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## 2011 James McCormick Mitchell Lecture

### Justice Jackson's 1946 Nuremberg Reflections at Buffalo: An Introduction

ALFRED S. KONEFSKY†

TARA J. MELISH††

On October 4, 1946, Robert H. Jackson, Associate Justice of the United States Supreme Court, who had taken a leave from the Court to become U.S. Chief of Counsel at the International Military Tribunal (“IMT”) at Nuremberg, journeyed to Buffalo to deliver a speech at the Centennial Celebration Convocation of the University of Buffalo. The event took place within days of his return from Germany, where he heard the IMT deliver its final judgment and verdicts, and Justice Jackson used the occasion of the convocation in Buffalo to reflect on his Nuremberg experience. Sixty-five years later to the day, October 4, 2011, the SUNY Buffalo Law School<sup>1</sup> hosted an event as

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† University at Buffalo Distinguished Professor, SUNY Buffalo Law School.

†† Associate Professor and Director of the Buffalo Human Rights Center, SUNY Buffalo Law School.

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1. Founded in 1846 as a private university, the University of Buffalo became part of the State University of New York (“SUNY”) in 1962. Its law school, New York State’s only public law school, is today known as SUNY Buffalo Law School.

part of its Mitchell Lecture series<sup>2</sup> to commemorate Justice Jackson's speech. Three distinguished legal historians, John Q. Barrett, Eric L. Muller, and Mary L. Dudziak, devoted their lectures to examining different aspects of the speech, often using Jackson's thoughts as an invitation to explore the implications of his arguments for today's most pressing issues related to the initiation and conduct of war, the protection of rights, and the global rule of law. That the Law School's Mitchell Lecture series provided the forum for a reconsideration of Jackson's words seems only fitting: delivering a speech entitled "Wartime Security and Liberty Under Law," it was Justice Jackson himself who inaugurated the Mitchell Lecture series in 1951.<sup>3</sup>

It was not an accident that Jackson appeared in Buffalo to make his first public pronouncements outside the courtroom about his interpretation of the meaning of Nuremberg. Jackson was comfortable in Buffalo, and his 1946 speech would mark the second of three occasions he spoke at the University within a decade of his appointment to the Supreme Court, culminating in the 1951 Mitchell Lecture. John Q. Barrett in his contribution to this essay collection has imaginatively recreated Jackson's ties to Buffalo,<sup>4</sup> stressing his upbringing and education in Western New York, his law apprenticeship and early law practice in Jamestown, his sojourn living and practicing law in Buffalo, and his extensive and lifelong friendships and connections with the local legal and educational communities.<sup>5</sup> When the University of Buffalo decided to mark its centennial celebration by awarding honorary degrees for the first time in its history, it was only natural that the University would

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2. The Mitchell Lecture is SUNY Buffalo Law School's most distinguished lecture series. It was endowed in 1950 by a gift from Lavinia A. Mitchell, in memory of her husband, James McCormick Mitchell, an 1897 graduate of the Buffalo Law School and, later, Chairman of the Council of the University of Buffalo.

3. The lecture was published that year in the first volume of the *Buffalo Law Review*. Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103 (1951).

4. John Q. Barrett, *Bringing Nuremberg Home: Justice Jackson's Path Back to Buffalo, October 4, 1946*, 60 BUFF. L. REV. 295, 296-301 (2012).

5. *Id.*

turn to Justice Jackson, a native son, to receive an honorary degree and address the convocation.<sup>6</sup>

In introducing Jackson's speech, the University's Chancellor, Samuel P. Capen, noted that Jackson "was for many years a neighbor, an intimate friend and associate of members of the [University] Council and of the faculty of the University's School of Law, and of other leaders of the bench and bar in this community."<sup>7</sup> But the occasion was not just a celebration of a milestone for a local community; Chancellor Capen also understood the broader significance of Jackson's appearance at a public forum at that particular moment in history: Capen observed that "out of [Jackson's] imagination and wisdom has come a new formulation of the responsibilities of states and statesmen, the basis of a new hope for the war-torn human race that the rule of law and of justice may at last control the relations of nations with one another."<sup>8</sup> So the place was set for Robert Jackson to take the stage at the convocation and make his first public attempt to make sense of his experiences at Nuremberg—the world stage having come to Buffalo.

Jackson's speech was rebroadcast later that day on the radio, and it figured prominently in newspaper coverage over the next few days, including a front-page, lead story in the *New York Times*, which also reprinted the entire speech.<sup>9</sup> But unlike Jackson's commanding and historic opening and closing statements as the chief prosecutor at Nuremberg, his 1946 speech in Buffalo seems to have been lost to historical memory. The Mitchell Lecture on October 4, 2011 was an attempt to restore that memory (and publish the speech for the first time in a law review), providing an opportunity to assess Nuremberg through the eyes of Justice Jackson immediately after the event, while the images and experiences were still fresh in his consciousness. Though the speech is careful and thoughtful and lawyerly, it is also personal, powerful, passionate, and engaged. There were things to be learned from Nuremberg,

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6. *Id.* at 304-05.

7. *Id.* at 314.

8. *Id.*

9. See Robert H. Jackson, Assoc. Justice of the Supreme Court of the U.S., Address at the Centennial Convocation of the University of Buffalo (Oct. 4, 1946), in *N.Y. TIMES*, Oct. 5, 1946, at 4.

and, after all, what better place to talk about those lessons than a university.

### I. THE SPEECH

Jackson began his address with a meditation on education, war, and law, particularly international law and its failure. He recalled H.G. Wells's observation that "history is a 'race between education and catastrophe,'" and commented that "[i]t is one of the paradoxes of our time that modern society needs to fear little except man, and what is worse, it needs to fear only the educated man."<sup>10</sup> In addition, Jackson claimed, "[t]he most serious crimes against civilization can be committed only by educated and technically competent peoples."<sup>11</sup> And he noted, with a measure of irony, that the most "belligerent" nations in the twentieth century had the most robust systems of public education "in their respective histories."<sup>12</sup> Nevertheless, the century had experienced two terrible wars. Why? Because, according to Jackson, "our entire cultur[al] inheritance has long been strangely hospitable to the idea that war is an acceptable and honorable means to a people's place in the world."<sup>13</sup> Cultures generally glorify "war and . . . the warrior," so "[w]hen a warlike spirit, always wearing the mask of patriotism and self-defense, takes possession of peoples, little in our cultural background is really offended."<sup>14</sup> And though "improvement through education offers the last clear chance of civilization to avoid catastrophe,"<sup>15</sup> unfortunately until now the "educational background" had only lent "strength and respectability to the forces that would meet a crisis by going to war and by refusing to accept any alternatives."<sup>16</sup> Clearly, the Nuremberg trial was going to be an important factor in educating the public, states, statesmen, governments,

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

11. *Id.*

12. *Id.*

13. *Id.* at 284.

14. *Id.*

15. *Id.*

16. *Id.*

universities, lawyers, and elites about the appropriate standards by which to establish norms of behavior in the international environment of conflict resolution. Law was crucial to that enterprise.

It was at this point that Jackson leveled his critical faculties at the failure of international law over time and his dissatisfaction with its historical trajectory, perhaps reflecting his frustration with the difficulties he faced at Nuremberg in redirecting the law's path. At his most eloquent, he proclaimed as a central strand in his historical argument:

Perhaps no branch of Western learning has been more tolerant of war than Nineteenth Century jurisprudence. Law always embodied more of people's customs than of their ideals. It condemned little men when they incited to a local riot but it majestically held aloof from dealing with men of rank who incite to war. It punished a single murder for personal ends, but a million murders for foreign policy ends was unquestioned. It said that killings in war were not crimes, because to kill and maim is part of war, and war itself was a legal activity.<sup>17</sup>

Then he noted that dating back at least to Grotius, there had once been a tradition in international law distinguishing between just and unjust wars, legal and illegal wars.<sup>18</sup> Somehow by the eighteenth and nineteenth centuries that understanding had been lost. "Instead, [international law] taught that 'sovereignty' placed each state above judgment by others and hence, that in law all wars by sovereign states must be accepted as legal."<sup>19</sup> Jackson saw this as a significant problem for the international order, but not just a legal problem. "Of course," he added, "this legal doctrine that an invader intent on conquest and pillage stood on the same basis as a people defending its homeland, did not commend itself to the moral sense of mankind."<sup>20</sup> It was to that "moral sense" that Jackson was to return at the conclusion of his speech when he justified the Nuremberg trial in part by invoking

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17. *Id.*

18. *Id.* For a more recent historical and philosophical treatment of the morality of war, see MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (4th ed. 2004).

19. Jackson, *supra* note 10, at 284-85.

20. *Id.* at 285.

Woodrow Wilson's call to rekindle international law with "the kind of vitality it can only have if it is a real expression of our moral judgment."<sup>21</sup> This separation between law and morality in the world of international law had unfortunate consequences, including "a powerful influence on our thinking and particularly on foreign office thinking, which always tends to the conventional."<sup>22</sup>

Though there have been attempts in the wake of war to establish international mechanisms to "preserve the peace," he said, they were "always in the hands of men who were educated in and accepted this background of International Law which taught that all wars are legal."<sup>23</sup> There might be political or policy "objections" to war, but not "legal objections."<sup>24</sup> For Jackson, "[i]t is an easy step from believing that war is never illegal to believing that war is never reprehensible."<sup>25</sup> The "peace professions,"<sup>26</sup> that is statesmen and diplomats, who if not trained in law certainly knew the legal rules and conditions of war, had failed miserably. In fact, international law "won little respect anywhere and invited the contempt of evil and aggressive men . . . [who] openly avowed a cynical and contemptuous attitude towards" that law.<sup>27</sup> Jackson then provided two examples: Hitler's statement to his generals on the eve of the invasion of Poland and the German Chancellor's statement in 1914 at the beginning of the First World War. Hitler had said that "[i]n starting and making a war, not the right is what matters but the victory—the strongest has the right."<sup>28</sup> The Chancellor had announced, "Gentlemen, we are now in a state of necessity, and necessity knows no law."<sup>29</sup> What they both actually meant

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21. *Id.* at 293 (quoting Woodrow Wilson).

22. *Id.* at 285.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 286 (quoting Adolf Hitler).

29. *Id.* at 285 (quoting Chancellor Von Bethmann-Hollweg). This was not the first time that Jackson referred to the 1914 statement on necessity. In a 1945 speech to the American Society of International Law shortly before President Truman appointed him to his Nuremberg post, Jackson commented that the

was that in their assertion of necessity, they would find their law.<sup>30</sup> Jackson saw that position as lawless, a complete abandonment of the rule of law, encouraged by an enervated international law that had become for evil men little more than “a compilation of pious preachments without practical sanctions.”<sup>31</sup>

If the world was to secure a permanent peace, Jackson argued, the international community would need to do more than simply “reorganize international political forces,”<sup>32</sup> as the United Nations had yet again set out to do in 1945.<sup>33</sup> “[I]t also seemed timely,” he insisted, “that an effort be made to conform our jurisprudence and the cultural background of international relations to the needs of a peaceful society.”<sup>34</sup> It was indeed “in this spirit,” he emphasized, “that the [Nuremberg] project . . . was

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Chancellor’s “miscalculation consisted of believing that international law was backed by no force because no such force was then visible.” Robert H. Jackson, *The Rule of Law Among Nations*, 31 A.B.A. J. 290, 293 (1945). But, he observed laconically, the Chancellor “was at least an intellectually honest man who knew legal right from legal wrong.” *Id.*

30. In late 1842, an alleged mutiny took place on board a U.S. Navy vessel, the *Somers*. The commander, Alexander Slidell MacKenzie, employed a summary procedure to determine the guilt of three sailors, including acting midshipman, Philip Spencer, son of Secretary of War John C. Spencer. MacKenzie ordered the execution of all three and, in a subsequent statement to a naval court of inquiry, defended his position by claiming that “[i]n the necessities of my position, I found my law . . . .” HARRISON HAYFORD, *THE SOMERS MUTINY AFFAIR* 42 (1959).

31. Jackson, *supra* note 10, at 285. The Kellogg-Briand Pact of 1928, known as the General Treaty for the Renunciation of War, or “World Peace Act,” was likely central in Jackson’s mind in this regard. In it, the major nations of the world—including Germany and Japan—had collectively renounced resort to war as an instrument of national policy, and yet had failed to indicate any sanction for failure to adhere to that renunciation. General Treaty for Renunciation of War as an Instrument of National Policy art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57. The 1928 Pact served at Nuremberg as the primary legal basis for recognizing “crimes against the peace” as an admitted international offense.

32. Jackson, *supra* note 10, at 286.

33. *Id.* For Jackson, these efforts must have recalled the earlier undertakings of the pre-war League of Nations, itself established in the aftermath of World War I to reorganize international political forces for the purpose of securing a permanent peace.

34. *Id.*

fashioned.”<sup>35</sup> Changing and revitalizing the law that applied in times of war—and ensuring that statesmen everywhere would faithfully apply that law as impartial principles of justice—was central to that project. Jackson correspondingly identified Nuremberg’s “long-range significance” as lying in its potential to contribute to two critical tasks: to “demonstrate or to establish the supremacy of law over . . . war and persecutions” and to “clarify and implement the law,” serving not only the “practical task of doing justice to offenders” but also “the academic task of setting straight the thinking of responsible men on these subjects.”<sup>36</sup>

Nuremberg, then, for Jackson held the hope that “men of good will” could establish “fairly workable legal controls”<sup>37</sup> on the chief “sources of catastrophe in modern life.”<sup>38</sup> He identified these as “war” and “tyranny—the oppression of individuals and minorities by governments in power.”<sup>39</sup> These ancient evils, Jackson emphasized, are closely related. Indeed, “[t]yranny is often the first step in a plan for war,” while war “often causes or invites dictatorship” for “it provides the most subtle of pretexts as well as some necessity for centralization and increase of authority.”<sup>40</sup> Given this interrelationship, Jackson concluded, “little progress can be made towards permanent peace without solving the problem of protecting the elementary rights of minorities.”<sup>41</sup> The protection of basic human rights by governments in power and the prevention of aggressive war were thus closely connected in Jackson’s mind.

Whether adequately or not, Jackson said, the Nuremberg trial squarely attacked both of these problems. It did so, he explained, through the International Agreement signed in London in 1945 by the Allied Powers, which he had negotiated on behalf of the United States.<sup>42</sup>

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35. *Id.*

36. *Id.* at 287.

37. *Id.*

38. *Id.* at 286.

39. *Id.*

40. *Id.*

41. *Id.*

42. Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European

Authorizing the creation of the IMT, that Agreement embodied two jurisdictional innovations that Jackson hoped would transform international law and revitalize its application.<sup>43</sup> The first was the idea that every “citizen or official who commits crimes against the peace and dignity of international society [is] answerable to it for the offense.”<sup>44</sup> Crafted in the shadow of the Treaty of Versailles, viewed by Jackson and his contemporaries as contributing to the recurrence of state aggression through its attribution of collective guilt to Germany for World War I, this innovation constituted a major departure from prevailing international law, where states were the relevant subjects.<sup>45</sup> As Jackson stated, it moved away from the “old theory that International Law bears only on states and not on statesmen, and that ‘sovereignty’ is a shield against all the world for any action done under the laws of a state or under its orders.”<sup>46</sup> Instead, under the belief that normative transformation is possible through individual accountability, responsibility under international law was reconceptualized as falling primarily on individual aggressors.

Second, in recognition of the close ties between war and minority rights, the Nuremberg Agreement recognized two new offenses in international law, each “long considered criminal by the common sense of mankind” but never before prosecuted.<sup>47</sup> These were crimes against the peace and

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Axis, Aug. 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279, 284 [hereinafter IMT Charter].

43. These principles were affirmed only a few months after his speech by the United Nations General Assembly. See Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95 (I), U.N. GAOR, 1st Sess., U.N. Doc A/236, at 1144 (Dec. 11, 1946).

44. Jackson, *supra* note 10, at 287; see IMT Charter, *supra* note 42, arts. 6-8.

45. As early as the 1942 St. James Declaration, the Allied Powers had asserted their intent to renounce vengeance and collective sanctions and, instead, to pursue a policy of punishing the guilty. See Inter-Allied Info. Comm., Aide-Memoire from the United Kingdom, in Punishment for War Criminals: The Inter-Allied Declaration Signed at St. James's Palace, London, on January 13, 1942, at 4 (1945).

46. Jackson, *supra* note 10, at 287.

47. *Id.*

crimes against humanity.<sup>48</sup> The first sought to criminalize “the planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties.”<sup>49</sup> The second criminalized the “persecution of individuals or minorities on political, racial or religious grounds where it is a domestic policy in preparation for such war.”<sup>50</sup> While Jackson recognized that this latter offense did not fully protect against abuses of minority rights and other persecutions within a state’s borders, it did disable international law’s traditional shield of sovereignty over a nation’s treatment of its own citizens so long as some nexus to war could be established, and hence “the peace of the world is affected.”<sup>51</sup> In so doing, Jackson hoped, recognition and application of the offense would go some way toward establishing the principle that accountability for atrocities and persecution within a state would never again be confined within national borders, but rather would constitute a matter of international human rights concern.

Significantly, in defending these new international legal controls against charges of illegality, Jackson labored to underscore that, whether they be regarded “as a codification or as an innovation,” these principles are “law today” and would henceforth be applied on an evenhanded basis “to victor as well as vanquished.”<sup>52</sup> For emphasis, he quoted from his own opening statement at Nuremberg on behalf of the United States, words fashioned to “remove any lingering doubts” about the political nature of the trial: “[W]hile this law is first applied against German aggressors . . . if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in

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48. IMT Charter, *supra* note 42, art. 6. The Agreement likewise recognized IMT jurisdiction over war crimes, already codified in international law through the Hague Conventions of 1899 and 1907 and the Geneva Convention of 1928, as well as conspiracy to commit any of the recognized offenses. *Id.*

49. Jackson, *supra* note 10, at 287. This latter formulation was intended to encompass the waging of war in violation of treaties like the 1928 Kellogg-Briand Pact. *See supra* note 31.

50. Jackson, *supra* note 10, at 287 (“ . . . or is a policy toward inhabitants of occupied countries.”). For the full formulation, see IMT Charter, *supra* note 42, art. 6(c).

51. *Id.*

52. *Id.* at 288.

judgment.”<sup>53</sup> For Jackson, the Nuremberg project was thus an active attempt to move beyond mere “political justice” in the international realm; it was designed to express a normative message on legality and the impartial and consistent application of the rule of law in times of war.

In his first speech at the University of Buffalo, delivered in 1942 less than three months after the attack on Pearl Harbor, Jackson, having only recently been appointed to the Supreme Court, anticipated in some ways what his 1946 Nuremberg speech would discuss: his analysis of what Nuremberg stood for and would stand for in history. In 1942, he called for the application of “reason and concepts of justice, instead of the torch and the firing squad, to the cure of the world’s ills. The state is conceived to be the instrumentality of the people, not their master, and men are held to have inviolable personal freedoms of soul and mind and expression.”<sup>54</sup> By 1946, based on his Nuremberg experiences, Jackson would now ask in the rest of his speech, in effect, whether law could in fact control tyranny, dictatorship, and the violation of the rights of minorities. What would Nuremberg yield, and what would it teach us?

Jackson thus turned his meditation squarely back to the question of minority persecution and individual liberties in times of war. His attention, however, was decidedly on Europe. “[S]o long as mass persecutions of minorities exist in Europe,” he said, “they will be provocations, excuses, or steps to war.”<sup>55</sup> He provided the example of Germany, which had prepared for war through the wholesale destruction of German liberties. Jackson nonetheless saw similar threats simmering across eastern Europe. The post-war redrawing of the European map, Jackson observed, “cruelly” created new “minorities at the mercy of newly dominant groups,”<sup>56</sup> as it had likewise done after the first war, with destabilizing consequences. At the same time, the spread of government absolutism across eastern and central Europe, with its intolerance of opposition or non-conformity, reinforced the

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53. *Id.*

54. See Robert H. Jackson, Assoc. Justice of the Supreme Court of the U.S., Youth Faces “The New Order” 6 (Feb. 23, 1942), available at [http://www.roberthjackson.org/files/youth-faces-\\_the-new-order\\_.pdf](http://www.roberthjackson.org/files/youth-faces-_the-new-order_.pdf).

55. Jackson, *supra* note 10, at 288.

56. *Id.* at 289.

“helplessness of minorities.”<sup>57</sup> While the method and degree of persecution of minorities varied widely—from extermination as in the Holocaust, to mass deportation, exile, and forced migrations, to milder forms of discrimination and confiscation—no nation in Europe appeared immune from its destabilizing effects. For Jackson, “[s]o long as there are three persons left in a society, a minority problem is not only possible but quite likely.”<sup>58</sup>

The proper question then, Jackson believed, is how a nation deals with “the minority problem.” Foreseeing a tension he would return to address more forthrightly in his 1951 Mitchell Lecture, the minority problem, Jackson asserted, cannot intelligently be dealt with “merely by embracing the cause of every minority because it is a minority.”<sup>59</sup> Rather, as Europe’s experience taught, some dissident minorities, especially those “following the line of a foreign government,” constitute a “real and continuing menace to a nation’s security.”<sup>60</sup> Citing the example of the Nazis, who were once themselves a minority, he underscored that the behavior of minorities may be as “hateful, intolerant and provocative” as that of majorities, and “if many minorities are not cruel and oppressive it is only for lack of power.”<sup>61</sup> Accordingly, the “minority problem must be dispassionately faced” as “it is a most difficult problem of adjustment of rights and obligations.”<sup>62</sup>

The “stubbornness” of the minority problem, moreover, is accentuated, Jackson added, by “the fact that restraints upon government to protect minorities are inconsistent with the political concept of ‘democracy’ held by many people.”<sup>63</sup> Jackson used this observation to distinguish between two alternative conceptions or models of “democracy” then prevalent in the world. The first, espoused by the Communist and Nazi parties, was based on an

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57. *Id.*

58. *Id.* at 290.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

“unrestrained absolutism in the name of ‘dictatorship of the proletariat,’” in which it is said that any restraint upon government is a restraint upon the people themselves and hence intolerable.<sup>64</sup> The second is the liberal model that “we” embrace in the United States and Western Europe, which is based on the protection of minorities by limitation of the power of any majority.<sup>65</sup> These conceptions are irreconcilable, said Jackson: “There is simply no way known by which you can have both unrestrained majority rule and legal minority protection.”<sup>66</sup> Indeed, “[t]he dictatorship of many may be as ruthless towards minorities as the dictatorship of one or a few.”<sup>67</sup> With the pendulum apparently “on the swing in Europe” toward the former conception, the major challenge presented to the world in 1946, Jackson believed, was how to establish “limitations on the absolutism of majorities which will protect the fundamental human rights of minorities.”<sup>68</sup>

For Jackson, the United States’ system of constitutional limitations on government provided the “only hopeful” method he could see.<sup>69</sup> While conceding that the United States’ record was not perfect, and that “bigotry and intolerance among majorities and minorities in our society” have led to “regrettable incidents,” he stressed that “oppression is not an official policy of the government.”<sup>70</sup> More directly, it “never can constitutionally become such because we have placed limitations on the measures which any majority or any official of a state or the federal government can take against an individual or a minority.”<sup>71</sup> Jackson viewed these denials of power upon popular and legislative majorities as effective in the United States for two primary reasons: on the one hand, they are backed by

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64. *Id.* at 291.

65. *Id.* at 291-92.

66. *Id.* at 291.

67. *Id.*

68. *Id.*

69. *Id.* at 291-92.

70. *Id.* at 292.

71. *Id.* Although Jackson spoke in an era of widespread officially sanctioned racial segregation in the United States, he indicated his belief that oppressions have been constitutionally limited such that “minorities live in no such helplessness here as many do in Europe.” *Id.*

“personal rights,” which exist not by administrative grace but as “matters of law”;<sup>72</sup> on the other, their enforcement is “entrusted to our Courts,” themselves independent of the political branches and “not subject to popular choice, popular removal, or popular review.”<sup>73</sup> Indeed, four years earlier, in a speech given in Buffalo while the war still raged, Jackson had identified the question of “whether we are to be permitted to have the kind of society that wants courts to settle controversies” as “[o]ne of the most vital issues of the war.”<sup>74</sup> “There can be no conception of the world,” he insisted, “that does not submit the problem of man to man to some kind of legal tribunal.”<sup>75</sup>

Circling back to Nuremberg, Jackson identified these two restraining attributes on power, together with the precedential impact of the Nuremberg trial itself, as key to encouraging the global demand for a “really effective International Law.”<sup>76</sup> “Peace cannot be secured and persecutions cannot be ended,” he said, “except by better formulation of the principles of non-aggression, and the adoption of at least a minimum of civil rights for peoples everywhere.”<sup>77</sup> At the same time, alluding perhaps to growing calls for an International Human Rights Court at the United Nations,<sup>78</sup> he hoped for the creation of “some permanent forum where the victims of persecution may invoke protection of the law before instead of after it culminates in war,” citing the model of U.S. judicial review of civil rights.<sup>79</sup> A new world, built on law and protected by independent courts, stood ahead, Jackson hoped, waiting to be constructed from the salvage of the Second World War.

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72. *Id.*

73. *Id.*

74. John Q. Barrett, *Back, Basics, Buffalo (1942)*, THE JACKSON LIST, 4 (Feb. 23, 2012), <http://www.stjohns.edu/media/3/89c2bdcad90e4598b5fe9333efe117a2.pdf?d=20120223>.

75. *Id.*

76. Jackson, *supra* note 10, at 293.

77. *Id.*

78. Following these calls, a proposal for such a court was formally made at the very first session of the U.N. Human Rights Commission in January 1947. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 35-38 (2001).

79. Jackson, *supra* note 10, at 293.

And yet, never pollyannaish, Jackson did not close his eyes to the potential storm clouds on the horizon. “If the East and the West cannot or will not bridge the gaps in interest and method and political viewpoint now evident and so often overdramatized,” he said, “it may be that the good effects of this drawing together in jurisprudential principles and procedures will be dissipated.”<sup>80</sup> Indeed, only time would tell the ultimate effect of Nuremberg on international law and the extent to which it would prove capable of deterring aggressive war and persecution of minorities. It was at this fitting point in his lecture that Jackson turned back to his audience of students, faculty, lawyers, and lawyers-in-training at the University of Buffalo:

Whether the Agreement among nations that underlies this trial is but a flash of light in an otherwise dark century, or is the harbinger of a dawn, will depend in large degree upon the adherence it wins in circles such as this where the coming generations will shape the concepts by which they in their time will be guided.<sup>81</sup>

For Jackson, then, the ultimate legacy of Nuremberg would depend on the expressive value and constructivist agenda its norms would engender for a new generation. Would the legal principles that Jackson and the other lawyers at Nuremberg worked so hard to advance in fact be embraced by the public, states, statesmen, governments, universities, lawyers, and elites? Would they be developed, applied, studied, clarified, and extended to new and changing contexts? Only if this were the case, Jackson suggested, would they have the possibility of transforming Nuremberg’s precedent and principles into a “really effective International Law,” one that “is a real expression of our moral judgment”<sup>82</sup> and not just “pious preachments without practical sanctions.”<sup>83</sup> The role of education and particularly legal education, Jackson understood, was central to this political and cultural challenge. And thus he spoke to the University and its Law School, underscoring what he hoped they would come to see—and energetically

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80. *Id.*

81. *Id.*

82. *Id.* (quoting Woodrow Wilson).

83. *Id.* at 285.

take up themselves—as “civilization’s chief salvage from the second World War.”<sup>84</sup>

## II. THE 2011 MITCHELL LECTURE: HISTORY’S ENDURING CHALLENGES TO JACKSON’S 1946 VISION

Sixty-five years later to the day and speaking to an academic and professional audience much like the one Jackson captivated at the University’s Centennial Convocation, the 2011 Mitchell Lecturers similarly challenged and stimulated their audience. They did so by drawing on Justice Jackson’s powerful words and robust vision in his 1946 speech to illuminate the continuing challenges we face in the twenty-first century in ending war and human rights abuse, both around the world and at home.

In the opening lecture, John Q. Barrett skillfully sets the scene for Jackson’s appearance at the University of Buffalo upon his return from Nuremberg. He traces Jackson’s “path back to Buffalo” from multiple dimensions, emphasizing Jackson’s connections with the city and university and how these ties influenced his life trajectory and his decision to give his first set of post-tribunal reflections on Nuremberg in Buffalo.<sup>85</sup> Fitting his trip into the few days between his return to the country and the opening of the new Supreme Court term on the first Monday of October, his first appearance on the bench in a year, Jackson clearly wanted to speak. And it is evident from Barrett’s account that Jackson spent some time thinking about what he wanted to say. The result, a reflection on his experiences and the lessons to be drawn from Nuremberg, was, as Barrett notes, not only “delivered with great eloquence,” but is “powerful and complex.”<sup>86</sup>

The scene thus set, Eric Muller and Mary Dudziak used their lectures to challenge the audience to take Jackson’s 1946 vision seriously in our own time, and with respect to our own conduct. In provocative and absorbing essays, they use his words and ideas, set in their own historical moment, as a springboard to demonstrate how a “war psychology”

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84. *Id.* at 293.

85. Barrett, *supra* note 4, at 296-301.

86. *Id.* at 315.

and “rumors of war” continue powerfully to affect our thinking about law, war, the attribution of responsibility, and the legal protection of rights. Highlighting the effects of that war psychology on Justice Jackson himself, they use his jurisprudential record as Supreme Court Justice, both before and after his 1946 Nuremberg speech, to underline the real-world challenges faced by nations in applying an impartial and consistent rule of law in times of war and “war hysteria.”

Eric Muller takes his challenge directly to the doorstep of modern legal education.<sup>87</sup> Using as a launch pad Justice Jackson’s view of war as a “professional failing”<sup>88</sup> and his conviction that “improvement through education offers the last clear chance of civilization to avoid catastrophe,”<sup>89</sup> Muller offers an important set of ideas to “fill in some of the blanks” in Jackson’s message about “the value of education as a counterweight to wartime excesses.”<sup>90</sup> He does this through two pedagogical pairings, both understood as likely to provoke, even outrage some listeners.

Muller begins by providing compelling portraits of the activities of two mid-level public officials, one German and one American, who participated in similar roles during World War II.<sup>91</sup> Each was tasked, beginning in early 1942, with overseeing the forced removal of “a racially defined internal enemy.”<sup>92</sup> One, Benno Martin, was responsible for the “forced removal of the Jews of Franconia”<sup>93</sup> to concentration camps; the other, Karl Bendetsen, was responsible for the “forced removal of Japanese and Japanese Americans from the West Coast”<sup>94</sup> to detention

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87. Eric L. Muller, *Of Nazis, Americans, and Educating Against Catastrophe*, 60 BUFF. L. REV. 323 (2012).

88. *Id.* at 323 (emphasis omitted).

89. Jackson, *supra* note 10, at 284.

90. Muller, *supra* note 87, at 326.

91. The German, a Nazi named Benno Martin, was the police chief in Nuremberg. The American, Karl Bendetsen, was an army colonel, who became “the commanding officer of the Wartime Civil Control Administration . . . a unit of the Army’s Western Defense Command based in San Francisco.” *Id.* at 326-27.

92. *Id.* at 327.

93. *Id.*

94. *Id.* at 332.

camps that were called concentration camps by some. Both excelled in professionally accomplishing their assigned tasks, “motivated not chiefly by virulent racism or psychopathology but by something more uncomfortable to acknowledge: the pressure of professional ambition.”<sup>95</sup> Despite the brutal human impacts of their conduct, both men also avoided public accountability for their acts. Indeed, both not only lived out the rest of their lives more or less in peace, but one—the American—continued his meteoric rise to the top echelon of the U.S. Army and Department of Defense.<sup>96</sup> Muller invites us to think about the moral and legal dilemmas in the post-Nuremberg world that these two careers pose.

Muller then pairs Justice Jackson’s 1946 speech with his 1951 Mitchell Lecture. He compares the former’s robust vision of the rule of law as an impartial mechanism of control over repressive wartime acts, with the latter’s defense of Jackson’s own ambivalent response to the U.S. policy of Japanese internment in the wake of Pearl Harbor. Indeed, while Justice Jackson conceded in his 1944 *Korematsu* dissent that the internment policy was unconstitutional, he nevertheless declared judicial review of such assessments of military necessity to be inappropriate for a civilian court’s adjudication.<sup>97</sup> “How odd,” Muller observes: “For the rest of the world, Justice Jackson preached the rule of law as an agent of reckoning. . . . For the United States, Justice Jackson was prepared to trust these tasks to politics.”<sup>98</sup> Noting the “curious blind spot”<sup>99</sup> that appeared in Jackson’s own vision, Muller finds this “a stunning position for an advocate of the rule of law as a

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95. *Id.* at 326.

96. *Id.* at 326, 348. After the war, Martin “was captured by Allied forces and imprisoned and interrogated at Nürnberg. He was not among those prosecuted for war crimes before the international tribunal at Nürnberg and was transferred to German custody in 1948 for trial in the country’s domestic courts.” *Id.* at 344 (footnote omitted). After a circuitous route through those German courts over the next five years, Martin was acquitted. He died at age eighty-two in 1975, a free man in West Germany. *Id.* at 344-46.

97. *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

98. Muller, *supra* note 87, at 353-54.

99. *Id.* at 354.

restraint on wartime excesses.”<sup>100</sup> Indeed, “[a] judge wishing to apply the teachings of Nürnberg—to ‘demonstrate . . . the supremacy of law over such catastrophic and lawless forces as war and persecutions,’ as Jackson put it in 1946—might be expected to conclude that the judiciary had the obligation to review and overturn such a wartime measure.”<sup>101</sup> Justice Jackson instead seemed to place “his country and its wrongdoers outside the didactic scope of Nürnberg.”<sup>102</sup>

What do these two pairings tell us, Muller asks, about our understanding of the rule of law and the protection of individual rights in wartime? For Muller, they confront us with serious questions about the teaching of moral education and professional responsibility in law schools. He wonders whether such education is effective or sufficiently emphasized at all. In particular, the fact that both Martin and Bendetsen were relatively high-ranking lawyers should “be a matter of special discomfort to us.”<sup>103</sup> As Muller notes, their legal education “gave them the analytical skills to solve difficult problems, but it evidently gave them little in the way of a moral framework for identifying unacceptable answers.”<sup>104</sup> With little in their training to restrain the pull of “the warping influence of bureaucratic ambition,”<sup>105</sup> they each eagerly harnessed their lawyerly energies to a policy of racial isolation and control that they knew was broadly seen as illegal. It is this lack of moral restraint, Muller suggests, that time and again lead “ordinary men” to tolerate and to collaborate in systems of repression, brutality, and murder. With education understood as a vital restraining force on professional ethical conduct, Muller thus uses his Essay to call for renewed attention to the integrated teaching of moral education and responsibility in law schools.

What would such an education look like? Like Jackson, Muller believes that “if education is to be the instrument for our improvement, it must be more consciously and consistently aware of its mission and its obstacles.”<sup>106</sup> Yet, as

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100. *Id.* at 353.

101. *Id.* at 352 (quoting Jackson, *supra* note 10, at 287 (footnote omitted)).

102. *Id.*

103. *Id.* at 360.

104. *Id.*

105. *Id.* at 356.

106. Jackson, *supra* note 10, at 284.

has been observed, "for the most part the formation of our lawyers is superficial; it is training for craftsmen, not members of a learned profession."<sup>107</sup> If the legal community is to strengthen the culture that sustains it, says Muller, "the process of teaching a person to 'think like a lawyer' has to include the study of certain moral commitments that anchor the profession and a mode of reflection that encourages practitioners to examine their efforts for their clients against the backdrop of those commitments."<sup>108</sup>

One important way of doing this, proposes Muller, is to use "examples of amoral lawyering as tools of professional ethical instruction."<sup>109</sup> We should "resolve to study the professional lives of bureaucrat-lawyers like Karl Bendetsen and Benno Martin," says Muller, using the example of their dangerous ambition as "a reminder of the need for a trumping professional commitment to defending, among other things, certain basic facets of human dignity, such as the right not to be uprooted, deported, and imprisoned because of the accident of membership in a feared or reviled group."<sup>110</sup> The comprehensive integration of such broad-based human rights education into legal training, Muller argues, is essential to the profession. It has been overshadowed to date not only by an unusually impoverished conception of "practice readiness" in the legal community, but also, he suggests, by Nuremberg's focus on the "easy" cases: the Hermann Görings.<sup>111</sup> While condemning such persons is "morally essential," argues Muller, it is "not particularly morally instructive to the ordinary person," as "[m]ost people rightly have a hard time seeing much of themselves" in such zealots.<sup>112</sup>

For Muller, the "uncomfortably interesting" question is the one from which the world was prepared to avert its gaze upon the handing down of the Nuremberg verdicts: that question is "not how a handful of extra-ordinary men functioned at the top of a repressive system but how a lot of

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107. Muller, *supra* note 87, at 361 (quoting Eugene V. Rostow, *The Japanese-American Cases: A Disaster*, 54 YALE L.J. 489, 492 (1945)).

108. *Id.* at 362.

109. *Id.* at 364.

110. *Id.* at 365.

111. *Id.* at 356.

112. *Id.*

ordinary men ran it.”<sup>113</sup> These are the “teachable examples” that should be incorporated into contemporary legal education, he asserts. Echoing the constructivist sentiment expressed by Justice Jackson in his own 1946 speech,<sup>114</sup> Muller believes that a “moral framework” can thereby be promoted in the profession that is capable of restraining the pedestrian pressures and motivations that lead “ordinary men” to tolerate and collaborate in extraordinary violence.<sup>115</sup>

Muller, like Jackson, is also vitally concerned about the accountability of public officials who actively contribute to the design and implementation of state-sponsored systems of human rights abuse. He is thus understandably troubled by the failure of Jackson and his contemporaries to bring U.S. officials responsible for abusive wartime conduct to public account. This failure to reckon, long the norm, was a central target of the Nuremberg project. And yet, it persisted, and persists, in our own wartime treatment of minorities. Muller offers compelling examples—from the engineers of Japanese American internment like Karl Bendetsen to the “high-ranking, prestigiously educated government lawyers,” like John Yoo and Jay Bybee, who helped to develop and defend abusive interrogation

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113. *Id.* at 360.

114. In this respect, Muller may in some ways overstate the degree to which Justice Jackson “presented a thesis that [he] did not try to support” in his 1946 speech. *Id.* at 323.

115. As Lawrence Thomas has observed in trying to understand the nature of evil:

[I]t must be acknowledged that evil can be perpetrated by individuals who were once ordinary people, that is, morally decent people like you and me. Any satisfactory view of evil must make sense of this. Ordinary people, though open to moral criticism in many ways, would not imagine themselves participating in evil institutions. In fact, many ordinary people subscribe to values that are diametrically opposed to evil institutions. Alas, however, but for the compliance of enough ordinary people, some more compliant than others, neither the Holocaust nor American Slavery could have occurred. Nothing, including evil itself, occurs in a vacuum. Ordinary people, as I am now using the expression, invariably define the backdrop against which evil or, for that matter, good occurs.

LAWRENCE MORDEKHAI THOMAS, *VESSELS OF EVIL: AMERICAN SLAVERY AND THE HOLOCAUST* 4 (1993).

practices for detainees that amount to torture.<sup>116</sup> The lack of personal responsibility for such wartime excesses, Muller insists, should deeply offend us. The fact that it does not “suggests the need for greater attention in legal education to matters of principle and conscience, and perhaps some study of moments in the history of the legal profession when lawyers have served causes of great injustice.”<sup>117</sup>

Mary Dudziak likewise uses her Essay to examine the impact of a “war psychology” on Justice Jackson and his vision, but she does so to draw attention to a different problem: the dangers to individual rights and global security presented by the deterioration of the boundaries around “wartime” and the normalization or regularization of war.<sup>118</sup> Dudziak begins by setting Jackson in the post-war universe he occupied at the moment he delivered his speech in Buffalo in 1946. That world was one in which “war” had a defined meaning. Jackson, at Nuremberg, had sought to change the law that applied to that war, forging “legal tools” to control its conduct and impact. Dudziak in her Essay then follows Jackson “as that world fell apart”<sup>119</sup> by the time of his 1951 Mitchell Lecture. As the Cold War set in, Jackson “found himself in an era when the boundaries around wartime were eroding.”<sup>120</sup> While once “wartime and peacetime were thought to be, more or less, distinct states,” the world had now “entered an ambiguous era that seemed to be neither war nor peace.”<sup>121</sup> Such an era presented important challenges to the legal protection of rights and restraints on abuses of power. Indeed, while “[r]ights were sometimes compromised in wartimes, and presidents

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116. Muller, *supra* note 87, at 325 & n.11. For Muller’s analysis of the Japanese American internments, see ERIC L. MULLER, *AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II* (2007), and ERIC L. MULLER, *FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II* (2001).

117. Muller, *supra* note 87, at 325.

118. See Mary L. Dudziak, *Law, Power, and “Rumors of War”: Robert Jackson Confronts Law and Security After Nuremberg*, 60 *BUFF. L. REV.* 367, 367-69 (2012). For further elaboration of Dudziak’s historical argument about the collapsed categories of wartime and peacetime, see MARY L. DUDZIAK, *WAR-TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* (2012).

119. Dudziak, *supra* note 118, at 368.

120. *Id.*

121. *Id.*

overstepped the limits to their power,” those excesses were understood to be both temporary and extraordinary, since wartimes were both temporary and extraordinary.<sup>122</sup> In an era of “war-but-not-war,” Dudziak asks, “[c]ould Jackson’s vision of peace through law and legal institutions hold during a Cold War?”<sup>123</sup>

In examining this question, Dudziak catalogs Jackson’s Cold War era jurisprudence, reviewing his First Amendment speech and assembly cases and those on presidential war powers. She concludes that the former cases, tied within the anticommunist fears of the era, “will not warm the hearts of contemporary civil libertarians.”<sup>124</sup> Indeed, just as Jackson had appeared in his *Korematsu* dissent to place “his country and its wrongdoers outside the didactic scope of Nürnberg,”<sup>125</sup> so too in his First Amendment cases did he find that another set of domestic minorities “may constitutionally be treated as something different in law.”<sup>126</sup> This time it was U.S. communists or Communist Party sympathizers. In sentiments perhaps reminiscent of those he prosecuted at Nuremberg, Jackson declared that existing constitutional doctrine—“developed for a different era”<sup>127</sup>—did not apply to such “dangerous” minorities.<sup>128</sup> For a man who had spoken so eloquently in 1946 about the perils of minority oppression and the need for international legal protections for minority rights as a bulwark against war and persecution, this position was perhaps surprising. At a minimum, it evidenced that no judge, including Justice Jackson, was immune to “war hysteria” and the influence of the passions and pressures of patriotic fervor when “national security” is triggered.<sup>129</sup>

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122. *Id.* at 368-69.

123. *Id.* at 369-70.

124. *Id.* at 385.

125. Muller, *supra* note 87, at 352.

126. Dudziak, *supra* note 118, at 376 (quoting *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 414-16 (1950) (Jackson, J., concurring in part, dissenting in part)).

127. *Id.* at 375.

128. *Id.* at 376-77.

129. As Dudziak notes, Justice Jackson appeared in these cases to place most of his attention “not on the facts in evidence [the actual dangerousness of the alleged conduct at issue], but on what he knew and believed about communism in the world.” *Id.* at 376. He seemed to be making a comparison between his

By contrast, in the presidential war powers cases, Dudziak is more optimistic. She concludes that the major ideas about law and power found in Jackson's 1946 Nuremberg speech—that the forces of war and destruction can be constrained by a collective will embodied in law—remained important in these cases and help us to look forward.<sup>130</sup>

And, yet, even in these latter cases, Jackson's vision seems painfully diminished from the views he expressed in 1946. In that speech, Jackson had insisted on the need for strict legal controls on the abuse of majoritarian power. The availability of independent judicial review for the enforcement of personally-held legal rights was central to that vision—indeed, it presented the “only hopeful” model Jackson could see.<sup>131</sup> In his 1952 *Steel Seizure* concurrence, Jackson nonetheless appeared to retreat from this essential legal control in wartime, as he had in *Korematsu*.<sup>132</sup> Jackson did recognize one important “absolute” limit on the presidential war power: it could not be used *unilaterally* to expand executive power over internal affairs.<sup>133</sup> Nevertheless, once some evidence of congressional assent was discerned, judicial review of national security uses of the war power in domestic affairs was effectively at an end. At the same time, Jackson appeared to understand domestic courts to have no review power over applications of the presidential war power “when turned against the outside world for the security of our society.”<sup>134</sup>

What a remarkable position for Justice Jackson, the advocate of an end to aggressive war and the strict application of legal controls on international human rights

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perception of the internal threat posed by communism within the United States (“dangerous minorities”), and the “behavior” of the Nazis when they had been a “minority” in Weimar Germany, on their way to power as an unrestrained majority. *See supra* text accompanying notes 60-62.

130. *See* Dudziak, *supra* note 118, at 379-83.

131. Jackson, *supra* note 10, at 291-92.

132. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

133. *Id.* at 642-44

134. *Id.* at 645 (asserting that he would “indulge the widest latitude of interpretation to sustain [the President’s]” power to command, “at least when turned against the outside world for the security of our society”).

abuse, just six years after Nuremberg and his 1946 speech at Buffalo. Such a position might have struck Jackson as dangerous in a Cold War era in which U.S. politicians, in executive and legislative positions alike, regularly encouraged war anxiety, even war hysteria, to justify increasingly severe limitations on the rights of Americans.<sup>135</sup> The same is true with respect to the growing use of the war power to justify foreign policy excesses. The world in 1952 was indeed one increasingly marked by super-power sponsored proxy wars and systematic human rights repression, all justified in the name of national security and military necessity. Dudziak's Essay thus recalls Justice Jackson's 1946 admonition on how a "warlike spirit" can overcome a nation, with breathtaking consequences for the rule of law, human rights, liberty, and freedom.

At the same time, the wartime precedents Dudziak reviews continue to present major challenges to the world in the twenty-first century, particularly as the Cold War has given way to the War on Terror.<sup>136</sup> With no identifiable end and effectively divorced from geography, this new "war" has already been used to justify major incursions on individual freedom and collective security around the globe. Inevitably, these "wartime" excesses are claimed to be both lawful and immune from independent judicial review. They include not only more regularized armed attacks across international borders justified as acts of preemptive defense, including the expansion of drone warfare, but also abusive interrogation practices that amount to torture, the indefinite detention of enemy combatants, routinized invasions of privacy, speech, and associational rights, and targeted assassinations abroad.

On March 5, 2012, in a major policy speech aimed at publicly "explaining" America's national security legal principles, the U.S. Attorney General, Eric Holder, went so far as to declare that it is constitutional for the government to kill citizens in the fight against terror without any

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135. See, e.g., GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 311-426 (2004); ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* (1998).

136. See, e.g., Sarah H. Cleveland, *Hamdi Meets Youngstown: Justice Jackson's Wartime Security Jurisprudence and the Detention of "Enemy Combatants,"* 68 *ALB. L. REV.* 1127 (2005).

judicial review.<sup>137</sup> When it comes to national security, he said, “[d]ue process’ and ‘judicial process’ are not one and the same.”<sup>138</sup> Because “[t]he Constitution guarantees due process, not judicial process,”<sup>139</sup> he said, no permission from a federal court is needed before the United States takes lethal targeted action against an individual, including a U.S. citizen abroad. All that is required, said the Attorney General, is a determination by the political branches that the individual poses an “imminent threat” to national security, a standard that remains undefined and judicially unreviewable. What would Justice Jackson think of this today?

#### CONCLUSION:

##### JUSTICE JACKSON AND THE FIRST MITCHELL LECTURE, 1951

On January 16, 1951, Christopher Baldy, a prominent Buffalo attorney, wrote to Justice Jackson to invite him to deliver the first James McCormick Mitchell Lecture at the University of Buffalo Law School. Baldy asked Jackson to accept because “[i]t will be gratifying to your many friends here and you will find a flourishing law school, housed in a beautiful new building and anxious to receive you as its first lecturer of the series.”<sup>140</sup> Jackson responded a few days later, accepting the invitation, “first, because of the regard I had for [Mitchell], secondly, because of my interest in the Law School and the section of the country.”<sup>141</sup>

By the time Justice Jackson returned to Buffalo for his 1951 appearance at the University, the world, as Mary Dudziak has noted,<sup>142</sup> had changed, and his speech “Wartime Security and Liberty Under Law” reflected the

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137. Eric Holder, Att’y Gen. of the U.S., Address at Northwestern University School of Law (Mar. 5, 2012). The text of the speech is available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

138. *Id.*

139. *Id.*

140. Letter from Christopher Baldy to Robert H. Jackson (Jan. 16, 1951) (Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C. [hereinafter Jackson Papers, LOC], Box 48, Folder 3).

141. Letter from Robert H. Jackson to Christopher Baldy (Jan. 19, 1951) (Jackson Papers, LOC, Box 48, Folder 3).

142. Dudziak, *supra* note 118, at 369.

post-Nuremberg universe.<sup>143</sup> Jackson was focused on the Cold War and the threat totalitarianism posed in the shape of communist rule abroad and its internal implications for the United States. “We can no longer take either security or liberty for granted,”<sup>144</sup> Jackson asserted. “The essence of liberty,” he reminded his listeners, “is the rule of law. Only when impersonal forces which we know as law are strong enough to restrain both official action and action by private groups is there real personal liberty.”<sup>145</sup> His views were informed by history, mostly the experiences of wartime: the two recent world wars, at home and abroad, and the American Civil War.

Jackson used the *Korematsu* case to illustrate the dangers of military policy enforced in a domestic setting, “the exclusion and detention of citizens of Japanese ancestry.”<sup>146</sup> “It seemed to me then, and does now,” he recalled, referring to his dissent in the case, “that the measure was an unconstitutional one which the Court should not bring within the Constitution by any doctrine of necessity, a doctrine too useful as a precedent.”<sup>147</sup> The dangers of expanded presidential power in wartime were exemplified by the confrontation between Chief Justice Taney and President Lincoln over the suspension of the writ of habeas corpus<sup>148</sup>: “Taney in the light of his duties was right, and Lincoln in the light of his duty was right,” Jackson observed. “And if logic supports Taney,” he concluded, “history vindicates Lincoln.”<sup>149</sup>

And he had a warning, based on his view of the past, coping with the changed circumstances of the Cold War, and projecting into the future:

It is easy, by giving way to the passion, intolerance and suspicions of wartime, to reduce our liberties to a shadow, often in answer to exaggerated claims of security. Also, it is easy, by contemptuously

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143. Jackson, *supra* note 3.

144. *Id.* at 104.

145. *Id.*

146. *Id.* at 115.

147. *Id.* at 115-16. For Muller’s criticism of Jackson’s position in *Korematsu*, see Muller, *supra* note 87, at 352-55.

148. See *Ex parte Merryman*, 17 F.Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

149. Jackson, *supra* note 3, at 117.

ignoring the reasonable anxieties of wartime as mere “hysteria,” to set the stage for by-passing courts which the public thinks have become too naive, too dilatory and too sympathetic with their enemies and betrayers.<sup>150</sup>

Justice Jackson turned out to be prescient, for that is precisely where we stand now. The War on Terror today presents all the challenges to liberty and security that the Cold War presented to Jackson, albeit in an increasingly fractured and globalized world. How, in this context, can we most effectively protect basic rights and liberties? What new limits and controls on power and its excesses must we fashion? If we allow courts to retreat from their essential function as checks on aggressive war and human rights abuse, what will take their place? Have we, in this sense, come full circle to “improvement through education” as the only ultimately effective restraint on the abuse of power, both nationally and globally? If so, how do we pursue such broad-based human rights education and the construction of a new global order upon which it would be based? In addressing these vital questions, all anticipated in many ways by Jackson’s 1946 speech in Buffalo, much remains to be learned. Long lost to history, the speech and its lessons deserve renewed attention today.

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150. *Id.* at 116.