gummow, Crennan and Bell JJ in their joint judgment in *Pape v The Commonwealth*[111] ('*Pape*'). Their Honours stated:

> The *Constitution* assumes also, in s 119, the existence and conduct of activities by 'the Executive Government of the State'. The conduct of the executive branch of government includes, but involves much more than, enjoyment of the benefit of those preferences, immunities and exceptions which are denied to the citizen and are commonly identified with 'the prerogative'; the executive power of the Commonwealth enables the undertaking of action appropriate to the position of the Commonwealth as a polity created by the *Constitution* and having regard to the spheres of responsibility vested in it.
>
> With that understanding, the phrase 'maintenance of this *Constitution*' in s 61 imports more than a species of what is identified as 'the prerogative' in constitutional theory. *It conveys the idea of the protection of the body politic or nation of Australia*.[112]

It is therefore tolerably clear that s 61 of the *Constitution* confers on the executive not only the role of waging war but also a role of protecting the nation.

As it happens and in relation to the United Kingdom, these twin responsibilities featured in an examination by the United Kingdom Parliament's Joint Committee on Human Rights of the circumstances which gave rise to *Khan*.[113] One main reason for the conduct of that inquiry was expressed by the Committee to be 'the need to provide reassurance to all those involved in implementing the Government's policy that they are not running the risk of criminal prosecution for murder or complicity in murder'.[114] The Committee apprehended that 'Where UK personnel kill another person abroad as part of a traditional armed conflict, the defence of combatant immunity applies and there is no risk of criminal liability provided the killing was in accordance with the Law of War'. One might comfortably apprehend that a similar position applies in relation to Australia.

108 (1975) 134 CLR 338.
109 Ibid 406
110 (1988) 166 CLR 79, 110.
111 (2009) 238 CLR 1.
112 Ibid [214]–[215] (emphasis added).
113 House of Lords and the House of Commons, Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing* (Second Report, Session 2015–2016, 10 May 2016) ('UK Joint Committee Report') <https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/57402.htm>.
114 Ibid para 1.45.

The Committee concluded that it was 'clear that the [UK] Government does have a policy to use lethal force abroad outside armed conflict for counter-terrorism purposes'.[115] The Committee also concluded that the execution of that policy by UK personnel was lawful, within very particular limits.

> The … use of lethal force abroad outside of armed conflict should only ever be 'exceptional'. … [We] accept that in extreme circumstances such uses of lethal force abroad may be lawful, even outside of armed conflict. Indeed, in certain extreme circumstances, human rights law may even impose a duty to use such lethal force in order to protect life. How wide the Government's policy is, however, depends on the Government's understanding of its legal basis. Too wide a view of the circumstances in which it is lawful to use lethal force outside areas of armed conflict risks excessively blurring the lines between counter-terrorism law enforcement and the waging of war by military means, and may lead to the use of lethal force in circumstances which are not within the confines of the narrow exception permitted by law.[116]

In relation to Australia, a starting premise is that 'It is fundamental to our legal system that the executive has no power to authorize a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer'.[117] However, having regard to the authorities just mentioned concerning s 61 of the *Constitution*, the executive power of the Commonwealth is broad enough for an Australian Government lawfully to adopt, for the protection of the Australian nation and as a matter of political value judgment, a policy like that of the UK Government, as described in the Committee's report. Further, there is no reason to think that, under the Law of Armed Conflict and International Humanitarian Law, the position in relation to the execution of such a policy would be any different for Australia to that described in the Committee's report.

Insofar as it were thought necessary or desirable to provide greater domestic law certainty for those engaged in the execution abroad of such a policy as to the lawful limits of engagement, the existing case law concerning both the defence and incidental heads of legislative power, discussed above, means that these heads of power would provide an uncertain foundation for resultant legislative validity. The position in respect of legislative competence would be more certain if the external affairs power[118] were invoked. That would engage the 'geographical externality' principle, which holds that this head of legislative power includes a power to make laws with respect to places, persons, matters or things outside Australia's geographical limits.[119]

Any endeavour to secure even declaratory relief from an Australian court in relation to conduct by an officer of the Commonwealth akin to that of UK officials in *Khan* would not necessarily see the same outcome as in that case in terms of a refusal to sit in judgment on the actions of the United States. To read the above-quoted observation by Dixon J in the *Communist Party case*, one might think that such a value judgment of the executive government was unexaminable in the courts, but several later authorities, mentioned below, suggest one should not assume there is a blanket prohibition.

115 Ibid para 2.39.
116 Ibid para 2.40.
117 (1984) 156 CLR 532, 540.
118 *Constitution*, s 51(xxix).
119 *XYZ v The Commonwealth* (2006) 227 CLR 532.

In *Re Ditfort; Ex parte Deputy Commissioner of Taxation*[120] ('*Ditfort*'), Gummow J, then a judge of the Federal Court of Australia, when considering diplomatic notes exchanged between Australia and Germany and whether false statements had been made by the Australian Government to the German Government, was of the view that, unlike in the United Kingdom, where the conduct of diplomatic relations fell within the prerogative power, in Australia the subject fell within s 61 of the *Constitution* with the result that the Court could adjudicate on matters going to restraints on and the extent and nature of the executive power as a constitutional question.[121] Justice Gummow qualified his view as to the general position in this way:

> there will be no 'matter' [on which the Court can adjudicate] if the plaintiff seeks an extension of the Court's true function into a domain that does not belong to it, namely the consideration of undertakings and obligations depending entirely on political sanctions.[122]

Hicks v Ruddock[123] concerned an application by an Australian citizen who had been confined at Guantanamo Bay Naval Base in Cuba for five years after apprehension in Afghanistan for judicial review of an Australian Government decision not to request his release and return to Australia and a related application for habeas corpus. In refusing an application or summary dismissal, Tamberlin J acted on the correctness of *Ditfort* and, after discussing some United States authorities, concluded that 'neither the Act of State doctrine nor the principle of non-justiciability justify summary judgment at this stage of the proceeding'.[124]

Habib v Commonwealth (No 2)[125] was another case arising from the detention, as an alleged unlawful combatant, of an Australian citizen at Guantanamo Bay as an unlawful combatant and earlier in Pakistan and Egypt. He alleged that he was illegally detained and tortured by overseas authorities and that the Australian Government knew of this but did little or nothing to stop it from taking place, in addition to its officers themselves examining him in oppressive circumstances. His claims against the Commonwealth included a claim in respect of the tort of harassment resulting in mental or psychological shock and an alleged breach of fiduciary duty on the basis that the Commonwealth should have exercised its constitutional power to conduct foreign relations in his interests and misfeasance in public office by Commonwealth officers. Justice Perram held that the act of state doctrine did not necessarily apply to prevent the Court from examining the rights and wrongs of the acts of a foreign state, as it is arguable that there is an exception to the principle where the acts of the foreign state in question constitute grave breaches of international law.[126] His Honour considered that a claim for misfeasance could be sustained if it could be said that the provision of intelligence for use in Mr Habib's torture was contrary to Commonwealth law pursuant to the third and fourth Geneva Conventions (the *Convention Relative to the Treatment of Prisoners of War* and the *Convention Relative to the Protection of Civilian Persons in Time of War*, done at Geneva on 12 August 1949). These conclusions were reached in the context of an interlocutory application concerning the adequacy of pleadings, rather than in a final judgment. However,

120 (1988) 19 FCR 347.
121 Ibid 369.
122 Ibid 370.
123 (2007) 156 FCR 574.
124 Ibid [34].
125 (2009) 175 FCR 350.
126 Ibid [75], [78] and [81].

in later, related proceedings in the Full Court, it was held that the application of the act of state doctrine to preclude judicial determination of Mr Habib's claims would be inconsistent with the Australian constitutional framework and with Ch III of the *Constitution*, which confers jurisdiction on federal courts to review the legality of acts of Commonwealth officials under Commonwealth law.[127]

If ever at common law there were a 'domain that does not belong to it' for the judiciary, it was, and remains, acts of war. In actual or imminent contact with the enemy, a rule of necessity applies to members of the ADF, *Salus populi suprema lex*, but this immunity from scrutiny is in circumstances of emergency and necessarily transient.[128] But, even in wartime, there is a difference between operations in war and operations of war. Only the latter are not justiciable. Even to secure judicial acceptance that a present state of war existed such that this type of immunity might arise in relation to particular offshore actions might very well require singular evidence.[129]

Further, with new and evolving technologies, the longstanding experience and practice of deployment of the ADF offshore to meet particular threats may, as never before, be supplemented or in some cases replaced by weapons platforms controlled remotely from Australia. Even with such platforms, actionable intelligence may be highly time sensitive as, I should expect, was that upon which the United States acted to target and kill General Soleiman as he exited the airport in Baghdad, Iraq. Remoteness of location from a foreign target of a domestic initiator of an engagement of that target does not necessarily diminish the urgency of tactical decision that is a factor which informs why, in relation to operations of war, such decisions are not justiciable at common law.

In short, then, the Australian judiciary has not, in times of earlier conflict, approached the *Australian Constitution* as if it were a suicide pact. But they have been scrupulous in confining the extent of the remit of both the defence power and the incidental power in relation to the valid enacting laws of domestic application within the limits of wartime necessity. However, the 'War on Terror' presents a very different threat to cases which have in the past addressed these powers to legislate. The existing case law raises interrogative notes as to the limits of Commonwealth legislative competence with respect to these powers to enact measures to deal with this current threat. As to the actions of the executive government abroad, Commonwealth executive power may well be sufficient to authorise the targeted killing of non-state actors who present an imminent threat to the Australian nation, but it should not be assumed that the question of whether that killing was lawful is not justiciable in a court exercising Commonwealth judicial power under Ch III of the *Constitution*. As yet, that remains an open question and one the answer to which will probably require singular evidence to be tendered describing the nature and extent of the ongoing 'War on Terror' and of the consequential threats to Australia.

127 *Habib v Commonwealth* (2010) 183 FCR 62.

128 *Shaw Savill And Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344, 354 (Starke J); 361–2 (Dixon J, Rich ACJ and McTiernan J agreeing), 367 (Williams J).

129 *Shaw Savill And Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344, 356 (Starke J).