

1975: Barwick CJ, the CIA and Kerr – conspiracy goes back to the future

By Humphrey McQueen*

A revival of interest in the dismissal of the Whitlam government on 11 November 1975 is focusing on who advised the Governor-General, Sir John Kerr. The role of the Chief Justice of the High Court, Sir Garfield Barwick, has been known almost from the start. Knowledge of a second counselor has been there for many years, with the near certainty that he was also the member of the High Court, and later Chief Justice, Sir Anthony Mason.

The current discussion is part of a campaign to promote the second volume of Jenny Hocking's new book on the life of Whitlam. Mason has released a statement to the Fairfax media (*AGE*, *SMH*, etc). The media will go on debating the propriety of the two judges' behaviour.

Mason was not a principal in this process. At the bar, he had been junior to Barwick and carried that deference into his first years on the bench, concurring with his Chief's opinions. His advice to Kerr was more like that of a judge's associate than a second opinion in all but one respect. His experience as Commonwealth solicitor-general from 1964 to 1969 made him the ideal person to draft a letter of dismissal in terms most likely to survive judicial challenge.

As diverting as these details might be to legal eagles, two aspects of the dismissal are unlikely to get the scrutiny they deserve. The first is the role of the US Central Intelligence Agency (CIA) in the dismissal. The second is the class nature of the legal system culminating in the High Court. Kerr and Barwick were both deeply involved with the security police; the High Court is one more state apparatus in a covert dictatorship of the bourgeoisie; the same goes for the office of Governor-General.

One mark of the extent to which bourgeois ideology pervades even the broad Left here in Australia is that these facts of political life can appear extreme. This piece puts some flesh, no matter how putrid, on these bones.

Governors-General

In these proto-republican days when the Governor-General's job is ceremonial, coming no closer to political involvement than 30-second grabs of moral exhortation, most Australians find it harder than ever to recognise that gubernatorial posts carry a legacy of intrigue in international and domestic affairs. Once that past is recognised the notion of Kerr as the CIA's man in Canberra is normalised.

Munro Ferguson 1914-20

For the Commonwealth's first 27 years, the Governor-General was not only the monarch's representative, but also served as the channel for the British government. The tasks were split after 1927 with Britain's appointment of a High Commissioner. Hence, no one should be surprised that, during the First World War, Government House, then in Melbourne, was the headquarters for the Counter Espionage Bureau,

run by the Governor-General's Official Secretary, George Steward, and watched over by His Excellency, Sir Ronald Munro-Ferguson. Steward had come from the army Intelligence Corps, was also secretary of the Executive Council, and retired to become Victoria's Police Commissioner. (Christopher Cunneen, *King's Men*, pp. 141-2.)

Bill Slim 1953-60

For the next 30 years, London could rely on its High Commissioners to influence the Australian government, buttressed by what radical nationalists called 'the British Garrison' of admirals, bishops, editors, headmasters and professors. That arrangement proved insufficient as Canberra accepted the exclusion of no-longer-so Great Britain from the ANZUS Alliance. The Australian cabinet fractured when Prime Minister Menzies wanted to back Britain in the Middle East against External Affairs Minister Spender who committed combat troops to Korea late in June 1950. To protect Empire interests, Whitehall sent out the Chief of the Imperial General Staff, Sir William Slim, although he was seriously unfit at the time. Three years later, in 1953, Menzies appointed him Governor-General, in effect, taking the office back to the days when the incumbent was also the prime agent of the British government. Chief of the General Staff is one of those jobs from which you never 'retire'.

The difference between Munro-Ferguson and Slim, on the one hand, and Kerr on the other, is that he was Washington's man, not Whitehall's, one of the President's men, not the Queen's man.

Kerr 1974-77

Like a lot of Cold War Warriors, John Kerr had started on the extreme Left in the 1930s. He abandoned his Trotskyist rejection of the war as a new round of inter-Imperialist contests to join the Directorate of Research, which he later described as living

on the fringe of the Army, it was not of the Army in any true and deep sense, it was a peripheral institution existing for the purposes of the Commander-in-Chief's [Field-Marshal Blamey] relations and the Army's relations of a slightly unorthodox character with outside institutions in this country and abroad. (quoted Richard Hall, *The Real John Kerr*, 1978)

Continuing his interest in Papua-New Guinea, he was first principal of the School of Pacific Administration in 1946, and on the Council on New Guinea Affairs in the 1960s when the defence and intelligence hierarchs feared that calls for self-government would turn towards communism. [See below for my letter to *Canberra Times*, July 1975]

In 1950, Kerr joined forces with the catholic Santamaria's Industrial Groups in legal work for another erstwhile Trotskyite, Laurie Short, to wrest control of the Ironworkers from the Communists. Kerr forged links with other right-wing NSW unions, including the gangsters at the Builders' Labourers' Federation who entertained him at Abe Saffron's Roosevelt Club. [*Photo shows Kerr at the club...on the viewer's right, towards the rear*]



Around this time, he began his association with CIA fronts, never finding one he was too busy to join, from the Congress for Cultural Freedom to LawAsia. As a judge in the Commonwealth Industrial Court, he sent Tramways Secretary Clarrie O'Shea to prison in 1969 for refusing to pay fines. Kerr later told intimates that ASIO had paid them to head the ensuing strike wave. Through ties to the Liberal Party, Kerr became NSW Chief Justice in 1972 before Whitlam picked him as Governor-General in September 1974.

The Labor government's relations with the US had got off to a bad start in December 1972 with two senior ministers denouncing the Christmas Eve bombing of Haiphong Harbour in Vietnam. As a sign of Washington's concern, it sent a career diplomat, and not some crony, as Ambassador. More tellingly, the choice was Marshall Green who had been in Jakarta helping to orchestrate events that led to the massacre of over half-a-million leftists in 1965-66. Green calmed the State Department but not the CIA's head of counter-intelligence, James Jesus Angleton, whose suspicions were fed by the 'raid' on Melbourne's ASIO offices in March 1973 led by Labor's Attorney-General Lionel Murphy. From that point on, the spooks convinced each other that the government had to go. Whitlam further enraged the crazies by setting up a Royal Commission into all the intelligence agencies.

By the end of October 1975, the Australian intelligence community was in chaos. Whitlam had sacked the heads of Australian Secret Intelligence Service and ASIO. One by-product of this lack of 'safe' leadership was that cables from the CIA found their way to the government and from there to journalists who published them. The prime concern of those communications was the CIA's key communications base at Pine Gap. (The traffic is reprinted in Brian Toohey and Marian Wilkinson's *The Book of Leaks*, 1987).

The crux of the matter was whether Whitlam's loose talk portended a rupture in the Alliance. The Pine Gap terms were to be renegotiated in a month's time. Head of the CIA's East Asia division, Ted Shackley, sent an official demarche on a service-to-

service basis, that is, not to be seen by politicians. The cables feared that Whitlam was about 'to blow the lid off those installations in Australia ... which are vital to both of our services and country, particularly the installation at Alice Springs' and 'if this problem cannot be solved they do not see how our mutually beneficial relations are going to continue.'

Those who seek to deny any link between protecting the CIA interests at Pine Gap and the dismissal have a load of evidence to sweep away. Kerr had resisted huge pressures, notably from the banks, to intervene. The alarms at Langley about what the hell was going on in Canberra and what Whitlam might be exposing next would have been enough to trigger an action which Kerr had been contemplating on purely local grounds for more than a year. On the day he was sacked, Whitlam was to identify the previous boss at Pine Gap, Richard Stallings, as CIA.

The part played by the CIA in the downfall of the Whitlam government returned to the spotlight when a young US American claimed that he had decided to sell CIA secrets to the Soviet embassy in Mexico City because of his disgust at his employer's dirty tricks against Australian Labor. Robert Lindsey told this story in *The Falcon and the Snowman*, which became the eponymous feature film in 1984. The other bunch of investigations to circle CIA doings down-under followed the apparent suicide, outside Lithgow (NSW) in 1980, of a co-founder of the Nugan-Hand Bank, an asset in CIA money-laundering, drug-trafficking and gun-running. (see Jonathan Kwitny, *The Crimes of Patriots*)

My letter published in the *Canberra Times* on 17 July 1975.

Sir,

Your editorial (4 July) softening up for a gubernatorial coup feeds speculation about the present Governor-General of Australia. Suspicion arises partly because of his past, partly because of the unusual nature of his appointment, and partly because that appointment has in no way lessened his longstanding special interest in political and international events.

Sir John Kerr's political career started with his membership and eventual leadership of the Civil Affairs Unit, Directorate of Research and Civil Affairs, during the first Pacific War. In the early 1950s, he worked as counsel for Industrial Group officials in the trade union movement. His role in developing a 'secure' legal system for Papua-New Guinea is also well documented.

His appointment was puzzling. For the first time since 1920, Australia has a Governor-General who is neither a has-been nor a remittance man. Why should a man in the fullness of his powers accept such a titular position when he could serve his class in so many other ways?

Finally, the vice-regal notices in your columns repay scrutiny. For example, on 20 September 1974, Sir John Kerr entertained Gordon Jockell, Director of the Joint Intelligence Organisation; W.B. Prichett, first assistant secretary, Defence Planning; Mr Peter Hastings, Research Fellow in the Strategic

Studies Centre at the Australian National University; and Professor Beddie, from the Political Science Department, Duntroon [Military College]. Any judicial inquiry into recent political events will be incomplete if it assumes that the career prospects of intelligence agents are in any way limited.

*Humphrey McQueen
Griffith, ACT*

The point of this luncheon party was not the overthrow of Whitlam. Rather, it was to aid the establishment of an intelligence organisation in Papua-New Guinea as it approached self-government.

The High Court

The propriety of a judge's blurring the supposed separation of powers between the judiciary, executive and legislature offends only those who cannot see how all branches of the state underpin the interests of capital.

The simplest way to demonstrate the class nature of the High Court is to track the careers of its members. Striking as many of the justices are as embodiments of reactionary politics and even business interests, a head count proves little about the place of the Court in a class society. To establish that relationship requires penetrating to the biases embedded in bourgeois jurisprudence, an appellation which law students are trained to dismiss when they cannot ignore the charge of systemic class prejudice.

Nonetheless, one benefit from a biographical introduction is to show that Barwick's and Mason's engagements with Kerr were not unique, or even unusual. The Chief Justice had been far right-wing politicians for sixty-five of the 109 years of the Court's existence: Griffith from 1903-19; Latham from 1935 to 1951; Barwick from 1964 to 1981. When we speak of Lefties on the bench we are dealing with Deakinite liberals – Isaacs, Higgins, Evatt, McTiernan, Webb, Murphy, Gaudron and Kirby.

***ultra vires* – beyond Powers**

Among the most contemptible of the High Court judges was Chas Powers, appointed in 1913 with a mildly progressive outlook. The surge in class conflict soon moved him to the position of lickspittle for the bosses. In April 1925, he wrote to the Attorney-General asking for a knighthood on the grounds that, as President of the Conciliation and Arbitration Court, he had blocked the increases recommended by the Royal Commission into the Basic Wage, restored the 48-hour week and cut twelve shillings a week from the wages of fitters and turners:

All these were very unpleasant duties but necessary in the interests of the Commonwealth. ... Imagine for eleven years refusing requests to increase the basic wage ... Where men have families of more than two it is hard work to insist of them getting only the basic wage. (National Library, MS 236/2/851-4)

He pleaded that such devotion to public service and the worry that it caused him, warranted the reward of an imperial gong; the Attorney-General treated this toady with the contempt he had earned, by making him wait until he retired in 1929.

Griffith CJ 1903-19

The first Chief Justice, Sir Samuel Griffith, had started out as a small-l liberal in Queensland, been impressed by Marx's *Capital* in 1888, but then sent mounted police to break shearers' strikes while forming a coalition with the corrupt premier Thomas McIlwraith (the Griffilwraith) . Griffith found time to translate Dante and to draft the Constitution which he interpreted according to his own lights once on the bench from 1903. In particular, he struck down every Act or judgment which strengthened the hand of labour under the industrial power (section 51 xxxv). Judicial activism was off to a flying start.

Supping with devils - Knox CJ 1919-30

Although commercial and corporate law takes up most of the time of most lawyers, the crossover between business and the bench is spectacular in the case of Chief Justice Knox, scion of the family atop the sugar monopoly CSR. He took over from Griffith in 1919 but resigned in 1930 to manage, as residual legatee, the estate of the coal baron John Brown, notorious for his attacks on his workforce.

The everyday workings of class dominance are nicely illustrated through an examination of the 1920 volume of the diary of the managing director of BHP, G.D. Delprat. (National Library, MS 1630/15) Because the diary was only an appointment book, it is necessary on occasion to identify from wider reading what was going on, though there is no need to invent anything. Those interpolations are given in square brackets:

18 February: Called on Inspector General Mitchell in connection with B[roken] Hill police. Promised to give one of his detectives work at Electric shop.

[A spy in the works during the 18-month lockout.]

15 May: dined at Melbourne Club with The Chief Justice (Knox) Judge Stark[e] Judge Cussen Judge Duffy General White Admiral Grant.

[Here was an executive committee of the bourgeoisie. White later headed the paramilitary 'White Army'.]

2 October: Taken silver plate out of the safe deposit for Tuesday's dinner.

4 October: Invited Chief Justice and Stark[e] to dinner, next day – they accepted. Meeting of mines committee – about Broken Hill.

5 October: In evening gave dinner party at my house ... Guests [names four BHP directors] and Rt Hon Chief Justice Knox and Mr Justice Stark[e].

22 November: Montheath and Payne came to see about cutting off supplies from Firm not keeping compact.

[One more instance of the minerals cartel.]

18 December: High Court Decision – (in our favour).

20 December: Left with 7.10 train for Melbourne. Chat with ... Sir Robert Garran [Solicitor-General].

22 December: Met Sir Robert Garran at his office by appointment. Explained in connection with Hobbles tribunal – Advised find out if Edmunds would give a statement that coke workers cannot belong to Coal and Shale Workers Union.

Here are nine entries covering a year, and what do we find? First, the managing-director of BHP arranges for a policeman to be placed in his firm; has dinner twice with leading judges while BHP has a case before the Full High Court – a case which it wins; is involved in a restrictive trade practice against firms which negotiate separately with unions; gets advice on how to proceed in an industrial dispute from the Commonwealth solicitor-general, whom he had bumped into two days before on a train.

The daily functioning of capitalist domination is not a run of conspiracies, though there is need for organisation. Rather than needing to plot every step of the way, the paths and ideas of the rich and powerful cross naturally so that when they meet they do not conspire but go about their business of running the country.

Latham CJ 1935-51

John Latham served his class in various ways. In 1915, he headed the Victorian organisation pushing for overseas conscription. Two years later, he became head of Naval Intelligence to root out subversion in the dockyards, a campaign he carried over into his parliamentary life as a reactionary attorney-general from December 1925 to 1929, and again from 1932 to 1934. During those years, he introduced a repressive Crimes Act in 1926, strengthening it in 1932 by banning the transmission of Red materials through the post. He failed to destroy Commonwealth Arbitration despite rewriting the Act and stacking the bench. His advice to cabinet in April 1929 shows how aware he was of the state as an instrument of class violence:

... it should be recognised that it is not possible, particularly with the limited executive agencies (police etc) available to a federal government, to compel obedience on a continental scale by merely legal means to an award to which the unions of Australia as a whole are opposed. The problem is smaller and simpler when the issue is fought upon a State arena – and the States have the police forces which the Commonwealth government lacks. (National Library MS 1009, series 28-4.)

As the Scullin Labor administration fell apart during 1931, Latham seemed assured of a smooth ride to the prime ministership. However, he stepped aside as leader of the opposition to make way for Labor rat Joe Lyons to head the United Australia Party. A conspiracy of Melbourne business and political figures managed those moves. One of those conspirators, R.G. Menzies, took over as Federal Attorney-General in 1934 and appointed his predecessor to the Chief Justiceship in 1935 as a consolation prize.

In 1951, Latham was the sole dissenter from the Court's rejection of the Communist Party Dissolution Act as unconstitutional. His reasoning expressed his life-long conviction that the government should be allowed to do whatever it decided was necessary to combat subversion. In retirement he became president of the Congress for Cultural Freedom but only after checking with ASIO to make sure it was not a communist front, like the Council of Civil Liberties.

Barwick CJ 1964-81

Barwick's road towards spookdom opened from 1950 when he defended the Menzies government's Act to ban the Communist Party before the High Court, a case he lost. He kept in touch with ASIO throughout the months of preparation for those hearings and later in advising the law officers on how to phrase the amendment proposed to the constitution to secure the ban, which the electorate rejected at the referendum. His involvement deepened when he intervened in 1954 to rescue ASIO's case at the Petrov Commission. ASIO officers briefed him at night on the next round of evidence so that he could coach the Commissioners before proceedings opened next morning into hearing only what ASIO wanted them to accept. On this basis, he then interrogated witnesses.¹

Barwick entered the federal parliament in 1958 on the assumption that he would take over as prime minister when Menzies retired. Instead, he retreated to the bench in 1964 after finding that his courtroom talents did not serve so well in the cut and thrust of parliamentary debate, still less on the hustings. As Attorney-General, he rewrote Latham's Crimes Act to give ASIO all the powers it wanted to compensate for the defeat of the Red ban and the failure of the Petrov Commission to identify anyone new.

His two achievements as Chief Justice were the construction of the High Court building in Canberra – aka 'the Gar Mahal' - and to legitimise every form of tax avoidance, notably bottom-of-the harbour schemes. In retirement, he told an interviewer that Whitlam had to be sacked to protect Australia from 'the jews', meaning the oil-rich Arabs during the Loans Affair. He had established his credentials as the mouthpiece for big capital in representing the banks up to the Privy Council against Chifley's Nationalisation Act in 1948.

On the basis of Barwick's lifetime of service to the corporate state and of obliging security services, his fortifying Kerr is no surprise.

Hawke as agent of US influence

Kerr's coup was a high-risk move. What if Whitlam refused to accept the sack? Or the Senate might swing behind Labour and grant supply? Beyond those high level concerns, there was no way of prejudging how furious would be the workers' response. Caucus was stunned and demonstrated its weakness when it gathered on the steps of the parliament to hear Whitlam call on his supporters to 'Maintain the rage' but then did not know the words of 'Solidarity forever' (there is more to exercising power than pronouncements from the top).

Meanwhile, across the continent, workers had downed tools with calls to block Fraser's ability to govern.

To the rescue rode another agent of US influence, R.J. Hawke, whom the Labour Attaché in the US Embassy had backed for the Presidency of the ACTU in 1969, recognising the need for a fake Leftie to contain the militancy, as the CIA had abandoned the Industrial Groupers. Hawke repaid them in spades on the afternoon of 11 November 1975 by exhorting unionists to stay on the job but denote a day's pay to the ALP campaign.

Capital commissions its lieutenants at every pressure point, from the High Court and Government House to the union movement.

ⁱ The failed ban and the Petrov Commission were linked by ASIO's hunt for any unidentified person(s) involved as the wartime informants to the Soviets who had been exposed by the partially decoded Venona transcripts. The defection of Petrov answered none the key questions that obsessed ASIO about what it called 'the case'. However, the Royal Commission into Espionage gave ASIO its chance to go on a fishing expedition for more of the clues that would point towards any unmasked 'nest of traitors', especially a sleeper. So far, so good. The problem was that the existence of the Venona material was itself a secret of the highest order. The handful who knew of Venona pretended that their information came from a mole inside the Soviet apparatus. The need-to-know principle meant that even prime ministers Chifley and Menzies heard no more than that there was hard evidence from the mole about enemy agents inside the Canberra bureaucracy. That assurance in 1948 convinced Labor prime Minister Chifley to set up ASIO and Menzies to drop his opposition to a ban on the Communist Party. Washington handed to ASIO only as much as it had gleaned from Venona; ASIO which then told Barwick of the 'mole' but did not, to use the technical term, 'indoctrinate' him into Venona.

ENDS



* Humphrey McQueen is a freelance historian and cultural commentator, renowned for his books, radio commentaries, articles and public speeches. He has written 19 books across history, media, politics and visual arts. Website: <http://www.alphalink.com.au/~loge27> He is a member of CLA.

CLA Civil Liberties Australia Inc. A04043
 Box 7438 Fisher ACT Australia
 Email: [secretary \[at\] cla.asn.au](mailto:secretary[at]cla.asn.au)
 Web: www.cla.asn.au