The High Court
FAILS HISTORY TEST
IN THOMAS JUDGMENT

The majority decision has stretched the elastic of the defence power out of all proportion, argues HELEN IRVING.

Helen Irving is associate professor in the Faculty of Law, University of Sydney.

On 2 August, in Thomas v Mowbray, the High Court upheld the constitutional validity of provisions in the Criminal Code (Cth) permitting a court, on the application of the Attorney-General, to issue control orders placing restrictions, prohibitions or obligations on an individual who is a member of, or trained by, a listed terrorist organisation and likely to engage in conduct falling within the Code’s definition of terrorism. These orders, the court held, were supported by the Commonwealth’s defence power (s. 51(vi) of the Constitution).

Responding to the judgment, many constitutional commentators were struck less by the court’s conclusions than the unusual appearance of Justice Hayne as a dissenter, and his even more unlikely alliance with the frequent dissenter Justice Kirby. Hayne’s conclusion that the provision was in breach of Chapter III of the Constitution and the making of control orders not a proper exercise of judicial power was particularly striking, given his position in previous cases where Commonwealth restrictions on individual liberty were at issue.

While the dissents may be a “big news story”, as some commentators have suggested, more worthy of note are the judgments of the majority. It is quite possible to agree that control orders are not unreasonable in principle, and still find the reasoning upon which Thomas is based unsatisfactory, even disturbing. Notable is the limited judicial engagement with the history of the defence power.

Students of constitutional law learn that the power is “elastic”. It “waxes and wanes” according to the existence or absence of actual or imminent national threats, reaching its widest expanse when Australia is at war, and diminishing as the war concludes, growing narrower as peace returns. Whether Australia is at war or peace, they learn, rests upon facts of which the court can take judicial notice. The defence power is “purposive”. A law with respect to defence requires a test of proportionality, so that legislative measures are capable of being seen as “reasonably appropriate and adapted” to the
purpose of defence. It can support internal measures for “defence preparedness”, but its central purpose relates to external threats and foreign aggression.

The Commonwealth cannot merely declare that the circumstances require a particular measure in the name of defence. It cannot, as was famously said in the 1951 Communist Party case, “recite itself into power”. In time of declared war, the defence power permits regulation of the economy and restrictions on daily life that would be unconstitutional during time of peace. But even then it remains subject to constitutional limitations. These principles emerge from cases like the Jehovah’s Witnesses case (1943) and Gratwick v Johnson (1945).

Without such limitations, students learn, the Commonwealth would be free to claim whatever it liked as necessary for Australia’s defence. As the court stated in R v Foster in 1951, without the insistence that the defence power retreats in time of peace, “nearly all the limitations imposed upon Commonwealth power by the carefully framed Constitution would disappear,” and a single head of power might take the place of all others. The rule of law, it might be added, may even be displaced by purported imperatives of defence.

The Thomas court paid surprisingly scant attention to this history. The Communist Party case, which should have drawn close analysis, received little sustained attention. Stopping short of actual overruling, much of the court’s reasoning treated the case as flawed. Justice Callinan was especially dismissive of Justice Dixon’s view that the “central purpose” of the defence power is the protection against external enemies. Dixon’s appreciation of the threats facing Australia was, Callinan suggested, incomplete, compared with that of Chief Justice Latham, the sole dissenter in the Communist Party case. But hasn’t history vindicated the 1951 court? The Communist Party of Australia was not dissolved, and yet the dangers that the Menzies government believed to justify, indeed necessitate, its abolition did not eventuate. The CPA was ultimately wound up for lack of membership in 1991.

In fact, the Communist Party case could have been distinguished, giving some support for the Criminal Code provisions. The Act purporting to dissolve the CPA had many features that the current law does not. It restricted judicial review of “declarations” made with respect to individuals, reversed the onus of proof, and conditioned the Act upon “recitals” of its own validity. The making of control orders is, in contrast, surrounded by judicial safeguards, the restrictions upon liberty are reviewable, and the restrictions imposed are comparable, as Chief Justice Gleeson stated (in a judgment notable among the majority for clarity and principled reasoning), to bail conditions or AVOs.

The majority judges insisted that the circumstances surrounding defence have changed, and that the post-September 11 threats posed by terrorism are unprecedented. It should not be forgotten that the Cold War fears of communist insurgency and sedition were as great and as genuine as the fears of terrorism today. This is not to say that Jack Thomas, an individual trained in terrorist principles and paramilitary techniques, should attract no legal restrictions on his movements and activities. State governments have the powers to create and enforce such laws. So, arguably, has the Commonwealth under the reference of state powers over terrorism. But to turn the history of the defence power on its head in support of such measures, and to open it to an application “without limitation” (as Gummow and Crennan suggested, with reference to The Federalist of 1787, a strange authority) is an extraordinary step.

Constitutional law students will now learn that the defence power is no longer directed at external aggression, or conventional war, or threats to the nation. It no longer rests upon judicial notice as previously understood, or requires a demonstration of proportionality in a context where the fact of war or peace is important. The reasoning behind this new jurisprudence will, however, be hard to explain. It will boil down, it seems, to the proposition that “things have changed”, and that threats to defence are now disguised and come from within. The same, however, was said in the 1950s.
Justice Callinan’s conclusion acknowledged that “too ready and ill-considered invocation of the defence power ... [may] have the capacity to inflict serious damage upon a democracy.” For this reason, he states, “courts must scrutinise very carefully the uses to which the power is sought to be put”. While the control orders to which Jack Thomas was subject are not unreasonable in principle, and still find the reasoning upon which Thomas is based unsatisfactory, even disturbing. 

“...It is quite possible to agree that control orders are not unreasonable in principle, and still find the reasoning upon which Thomas is based unsatisfactory, even disturbing.”