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Law, Power, and "Rumors of War": Robert Jackson Confronts Law and Security After Nuremberg

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Abstract

Supreme Court Justice Robert Jackson's most important legacy was his role as chief prosecutor for the United States at the Nuremberg Trials. This essay follows Jackson's legal thought from his return to the United States after Nuremberg, until his death in 1954. Jackson hoped that the lesson of Nuremberg would be "to establish the supremacy of law over such lawless and catastrophic forces as war and persecutions." Jackson changed law that applied to warfare. In looking to the future, he seems to have assumed that although law had changed, war would retain its essential character. Yet as the post-war years became instead the Cold War years, Jackson found himself in an era when the boundaries around wartime were eroding. The world entered an ambiguous era that seemed to be neither war nor peace. As Jackson himself would put it in 1951, rather than a break between wartime and peacetime, there was instead "a prolonged period of international tension and rumors of war, with war itself as the ever threatening alternative."

Jackson's response to the Cold War era was twofold. In cases involving members of the Communist Party, he argued that they were different in kind from other dissenters, so that the Justice who argued that the rule of law should apply to Nazi leaders also argued for a departure from applicable first amendment analysis because of the dangers posed by communism. In the area of war-related powers, Jackson took up more directly the ambiguous character of an era that seemed neither wartime nor peacetime. In this context, he favored limits on presidential power. Calling the Korean War an undeclared "foreign venture," he argued in his famous Steel Seizure concurrence that it would subvert constitutional limits for a president to go to war without a declaration from congress, and then use that state

of war as the basis for expanding his own domestic authority.

The essay is based on my contribution to the 2011 James McCormick Mitchell Lecture program at SUNY Buffalo Law School, which commemorated Robert Jackson's inaugural Mitchell Lecture in October 1951.

Law, Power, and "Rumors of War": Robert Jackson Confronts Law and Security After Nuremberg

MARY L. DUDZIAK†

INTRODUCTION

When Robert Jackson traveled to Buffalo in October 1946, he stood on the threshold of a new era. In his centennial speech, Jackson took account of a war era the world was just emerging from. The horrors of World War II, he hoped, reshaped the world in a way that would lessen such devastating conflict and destruction. Until this time, collective efforts had not been able to hold back war. But Nuremberg changed this, he hoped. Its long-range significance lay in "the effort to demonstrate or to establish the supremacy of law over such lawless and catastrophic forces as war and persecutions."[1] From Nuremberg might come "legal controls of these disastrous forces."[2] But only the coming years would show whether the efforts at Nuremberg were "but a flash of light in an otherwise dark century, or . . . the harbinger of a dawn."[3]

Even as Jackson urged that human action, through law, could hold back the forces of warfare, he warned of a different future. "If the East and the West cannot or will not

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† Judge Edward J. and Ruey L. Professor of Law, History and Political Science, University of Southern California Gould School of Law. Many thanks to Alfred Konefsky, Dianne Avery, Mateo Taussig-Rubbo, and others on the SUNY Buffalo Law School faculty for their helpful comments on this Essay and on my broader work on wartime. Thanks to Julia Wood, Habeeb Syed, and Sam Petty for their essential help with research, to Marguerite Most of the Duke Law Library, and to the *Buffalo Law Review* staff.

1. Robert H. Jackson, *Address at the University of Buffalo Centennial Convocation, October 4, 1946*, 60 BUFF. L. REV. 283, 287 (2012).

2. *Id.*

3. *Id.* at 293.

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bridge the gaps in interest and method and political viewpoint now evident and so often overdramatized, it may be that the good effects of this drawing together in jurisprudential principles and procedures will be dissipated."[4] But they had worked so hard to overcome national differences at Nuremberg. He simply found it "difficult to believe that we will not be able to live together without sacrificing either the peace or fundamental interests."[5]

My task in this Essay is to set Jackson in the world he occupied when he returned from Nuremberg, and to follow him as that world fell apart. In Nuremberg, Jackson and his colleagues took what war had wrought, and they fashioned legal tools that they hoped would lessen war itself. In this effort, Jackson changed law that applied to warfare. In looking to the future, he seems to have assumed that although law had changed, war would retain its essential character. Yet as the post-war years became instead the Cold War years, Jackson found himself in an era when the boundaries around wartime were eroding.[6] The world entered an ambiguous era that seemed to be neither war nor peace. During such an era, how did Jackson think about war? What sort of war era did he think the nation was facing, and how should it affect rights and government power at home?

A set of ideas about war and peace were held by the World War II generation. Wartime and peacetime were thought to be, more or less, distinct states. People could tell when they were in a wartime—after all, Congress would declare it. Wartime was always followed by peacetime, and this meant that wars were, by definition, temporary. Rights were sometimes compromised in wartimes, and presidents overstepped the limits to their power, but since wartimes were temporary, that would eventually go away.[7]

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4. *Id.*

5. *Id.*

6. *See* MARY L. DUDZIAK, WAR·TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES 61-94 (2012).

7. *See id.* at 11-32.

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This basic structure to thinking about wartime still lurks in American jurisprudence, even in the age of drone warfare.[8] But there was a moment when this way of thinking seemed to collapse, when the concept of peacetime dissolved. As Jackson himself would put it when he returned to Buffalo to deliver the inaugural James McCormick Mitchell Lecture in 1951, rather than a break between wartime and peacetime, there was instead "a prolonged period of international tension and rumors of war, with war itself as the ever threatening alternative."[9] Could Jackson's vision of peace through law and legal institutions hold during a Cold War?

I. POSTWAR BECOMES COLD WAR

Before the Nuremberg tribunal heard its first witness, writers on both sides of the Atlantic took stock of a world reshaped by the advent of nuclear weapons. In the fall of 1945, George Orwell wrote that the bomb was likely to change the structure of global politics. Weak states would become weaker, and "two or three monstrous super-states," each with nuclear weapons, would "divid[e] the world between them."[10] These monster states would not use the bomb against each other. Instead, each state might be "*unconquerable* and in a permanent state of 'cold war' with its neighbours."[11] The nuclear age would be, therefore, a "cold war" era, in which the world would see "an end to large-scale wars at the cost of prolonging indefinitely 'a peace that is no peace'."[12]

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8. *See id.* at 95-132.

9. Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 104 (1951).

10. George Orwell, *You and the Atomic Bomb*, TRIBUNE (London), Oct. 19, 1945, *reprinted in* 4 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL: IN FRONT OF YOUR NOSE, 1946-1950, at 6, 8 (Sonia Orwell & Ian Angus eds., 1968).

11. *Id.* at 9.

12. *Id.* at 10.

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The idea of a "cold war" was, of course, intentionally contradictory, suggesting an era of war-but-not-war.[13] But international tensions soon escalated. In March 1946, while the Nuremberg trial was in session, Winston Churchill warned that "an iron curtain has descended across the Continent" of Europe.[14] This was "a solemn moment" as the United States, "at the pinnacle of world power," shouldered "an awe-inspiring accountability to the future."[15] For Churchill, Soviet power and aggression would not be reined in by international law. They could only be met with American strength and solidarity with Western Europe.[16]

The anxieties of the nuclear age were manifested in post-World War II national security politics. Historian Michael Hogan argues that Cold War struggles over American policy and the nature of the state were about more than combating communism. Also at stake was American national identity, the nation's role in the world, and the impact of Cold War policies on domestic institutions.[17]

After World War II, Americans hoped for a return to peacetime concerns. Initially, American leaders were divided in their perceptions of the world conditions that the nation confronted. In battles over the budget and military policy, some policymakers viewed the idea of distinctions between war and peace to be a "technicality" outmoded in a new era "when the United States had to be prepared for war

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13. The term was popularized by Walter Lippman and Bernard Baruch, and entered American political discourse in 1947. *See* Bernard Baruch, *Text of Bernard Baruch's Address at Portrait Unveiling*, N.Y. TIMES, Apr. 17, 1947, at 21; Walter Lippmann, *Today and Tomorrow, The Cold War: Study of U.S. Policy*, WASH. POST, Sept. 2, 1947, at 11; WALTER LIPPMANN, THE COLD WAR: A STUDY IN U.S. FOREIGN POLICY (1947).

14. Winston S. Churchill, The Sinews of Peace, Address at Westminster College in Fulton, Missouri (Mar. 5, 1946), *in* 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897-1963, at 7285, 7290 (Robert Rhodes James ed., 1974).

15. *Id.* at 7286.

16. *Id.* at 7285-93.

17. MICHAEL J. HOGAN, A CROSS OF IRON: HARRY S. TRUMAN AND THE ORIGINS OF THE NATIONAL SECURITY STATE, 1945-1954, at 24 (1998).

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on a permanent basis."[18] "The central challenge of state-making in the early Cold War," Hogan argues, "was to prepare for permanent struggle without surrendering constitutional principles and democratic traditions to the garrison state."[19]

President Harry S. Truman initially tried to maintain the idea of a peacetime world, insisting that his policies were not "mobilization for war," but instead "preparedness."[20] But Truman himself encouraged war hysteria to generate support for foreign aid in his "Truman Doctrine" speech in March 1947.[21] Framing the Cold War as an epic struggle, Truman warned that "[a]t the present moment in world history nearly every nation must choose between alternative ways of life. The choice is too often not a free one."[22] Truman contrasted a "way of life [ ] . . . based upon the will of the majority, and . . . distinguished by free institutions, . . . freedom of speech and religion, and freedom from political oppression," and a "second way of life" that "relies upon terror and oppression, a controlled press and radio, fixed elections, and the suppression of personal freedoms."[23]

To safeguard American liberty and freedom, Truman insisted that the United States must support free peoples who were resisting communism around the world, so the Truman Doctrine was about the projection of American power, not about maintaining peace through international institutions.[24] The following year would seem darker, with a coup in Czechoslovakia, the ouster of non-communist members of its government, and the Soviet blockade of West

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18. *Id.* at 215.

19. *Id.* at 234.

20. *Id.* at 217.

21. *Id.* at 15.

22. President Harry S. Truman, Special Message to the Congress on Greece and Turkey, Address Before a Joint Session of Congress, 1947 PUB. PAPERS 176, 178 (Mar. 12, 1947).

23. *Id.*

24. *See id.* at 179-80; CAMPBELL CRAIG & FREDRIK LOGEVALL, AMERICA'S COLD WAR: THE POLITICS OF INSECURITY 76-82 (2009).

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Berlin, geared toward driving American, French, and British troops from the city.[25] Then, in August 1949, the Soviet Union exploded its first atomic bomb. In October of that year, China "fell" to the Communists, as Mao Zedong's troops prevailed in a civil war.[26] In June 1950, North Korean forces, allied with the Soviets and China, invaded South Korea with the goal of reunifying the divided country. Within days, President Truman committed American forces to a United Nations action in support of South Korea.[27] As events seemed to propel the world closer to the brink, American leaders crafted a Cold War strategy premised on the idea that projecting American military power around the world was the best means of safeguarding American security. *NSC 68: United States Objectives and Programs for National Security* would remain secret during Jackson's lifetime, but it became central to American national security policy.[28] Its vision was that the only protection against an aggressive Soviet Union was to project American power and extend American military engagement. If international law might restrain aggression, it was at least a distant second to power—economic and military.

At home, Cold War anxieties filtered into domestic politics. In February 1950, Senator Joseph McCarthy falsely claimed that he had a list of 205 communists employed in the State Department. McCarthy had been looking for a campaign issue.[29] He would not be alone in "red-baiting," as politicians quickly learned that campaigning against communism was an effective way to run for office.[30]

25. CRAIG & LOGEVALL, *supra* note 24, at 91-95.

26. *Id.* at 102.

27. *Id.* at 114-18.

28. NAT'L SECURITY COUNCIL, NSC-68: A REPORT TO THE NATIONAL SECURITY COUNCIL BY THE EXECUTIVE SECRETARY ON UNITED STATES OBJECTIVES AND PROGRAMS FOR NATIONAL SECURITY (Apr. 14, 1950), *reprinted in* U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: 1950 NATIONAL SECURITY AFFAIRS, FOREIGN AND ECONOMIC POLICY 234, 234-92 (1974); *see also* CRAIG & LOGEVALL, *supra* note 24, at 127-38.

29. ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA 241 (1998); CRAIG & LOGEVALL, *supra* note 24, at 123-24.

30. *See* STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 431-33 (2008).

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Meanwhile, Hogan writes, national security "became the common currency of most policy makers, the arbiter of most values, the key to America's new identity."[31] In American national security ideology, "the distinction between war and peace had disappeared," as the government transitioned into a National Security state.[32]

II. JUSTICE JACKSON'S COLD WAR

A. *The Communist Threat*

These global tensions troubled Robert Jackson as he resumed his role as a Supreme Court Justice, and they challenged his vision of peace through law. In the spring of 1947, the specter of imminent war did not worry him, but instead the spread of totalitarianism, which left the world "more fear-ridden" than it was "at the close of a war to give freedom from fear."[33] In World War II-related cases, he had counseled against wholesale abrogation of rights because of security concerns. In *Cramer v. United States*, which overturned, on the basis of insufficient evidence, a conviction for treason of a man charged with helping two German saboteurs, Jackson quoted Thomas Paine: "He that would make his own liberty secure must guard even his enemy from oppression."[34] Jackson dissented in *Korematsu v. United States,* arguing that the Court should not ratify the internment of Japanese Americans during the war.[35]

One of Jackson's most celebrated Supreme Court opinions on individual rights and war was *West Virginia Board of Education v. Barnette* in 1943.[36] The Court held

31. HOGAN, *supra* note 17, at 313.

32. *Id.* at 209, 300, 313.

33. Robert H. Jackson, Assoc. Justice of the Supreme Court of the U.S., Address at the United Jewish Appeal (Apr. 15, 1947), *available at* http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/address-at-the-united-jewish-appeal/.

34. 325 U.S. 1, 48 (1945) (internal quotation marks omitted); *see also* Eugene C. Gerhart, *A Decade of Mr. Justice Jackson*, 28 N.Y.U. L. REV. 927, 948 (1958).

35. 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

36. 319 U.S. 624 (1943).

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that a mandatory flag salute requirement violated the rights of Jehovah's Witness children who were expelled from school when, for religious reasons, they refused to salute the flag.[37] *Barnette* reversed a 1940 ruling in which Justice Felix Frankfurter had argued that "national unity is the basis of national security," and it was constitutional to require the flag salute as a means of fostering that unity.[38] Jackson in *Barnette* saw it differently. "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men," he wrote for the Court.[39] But:

> Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.[40]

Cold War-era cases would show that Jackson's tolerance of dissenting speech was limited, however. In 1949, he dissented in a landmark free speech case, *Terminiello v. Chicago*, arguing that dangerous speech should be controlled, for "if the Court [did] not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[41] He was especially unsympathetic to the Communist Party, viewing

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37. *Id.* at 642.

38. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 595, 599-600 (1940).

39. *Barnette*, 319 U.S. at 640.

40. *Id.* at 641.

41. 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). In *Terminiello*, the Court struck down the conviction of a priest whose vitriolic speech, which incited a crowd, led to his arrest for breach of the peace. Justice William O. Douglas wrote for the majority that "a function of free speech under our system is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.* at 4 (majority opinion).

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it as a "conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system."[42]

Jackson sided with the majority in the prosecution of Communist Party members in *Dennis v. United States*; however, in his concurrence, Jackson did not apply the Court's prevailing First Amendment doctrine.[43] Instead, he argued that the defendants were not entitled to it. Jackson devoted much of his concurrence to a description of the methods of communists, drawing lessons from recent experience, including the 1948 coup in Czechoslovakia, where, he wrote, "the Communist Party during its preparatory stage claimed and received protection for its freedoms of speech, press, and assembly."[44] The international Communist movement, Jackson argued, was "able only to harass our own country. But it has seized control of a dozen other countries."[45]

The Court majority held that the prosecution was lawful, purporting to apply the "clear and present danger" test under the First Amendment.[46] For Jackson, however, the "clear and present danger" test had been developed for a different era:

> When the issue is criminality of a hot-headed speech on a street corner, or circulation of a few incendiary pamphlets, or parading by some zealots behind a red flag, or refusal of a handful of school children to salute our flag, it is not beyond the capacity of the judicial process to gather, comprehend, and weigh the necessary materials for decision whether it is a clear and present danger of substantive evil or a harmless letting off of steam.[47]

But the doctrine should not apply to communists, "a well-organized, nation-wide conspiracy," he wrote, "[u]nless we are to hold our Government captive in a judge-made

42. Am. Commc'ns Ass'n v. Douds, 339 US 382, 424 (1950); Gerhart, *supra* note 34, at 966.

43. 341 U.S. 494, 567-70 (1951) (Jackson, J., concurring).

44. *Id.* at 566.

45. *Id.* at 563.

46. *See id.* at 515 (majority opinion).

47. *Id.* at 568 (Jackson, J., concurring).

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verbal trap."[48] In rejecting the claims of the *Dennis* defendants, Jackson placed most of his attention not on the facts in evidence, but on what he knew and believed about communism in the world. "The Communist Party realistically is a state within a state, an authoritarian dictatorship within a republic," he wrote.[49] "It demands these freedoms not for its members, but for the organized party. It denies to its own members at the same time the freedom to dissent, to debate, to deviate from the party line, and enforces its authoritarian rule by crude purges, if nothing more violent."[50] In contrast to Jackson's concerns about dangers posed by communism, Justice Douglas argued in dissent that the Communist Party had no power in the United States because their ideas had been rejected.[51]

Protecting rights safeguarded democracy, Jackson had argued in the flag salute case, but in *Dennis*, rights seemed to threaten free government. In arguing that the security threat counseled departure from the Court's otherwise applicable doctrine, Jackson's argument was triggered by his assessment of the nature of the threat—a national security judgment courts are usually reluctant to engage in.

The idea that communists were a singular threat, and so were outside the law, mattered in other cases, including *American Communications Ass'n v. Douds*, which upheld the requirement that labor leaders file an affidavit that they were not communists before a union could benefit from the protection of federal labor law.[52] Jackson spent much of his lengthy concurrence and dissent discussing the nature of the Communist Party, to support his argument that "Congress reasonably could have concluded that the Communist Party is something different in fact from any other substantial party we have known, and hence may constitutionally be treated as something different in law."[53]

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48. *Id.*

49. *Id.* at 577.

50. *Id.*

51. *Id.* at 584-85 (Douglas, J., dissenting).

52. 339 U.S. 382, 414-16 (1950).

53. *Id.* at 423 (Jackson, J., concurring in part, dissenting in part) (footnote omitted).

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Again, existing principles should not be applied to this dangerous group. Jackson's analysis of communism was so resonant that it was reprinted in *Harper's Magazine*.[54]

Jackson's views about communism would carry through to cases outside of criminal prosecution and labor law, including a case in which important human rights were at stake. In *Harisiades v. Shaughnessy*, Jackson wrote the majority opinion upholding the deportation of three resident aliens who arrived in the United States as children, and later joined the Communist Party.[55] The power to deport was greatest in war, Jackson wrote, but the deportation power was also important during an ambiguous era, like the Cold War, since "Congressional apprehension of foreign or internal dangers short of war may lead to its use."[56] The Cold War, for Jackson, was "short of war," but examples related to military conflict informed the opinion. "[T]he Due Process Clause does not shield the citizen from conscription and the consequent calamity of being separated from family, friends, home and business while he is transported to foreign lands to stem the tide of Communism," Jackson wrote, presumably alluding to the reinstatement of the draft in 1948.[57] "If Communist aggression creates such hardships for loyal citizens, it is hard to find justification for holding that the Constitution requires that its hardships must be spared the Communist alien."[58] It seemed that this quasi-war had made communists a quasi-enemy.

Jackson's vision of human rights had been crafted in an era when many European Jews became stateless in their flight from the Holocaust, so he was attuned to the great human impact of the deportation power.[59] Still, "[w]e think

54. Robert H. Jackson, *The Communists in America*, HARPER'S MAG., Sept. 1950, at 21, *available at* http://www.roberthjackson.org/files/thecenter/files/bibliography/1950s/the-communists-in-america.pdf.

55. 342 U.S. 580, 581, 596 (1952).

56. *Id.* at 587.

57. *Id.* at 591; *see* HOGAN, *supra* note 17, at 154-56.

58. *Harisiades*, 342 U.S. at 591.

59. *See* EUGENE C. GERHART, ROBERT H. JACKSON: COUNTRY LAWYER, SUPREME COURT JUSTICE, AMERICA'S ADVOCATE 307-406 (2003).

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that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation," he wrote.[60] "However desirable world-wide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy."[61] Reform in this area must come from the President and Congress, not from the courts.

For Jackson, rights in these cases did not turn on whether the nation was in wartime or peacetime, but on the nature of the threat. He argued that the political branches were better at judging the proper response to difficult national security problems, but he nevertheless rested his opinions on his own national security analysis, rather than simple deference.

There were limits to Jackson's willingness to uphold actions against noncitizens thought to be security risks, however. In *Shaughnessy v. United States ex rel. Mezei*, the Court upheld the exclusion of a resident alien who had gone overseas to visit his ailing mother.[62] When he tried to return, he was barred from entering the United States on security grounds.[63] Because no other country would admit him, Mezei was held indefinitely at Ellis Island.[64] The government refused to reveal the evidence supporting Mezei's exclusion because its disclosure "would be prejudicial to the public interest."[65]

Jackson was outraged. Because Mezei had no right to enter the United States, did it follow that "he has no rights at all?" Jackson asked.[66] The government argued that Mezei was free to leave at any time, and that Ellis Island was

60. *Harisiades*, 342 U.S. at 591.

61. *Id.*

62. 345 U.S. 206, 207-08, 216 (1953). *See generally* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933 (1995).

63. *Mezei*, 345 U.S. at 208.

64. *Id.* at 209.

65. *Id.* at 208.

66. *Id.* at 226 (Jackson, J., dissenting).

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simply his "refuge."[67] "That might mean freedom," Jackson wrote, "if only he were an amphibian! Realistically, this man is incarcerated by a combination of forces which keep him as effectually as a prison."[68]

Jackson was also sympathetic in the 1950 case of Ellen Knauff, a "war bride" who was excluded from the United States without a hearing for national security reasons, an outcome Jackson found to be "brutal."[69] He wrote in dissent that "[t]he plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected."[70] Knauff faced separation from her husband, but *Harisiades* had also involved the separation of families.[71] It seems difficult to avoid the conclusion that the weight given by Jackson to the government's national security claims turned at least in part on his sympathies for the parties.

B. *Presidential War Power*

If the communist cases show Jackson's thinking about national security, cases about war powers tell us more about how he thought about war and external threats themselves. Jackson concurred in *Woods v. Cloyd W. Miller Co.*, a case that upheld a rent-control law based on Congress's war powers, even though it was passed in 1947.[72] Jackson agreed with the outcome, but he felt the need to "utter more explicit misgivings about war powers than the Court has done" because of the government's arguments in the case.[73] The Justice Department had offered no basis for the

67. *Id.* at 220.

68. *Id.*

69. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 550 (1950) (Jackson, J., dissenting).

70. *Id.* at 550.

71. *Harisiades*, 342 U.S. at 581.

72. 333 U.S. 138, 144-46 (1948).

73. *Id.* at 146 (Jackson, J., concurring).

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statute's constitutionality other than the "vague, undefined and undefinable 'war power.'"[74] He wrote:

> [T]his power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures. Always, as in this case, the Government urges hasty decision to forestall some emergency or serve some purpose, and pleads that paralysis will result if its claims to power are denied or their confirmation delayed.[75]

If the war power could be invoked simply because the effects of the war lingered, then the war power would be "permanent—as permanent as the war debts."[76] The reason Jackson thought the war power applied to a 1947 law was not because of the continuing *effects* of a war that had ended, but instead due to the continuance of war itself. "We have armies abroad exercising our war power and have made no peace terms with our allies, not to mention our principal enemies."[77] In fact, the formal ending of hostilities with Germany and Japan would not come until 1951 and 1952, respectively.[78]

Jackson's tremendously influential concurrence in the *Steel Seizure* case is his most well-remembered analysis of presidential power.[79] This 1952 case, in which the Court struck down President Truman's effort to seize steel mills to avert a strike, is remembered by constitutional scholars as a case about presidential power during wartime.[80] The ambiguities of the Cold War era might, at first glance, be

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74. *Id.*

75. *Id.*

76. *Id.* at 147.

77. *Id.*

78. *See* DUDZIAK, *supra* note 6, at 37-38. On the endings to World War II, which extended over many years, see *id.* at 33-40.

79. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

80. *See, e.g.*, LOUIS FISHER, PRESIDENTIAL WAR POWER 101-02 (1995).

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brushed aside, since the case dealt squarely with President Truman's power during the Korean War, when American troops were in active combat, and steel was necessary for the production of war materiel.[81]

Jackson's concurrence famously categorizes the scope of presidential power based on whether or not the president is acting pursuant to, or against, authorization from Congress.[82] But Jackson goes beyond this topic in this important case. He does not set the case in the context of a "wartime," but instead, remarks on the slipperiness of the category, so that presidential war power did not appear to have a firm foundation. "Loose and irresponsible use of adjectives colors all non-legal and much legal discussion of presidential powers," he wrote.[83] "'Inherent' powers, 'implied' powers, 'incidental' powers, 'plenary' powers, 'war' powers and 'emergency' powers are used, often interchangeably and without fixed or ascertainable meanings."[84]

Jackson warned that a president cannot have the power to define an era as a war, thereby triggering his own war powers.[85] He did not find it "necessary or appropriate" to determine the legal status of "the Korean enterprise."[86] Congress retained the power to declare war—and they had not used it. In Korea, the President had acted without Congress, thereby seeming to "invest[ ] himself with 'war powers.'"[87]

> [N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs

81. *See* MAEVE MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 1-2, 75-76 (1977).

82. *Steel Seizure*, 343 U.S. at 635-39 (Jackson, J., concurring).

83. *Id.* at 646.

84. *Id.* at 647.

85. *See id.* at 642.

86. *Id.* at 643.

87. *Id.* at 642.

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> of the country *by his own commitment* of the Nation's armed forces to some foreign venture.[88]

Jackson himself had argued that President Roosevelt could draw upon the Commander-in-Chief power long before Congress declared war during World War II.[89] He thought that the Court should not limit this power. It deserved "the widest latitude of interpretation . . . at least when turned against the *outside* world for the security of our society."[90] It was the internal use of these powers in a labor dispute that troubled Jackson. We did not have a "militaristic system" of government, but a "constitutional Republic."[91] The purpose of placing the presidency and the commander-in-chief in one person "was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office. No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role."[92] The reliance on emergency power by European governments during World War II showed that "emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them."[93]

If Jackson's anti-communist opinions seem tied within the fears of his era, it is the *Steel Seizure* concurrence that helps us to look forward. His most important critique was that the President had himself declared an era a wartime, and then argued that this self-declared wartime was the occasion for the expansion of his own powers. Jackson called Korea a "foreign venture," not a de jure war, but perhaps a de facto war.[94] When it came to the powers of war, he argued that in our system of government they must be reined in by

88. *Id.* (emphasis added).

89. *See* ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT 80-83 (John Q. Barrett ed., 2003).

90. *Steel Seizure*, 343 U.S. at 645 (emphasis added).

91. *Id.*

92. *Id.* at 646.

93. *Id.* at 652.

94. *Id.* at 642.

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law, and not invoked by the president on his own and without political restraints.

Jackson's concern in the *Steel Seizure* case, that a president should not go to war without Congress, thereby generating his own war powers, would become more important in later years. War would not be formally declared again for the rest of the twentieth century, and yet war powers would be drawn upon repeatedly in more occasions like Korea.[95]

And so Jackson's most important point in the *Steel Seizure* case is not the analysis for which his opinion is usually cited. The President had himself declared an era a wartime, Jackson argued, and then this self-declared wartime was used as the occasion for the expansion of his own powers.[96] As we can see from the *Steel Seizure* case, this problem existed long before a President would declare war on terrorism. Later Presidents would also announce a wartime and commit American troops, and thereby would create the occasion for the invocation of their own war powers.[97]

III. RUMORS OF WAR

When Robert Jackson returned to Buffalo to deliver the first Mitchell Lecture on May 9, 1951, he spoke of an altered world.[98] This time his topic was "Wartime Security and Liberty Under Law," but his title belied the ambiguity of the era.[99] His lecture drew from his opinions of the previous few years, when he so often described the era in more fluid terms.[100]

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95. *See, e.g.*, FISHER, *supra* note 80, at 84-87.

96. *Steel Seizure*, 343 U.S. at 642-47.

97. *See* Mary L. Dudziak, *A Sword and a Shield: The Uses of Law in the Bush Administration*, *in* THE PRESIDENCY OF GEORGE W. BUSH: A FIRST HISTORICAL ASSESSMENT 39, 39-58 (Julian E. Zelizer ed., 2010).

98. *See* Jackson, *supra* note 9.

99. *See id.*; DUDZIAK, *supra* note 6, at 63-94.

100. *See* Jackson, *supra* note 9; *see also supra* notes 79-95 and accompanying text.

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Jackson had once thought of 1946 as an ending to warfare, but this new era had not brought peacetime. Instead, he told the audience at Buffalo, "[t]he best that we can now hope for seems to be a prolonged period of international tension and rumors of war, with war itself as the ever threatening alternative."[101] In this environment, "we can no longer take either security or liberty for granted."[102]

He seemed to agree with the direction American national security policy had taken, that protection from global threats came not from international law but from American power.[103] "For security against foreign attack we must look to the professions which manage our armed forces and to the economy of the country that sustains them."[104] But Jackson remained hopeful about the status of the United States in this new world order. "I see not the slightest probability in the foreseeable future that any conqueror can impose oppression upon us," he told his audience.[105] Instead, "the dangers to our liberties which I would discuss with you are those that we created among ourselves."[106]

Could he know whether his most important life's work, his efforts at Nuremberg, were "but a flash of light in an otherwise dark century, or . . . the harbinger of a dawn"?[107] The world he had imagined at Nuremberg, in which peace would follow war, had slipped away. The United Nations had not become a powerful arena for global law enforcement, but instead a site of Cold War politics.[108] And it was hard to imagine legal institutions restraining warfare

101. Jackson, *supra* note 9, at 104.

102. *Id.*

103. *See* HOGAN, *supra* note 17, at 24.

104. Jackson, *supra* note 9, at 104.

105. *Id.*

106. *Id.*

107. Jackson, *supra* note 1, at 293.

108. *See generally* STANLEY MEISLER, UNITED NATIONS: A HISTORY (rev. ed. 2011).

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when war and peace had melted together into an unsettling and ambiguous era.

Americans were "troubled, disillusioned and confused," he said in late January, 1954, in the last year of his life.[109] American ideals seemed not to have taken hold in the world, but were in retreat. And the nation had been drawn into an arms race, "a policy of accumulating more military, air and naval force than the Communists can muster."[110] Yet he continued to believe that military force alone would not determine the course of history, for the Cold War was "largely a war of ideas, a struggle for the minds of men."[111]

In terms of his own ideas, Jackson's Cold War era jurisprudence will not warm the hearts of contemporary civil libertarians. But in an era when war powers seem immune to political restraints, Jackson's ideas about law and power, the core lesson of Nuremberg, remains important: the idea that the forces of war and destruction can be constrained by a collective will embodied in law. This was inscribed into his vision at Nuremberg. And when it came to presidential war power, this remained for Jackson an article of faith: "With all its defects, delays and inconveniences," he wrote in the *Steel Seizure* case, humans "have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."[112] And it was his role, and that of his colleagues on the bench, to enforce this principle. "Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up."[113]

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109. Robert H. Jackson, Assoc. Justice of the Supreme Court of the U.S., Liberty Under Law, Address to the New York State Bar Association (Jan. 30, 1954), *available at* http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/liberty-under-law/.

110. *Id.*

111. *Id.*

112. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 655 (1952) (Jackson, J., concurring).

113. *Id.*

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