

# A COMMANDER'S POWER, A CIVILIAN'S REASON: JUSTICE JACKSON'S *KOREMATSU* DISSENT

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## I

### INTRODUCTION

Robert Houghwout Jackson was a justice of the United States Supreme Court during the years of World War II. This article considers his great but potentially perplexing December 1944 dissent in *Korematsu v. United States*,<sup>1</sup> in which he refused to join the Court majority that proclaimed the constitutionality of military orders excluding Japanese Americans from the West Coast of the United States during the War years.<sup>2</sup>

Japanese American internment history and the general public memory it shapes recall today that Justice Robert H. Jackson in *Korematsu* was, with his characteristic candor and gifted writing style, one of three—sadly, only three—Supreme Court justices who recognized these military policies for what they were, who called them by their racist name, and who refused to assist in their enforcement by judging them to be authorized by the Constitution. We recall much less often that Justice Jackson also wrote in *Korematsu*, with explicit res-

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This article grows out of remarks I delivered on November 6, 2004, at the conference, "*Judgments Judged & Wrongs Remembered: Examining the Japanese American Civil Liberties Cases of World War II on Their 60<sup>th</sup> Anniversary*," at the Japanese American National Museum in Los Angeles. I am very grateful to the skilled leaders and personnel of the institutions that sponsored the conference—the University of North Carolina School of Law, the JANM, and the UCLA Asian American Studies Center—and especially to UNC Law Professor Eric Muller, whose vision, boundless energy, and deep expertise made it an extraordinary event. This article also reflects my September 26, 2002, participation in a Jackson Center conversation at Chautauqua Institution's Lenna Hall with Fred Korematsu, his wife Kathryn Korematsu and documentary filmmaker Eric Paul Fournier. I am very grateful to Fred and Kathryn Korematsu, Karen Korematsu-Haigh, Eric Fournier, Gregory L. Peterson, Scott McVay, Thomas Becker, Richard Redington, Elizabeth Lenna, and many others who made that special event possible. I also thank Lauren DiFilippo, Melissa Peterson, Ann Carroll, and Jessica Duffy for excellent research assistance.

Fred Korematsu, a wonderfully gentle man, was eighty-six years old when he died on March 30, 2005. As a token of thanks for his lifetime of brave patriotism, I dedicate this article to his memory.

1. 323 U.S. 214 (1944).
2. See *id.* at 242-48 (Jackson, J., dissenting).

ignation about judicial powerlessness, that civilian courts, up to and including his own Supreme Court, perhaps should abstain from attempting to hold military commanders to constitutional limits in wartime.

This article considers Justice Jackson's *Korematsu* dissent in full. It was and is, contrary to some of the criticisms it has received over the past 60 years, a coherent position. (Readers can and should see this for themselves—reading this article is no substitute for reading Jackson's compact six-page dissent.) Jackson's dissent is also biographical and, to that extent, deeply and personally pragmatic. It emanated in part from his outlook and upbringing as quintessentially a rural American civilian who viewed life as pacific and individually autonomous, and who saw our law as most workable in such times of peace and unthreatening personal freedom. It was grounded as well in his very special, direct, and formative experiences with executive power. In the decade preceding his civilian judicial encounter with the military orders at issue in *Korematsu*, Jackson was very often a central player in exercising, and was constantly an up-close witness to, the unstoppable nature of the Executive power that reaches its apex in military command. Jackson's *Korematsu* dissent also fit into his general view of people and power and into what he saw throughout his life as the idea of law itself: it is the codified product of human beings struggling, by employing their rational and selfless capacities, to impose some limits on what they and their governments otherwise could perpetrate with the vast powers they possess. And despite Jackson's apparent institutional pessimism about the power of courts to protect constitutional liberties from military command threats during wartime, his *Korematsu* opinion also displayed, and had as part of its bottom line, his characteristic optimism about U.S. democracy, from its smallest people to its most powerful leaders.

In his years after *Korematsu*, Justice Jackson had unique experiences that confirmed his dissent's perspective on the vast nature of executive—including military—power, and his hopeful view that the people who possess such power are capable of restraining themselves in its exercise. At Nuremberg, in particular, where Jackson was the chief American military prosecutor of the surviving Nazi leaders following Germany's unconditional surrender to the Allies, he worked closely with military leaders who exercised such restraint, and he himself functioned as—and tried with considerable success to live up to the responsibilities of being—one of those powerful commanders.

Jackson was never fully satisfied with his *Korematsu* opinion, but he knew two things from its writing in 1944 until the end of his life ten years later: he had properly identified the unconstitutionality of defining crimes based on race, and his candor about the weakness of civilian judicial power as a limit on wartime executive power was superior to any alternative judicial approach that his colleagues had offered or that he could imagine. His dissenting opinion was, he knew, effective as a candid, smart consideration of perhaps the toughest challenge to civilian self-government: the military commander's wartime power.

For all of these reasons, Justice Jackson's dissent in *Korematsu v. United States* merits its very high place in both the American legal and the human canons. The opinion—all of it—deserves to be studied, admired, and celebrated. If it gets absorbed deeply by leaders who wield the vast powers of military command, Jackson's words and his example may offer real hope that wartime leaders will not, simply because they can, act to curtail individual liberty when it poses theoretical risks to ideals of physical and national security.

## II

### JACKSON'S *KOREMATSU* DISSENTING OPINION

Although Justice Jackson was, like his senior colleagues Justices Owen J. Roberts and Frank Murphy, a dissenter in *Korematsu*, he earlier had been part of the unanimous Supreme Court that upheld, in *Hirabayashi v. United States*, the constitutionality of military curfew orders directed at West Coast Japanese Americans.<sup>3</sup> Jackson's dissent in *Korematsu* must thus be located in the context of his own development as a justice, for it marked a significant break from his previous judicial acquiescence in military measures that restricted the liberties of U.S. citizens at home. As Professor Dennis Hutchinson has documented in detail, Jackson was late and skeptical in joining Chief Justice Stone's opinion for the Court in *Hirabayashi*.<sup>4</sup> But in those first years of World War II, in those early days of the Supreme Court's considering the constitutionality of such drastic wartime military measures, and in Jackson's first years as a justice, he saw military curfew orders as understandable and, because of their relatively minor nature, constitutionally tolerable restrictions on civilian freedom. Military imposition of a nighttime curfew was for Jackson and each of the justices an infringement on individual freedom that could be balanced against, and outweighed by, the military's conviction that the curfew served a legitimate wartime security need.

By the fall of 1944, however, Justice Jackson's judicial and constitutional acquiescence to race-based military measures against U.S. citizens had ceased. When the justices met in conference on October 16, 1944, to discuss and vote on the *Korematsu* case, Jackson told his colleagues that he "stop[ped] with *Hirabayashi*" and would go no further.<sup>5</sup> Two months later, when the Court announced

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3. 320 U.S. 81 (1943).

4. Dennis J. Hutchinson, "*The Achilles Heel*" of the Constitution: Justice Jackson and the Japanese Exclusion Cases, 2003 SUP. CT. REV. 455, 462-476. So too in *Ex Parte Quirin*, argued and decided even earlier, when Jackson had been on the Court only one year, in which he belatedly joined Chief Justice Stone's opinion upholding the military tribunal procedure by which undercover Nazi agents, apprehended on U.S. soil, were swiftly tried, convicted, and punished (including six executions). See 317 U.S. 1 (1942).

5. Conference notes of Justice Frank Murphy, "No. 20 [sic], O.T. 1944," in Murphy Papers, University of Michigan, Box 133, quoted in PETER IRONS, JUSTICE AT WAR 322 (1983); accord THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 687-91 (Del Dickson ed., 2001) (using various Justices' notes to recreate their conference discussion in *Korematsu*). Interestingly, Jackson indicated earlier, in some notes that he jotted after reading briefs in the case, that he was undecided but would "[p]robably reverse" Kore-

to the public its decision upholding Fred Korematsu's criminal conviction for violating the military's exclusion order, Jackson announced his dissent through an opinion that included one of the ringing principles of our nation and our constitutional law:

[I]f any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. . . . But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is a son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.<sup>6</sup>

In his dissent's classic passage, Jackson explained the malignancy of the majority decision to uphold the constitutionality of the military orders excluding Japanese Americans such as Fred Korematsu from the West Coast:

[A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we, the Supreme Court, review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its image. Nothing better illustrates this danger than does the Court's opinion in this case.<sup>7</sup>

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If Justice Jackson's dissent in *Korematsu* had said only that, it would be an opinion to study and celebrate, but it would not be much of a puzzle or a target for continuing criticism. These words put Jackson on the right side of what is, at least from our historical perspective, an easy case. In this respect, his words very much resemble Justice Murphy's analysis that the wholesale exclusion of Japanese Americans from the West Coast was based on unfounded "racial and sociological considerations [and thus was] not entitled to the great weight ordinarily given the [military] judgments based upon strict military considerations."<sup>8</sup> And these Jackson words evoke Justice Roberts's close and scathing parsing of

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matsu's criminal conviction. Jackson note, "22," in Robert H. Jackson Papers, Library of Congress, Manuscript Division (hereinafter "RHJ Papers"), Box 132.

6. *Korematsu*, 323 U.S. at 243-44 (Jackson, J., dissenting).

7. *Id.* at 245-46.

8. *See id.* at 239-40 (Murphy, J., dissenting). Murphy called the Court's opinion a "legalization of racism" and described racial discrimination as "utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States." *Id.* at 242.

the contradictory military orders that simultaneously confined Fred Korematsu to, and excluded him from, the California area in which he lived.<sup>9</sup>

These words were, however, only the first part of Jackson's *Korematsu* dissent. The second part is, especially when juxtaposed with his first part, the puzzler, because it expressed pessimism about a civilian court's ability and will to enforce constitutional limits on exercises of military power in wartime. Because Jackson thought it was predictable, and indeed almost certain, that the judiciary would defer to the military whenever individuals challenged its wartime actions, he all but urged courts to treat as non-justiciable any citizen's claim that a wartime military action was unconstitutional. As Professor Patrick Gudridge put it recently, Jackson seemed to be arguing in this latter portion of his *Korematsu* dissent "that constitutional law would have been better served if the Supreme Court ha[d] not addressed" the constitutionality of the military exclusion orders "at all."<sup>10</sup> This aspect of Jackson's dissent troubled those who focused on it at the time of the decision. It also troubled Jackson, then and during the years he lived after *Korematsu*. And it remains troubling today as we think about the Constitution and how it does or does not constrain the national war powers it ostensibly addresses.

This second part of Jackson's dissent in *Korematsu* begins by describing two circumstances that he saw as fixed realities: (1) in the civilian legal process, judges, such as Jackson and his Supreme Court colleagues, lack the martial competence needed to determine the actual military necessity of wartime actions by commanders such as Lieutenant General John L. DeWitt, who headed the Army's Western Defense Command from 1939 until June 1943 and who, in 1942, ordered Japanese Americans excluded from the West Coast;<sup>11</sup> and (2) ci-

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9. See *id.* at 225-33 (Roberts, J., dissenting). Justice Roberts called these contradictory military orders, violations of which each constituted a federal misdemeanor, "nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock [Korematsu] up in a concentration camp." *Id.* at 232.

In *Ex parte Endo*, in which the Court held, on the same day on which it upheld in *Korematsu* the constitutionality of military exclusion orders, that there was no legal authority for the government to detain a loyal Japanese American citizen of the United States based only on her race, Justices Murphy and Roberts each filed a separate opinion stating bluntly that such detention was as unconstitutional as were the military orders that had excluded persons like Ms. Endo and Mr. Korematsu from their West Coast home areas. See 323 U.S. 283, 307-08, 308-10 (1944) (Murphy, J., & Roberts, J., concurring). Justice Jackson, by contrast, who initially drafted for himself (it being his habit to start drafting an opinion for himself as he thought about cases) a short opinion on the unconstitutionality of detaining United States citizens "in camps without conviction of crime," Jackson three-page typescript opinion, "*Endo*," in RHJ Papers, Box 133, reprinted in Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1969-70 (2003), ultimately decided simply to join Justice Douglas's opinion for the *Endo* Court. (Professor Gudridge's article is an intriguing argument that *Endo*'s condemnation of the detention camps was based in constitutional law, not merely on narrow statutory and Executive order interpretations, and that we should understand and commemorate *Endo* as such.)

10. Gudridge, *supra* note 9, at 1933.

11. See generally IRONS, *supra* note 5. General DeWitt also selectively issued exclusion and relocation orders to non-Japanese American citizens of the United States who lived within his command region. For an odd and somewhat entertaining account of one such order, which resulted in the court-martial of a U.S. citizen and soldier of Italian ethnic heritage who ultimately was acquitted, see REMO

vilian courts—at least those that recognize their incompetence to second-guess the military about national security matters in wartime—would thus defer, quite properly, to a commander’s “military necessity” claim.

Jackson explained these practical realities in his dissenting opinion:

The limitation under which courts always will labor in examining the necessity for a military order are illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt [final] report [explaining the military basis for removing Japanese Americans from the West Coast in 1942.] So the Court, having no real evidence before it, has no choice but to accept General DeWitt’s own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.

In the very nature of things, military orders are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.<sup>12</sup>

For readers looking to embrace Justice Jackson’s eloquent condemnation of the military’s racist exclusion of Japanese Americans from the West Coast, his confession of civilian judicial incompetence to determine whether this wartime military measure actually was necessary and his resulting call for court deference to military claims of necessity were not the end of the bad news. Jackson went on to predict, in effect, that civilian judges *never* would presume to declare a wartime military measure unconstitutional, and that this reality counseled against courts even embarking to review such cases in the first place:

I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. . . .

My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt’s evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task.<sup>13</sup>

In other words, having announced, in the first part of the opinion, constitutional condemnation of the military’s racist exclusion orders, what Jackson articulated in this second part of his opinion was a prescription for civilian courts to abstain from reviewing the constitutionality of military action during wartime.

Justice Jackson’s *Korematsu* dissent contained a third argument—an important one, for it was the basis on which he was, at the bottom line, dissenting and

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BOSIA, THE GENERAL AND I 36-37, 74, 102 (1971) (personalizing his battles with General DeWitt but admitting that he never met the man).

12. *Korematsu*, 323 U.S. at 245 (Jackson, J., dissenting).

13. *Id.* at 248.

dissenting alone. “I should hold,” Jackson wrote, “that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority.”<sup>14</sup> At the very end of his opinion, he repeated this idea: “I do not think [the civil courts] may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.”<sup>15</sup>

Although Jackson declared this ultimate position bluntly, he did very little to explain or develop it. Yet it actually was the key turn in his dissent, for it was the argument that explained why he was not concurring in the Court's result—that Fred Korematsu was, in law, a criminal—or joining his dissenting colleagues in reasoning that the military exclusion order was unconstitutional. What Jackson was stating, very tersely, was that for him it would make no difference if a civilian court could somehow determine, with competence, that a race-based exclusion order was reasonable in military terms. Even then, he believed, a civilian court could not, constitutionally, assist the military in enforcing an order that is racially discriminatory on its face—its blatant racism made it, for courts, legally, constitutionally, and judicially untouchable. In any such venture, Jackson was announcing, the military would have to do its deeds on its own, without judicial assistance or imprimatur.<sup>16</sup>

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The second part of Justice Jackson's *Korematsu* dissent—his argument that courts probably should abstain from deciding constitutional challenges to military policy judgments in wartime—contained many messages. At the level of the particular case, he seemed to be castigating the Court (including his earlier self, for he had voted to grant Fred Korematsu's petition seeking a writ of certiorari<sup>17</sup>) for having agreed to review the constitutionality of this criminal conviction for violating a military order of exclusion. More generally, Jackson seemed to be advising prospective litigants not to seek judicial protection from unconstitutional military actions. Perhaps he also was lobbying his Court col-

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14. *Id.* at 247.

15. *Id.* at 248.

16. Judge Richard Posner, who views Jackson generally, and admirably, as “one of the greatest pragmatic Justices,” has described this closing strand of his *Korematsu* dissent as a “surprising” disappointment because Jackson there failed to understand that, in Posner's view, the military's exclusion order “did not violate any hard-edged rule of constitutional law.” RICHARD A. POSNER, *LAW, PRAGMATISM & DEMOCRACY* 293, 294 (2003). Interestingly, Judge Posner did not address, in this book advocating pragmatic judging, the second, utterly pragmatic, part of Jackson's *Korematsu* dissent: his argument that courts should abstain from reviewing the constitutionality of wartime actions that the military claims are necessary because the courts are destined, in the end, simply to approve those actions anyway, debasing constitutional law in the process.

17. See Justice Douglas's secretary's notes on the Justices' conference votes on Korematsu's petition seeking a writ of certiorari, in William O. Douglas Papers, Library of Congress, Manuscript Division, Box 113. In addition to Jackson, the other Justices who voted to grant Korematsu's petition for a writ of certiorari were Rutledge, Murphy, Douglas, Frankfurter, Reed, and Roberts. Justice Black voted to deny the petition and Chief Justice Stone did not participate in the vote. See *id.*

leagues to avoid future cases of this type. (In this, Jackson's view might have been institutionally pragmatic—he may have been, despite his stance as a dissenter on the merits, viewing the Court majority's decision to give its constitutional blessing to the military's exclusion orders as, at least implicitly, something of a *success* for the judicial branch because it thereby avoided the potential disaster of being disobeyed. Jackson was doing this, perhaps, by flagging very subtly—and fearing—the possibility of a future case in which the Supreme Court actually might strike down a wartime military order as unconstitutional, only to provoke Executive branch disobedience and thus an inter-branch constitutional conflict that the Court would necessarily lose, at least in the short term, because it lacks the practical power to enforce its commands.) In all of these respects, Jackson's opinion offered license to the Executive branch, including the military, and discouragement to those who would look to the Supreme Court to restore constitutional limits when other branches have exceeded their war power boundaries.

Jackson's dissenting opinion drew subtle criticism from within the Court itself. Justice Felix Frankfurter, who was Jackson's most like-minded colleague and closest friend on the Court even at this relatively early point in their tenure together (fall 1944 marked the start of their fourth of twelve years as judicial brethren), wrote a brief concurring opinion in *Korematsu*.<sup>18</sup> Frankfurter aimed a sentence or thought in that opinion at each of the three dissenters, but his comment on Jackson's effort to have it both ways—Jackson declaring his inability to say that the military exclusion order was an unreasonable exercise of the executive power to wage war, but Jackson nonetheless declaring *Korematsu*'s criminal conviction unconstitutional—was especially barbed and powerful:

To recognize that military orders are “reasonable expedient military precautions” in time of war and yet to deny them constitutional legitimacy makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to hard-headed Framers, of whom a majority had had actual participation in war. If a military order such as that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission within the limits of the constitutional power to regulate commerce.<sup>19</sup>

This passage was a well-aimed, double-barreled shot at Jackson: the words “reasonably expedient military precautions,” which Frankfurter put in quotation marks but did not attribute to a source, came from Jackson's dissenting opinion,<sup>20</sup> and the Court's recent unanimous explanation of the breadth of the national power to regulate interstate commerce had the same authorship.<sup>21</sup>

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18. See 323 U.S. at 224-25 (Frankfurter, J., concurring).

19. *Id.* at 225.

20. See 323 U.S. at 245 (Jackson, J., dissenting) (“I cannot say, from any evidence before me, that the orders of General DeWitt were not *reasonably expedient military precautions*, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional and have done with it.”) (emphasis added).

21. See *Wickard v. Filburn*, 317 U.S. 111 (1942) (Jackson, J., for the Court).



Although early commentators on *Korematsu* praised Jackson's dissent for its constitutional condemnation of racism,<sup>22</sup> it soon drew barbs from more reflective, scholarly readers. Professor Eugene Rostow, in his now-famous early attack on the Supreme Court's decisions in the Japanese American cases, described Jackson's opinion as "a fascinating and fantastic essay in nihilism."<sup>23</sup> Some years later, Professor Charles Fairman, a scholar who defended the constitutionality of the military orders excluding Japanese Americans from the West Coast during the War and who later became a trusted friend of Jackson, told him that his *Korematsu* dissent—which Fairman read as telling "officers of the Executive that in practice, in order to preserve the nation, they may have to violate its Constitution"—was "wrong" and urged him to reconsider his narrow view of executive power in wartime emergency.<sup>24</sup>

As Justice Jackson continued for the rest of his life to think about the issues of constitutional law and military power that he had grappled with in *Korematsu*, he remained convinced that he had, in each step of his complex approach, done the best he could have done with this problem as a civilian judge. His stated reasons for adhering in later years to the approach he had taken in *Korematsu* resembled what he wrote in the dissent itself. His less obvious (and perhaps even less conscious) reasons included knowledge that was more personal: his dissent was grounded in, and it was later reconfirmed by, the experiences and practical wisdom of his own life. Justice Jackson's *Korematsu* dissent did not explicitly mention "Spring Creek," "Frewsburg," "World War I," "Jamestown," or even "FDR." Nor, of course, did it mention "Nuremberg," for in 1944 that undertaking and defining experience was still in Jackson's unfore-

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22. See, e.g., Merlo Pusey, *War and Civil Rights*, WASH. POST, Dec. 26, 1944, at 7. Columnist Pusey, writing only a few days after the decision, quoted approvingly and at length from Jackson's criticisms of majority rationalizations regarding the constitutionality of the military exclusion orders—in other words, the first part of Jackson's dissenting opinion. Pusey did not, however, address Jackson's judicial futility/abstention argument, which might lead to exactly the same result as the majority's decision to affirm *Korematsu*'s conviction: a military unsupervised and thus unrestrained by judicial review. Cf. letter from Judge Jerome N. Frank to Justice Robert H. Jackson (Jan. 5, 1945), in RHJ Papers, Box 132 (stating "how much I admire your opinion in the *Korematsu* case" but not discussing, in this one-sentence private letter, any of its specifics).

23. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 510 (1945).

24. Charles Fairman, *Associate Justice of the Supreme Court*, 55 COLUM. L. REV. 445, 453-54 n.30 (1955). This article, a tribute to Jackson that Fairman wrote shortly after Jackson's premature death, is a thorough, and thoroughly admiring, account of Jackson's judicial work.

In 1942, in the months immediately following the attack on Pearl Harbor, Fairman lived and wrote about the exclusion orders in the area where they applied—he then was a political science professor at Stanford University. Fairman then (and later) defended General DeWitt's "evacuation" orders as reasonable preventative security measures. See Charles Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253, 1301-02 (1942). Jackson cited to Fairman's 1942 article and also to its sequel, Charles Fairman, *The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case*, 59 HARV. L. REV. 833 (1946), in a major lecture that Jackson wrote and delivered in 1951. See Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 111 n.21 (1951).

For the most recent evaluations of Jackson's *Korematsu* dissenting opinion, see JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE* 250-51 (2004), and William E. Nelson, Brown v. Board of Education and the Jurisprudence of Legal Realism, 48 ST. L. UNIV. L. REV. 795, 816-17 & n.156 (2004).

seeable future. But the presence and influence of all of these personal experiences on Jackson's thinking about *Korematsu* is unmistakable, and the context they add gives his words a rational content that may be its greatest, and its most humanly optimistic, attribute.

### III

#### THE ESSENTIAL JACKSON IN HIS *KOREMATSU* DISSENT

Robert Jackson's earliest forebears came to North America from Europe more than one hundred years before his 1892 birth in a family farmhouse in northwestern Pennsylvania. As the nineteenth century became the twentieth, Jackson grew up in a clan that valued its independence, first on its isolated farmland and then in a small town in southwestern New York State. As a boy, he was educated in rural public schools, as well as through his own listening, reading, speaking, and writing. He worked in various family and community businesses, and, as an adult, he became a lawyer who achieved great successes, first during twenty years in private practice in western New York State and then in a national government career that began after his political mentor and friend Franklin Roosevelt became president in 1933.

Jackson remained true to, and his work always reflected, the shaping influences of his origins and experiences. To understand Jackson, including his judicial opinions, look to his life. To understand Jackson's dissent in *Korematsu*, look to the life experiences before 1944 that gave him deep understandings both of the autonomous individual's true freedom and personal space in peacetime and of the vast and comparatively enormous nature of executive power in national government, especially during wartime. As he considered that juxtaposition—the nature of civilian freedom versus the power of government itself—Jackson developed a theory and a faith that the power of government could be exercised, even in the military realm and even during war, with thoughtful self-control. That theory was the basis for his hopefulness and core optimism that governmental episodes such as the excesses of West Coast military command during World War II were not inevitable and could be controlled, even if the means of control could not be the judiciary.

#### A. Jackson the Civilian

Jackson's upbringing and experiences before he came to Washington in 1934 were utterly civilian and deeply pacific. The years of Theodore Roosevelt's presidency (those of Jackson's rural childhood), the Taft years (in which Jackson was young adult), and Wilson's first term (when Jackson became a lawyer) were times of great national peace and isolation. Decades later, as he dictated an early draft of one of his notable public lectures, Justice Jackson described his milieu and outlook as a young man:

Our world then was a peaceful world, our Nation unarmed—but unafraid. [In the region where I grew up] close to the Canadian border, where a century before war with England had been waged, we had come to think of the unfortified frontier between

ourselves and our friendly Canadian neighbors as somehow symbolic of the state of the world. We regarded ourselves as living in an age of enlightenment. Tyranny belonged to the middle ages but lingered, of course, in a few countries—such as Russia, Germany, and the Austro-Hungarian empire. We knew they were backward and tyrannical governments, for they maintained standing armies and conscripted their youth for compulsory military service. We thanked God that we were not militarists, as were they. We never expected another large-scale war. The initiative in the world was held by the ideas of our Declaration of Independence and our type of constitutionalism. Its spread in the century that followed Waterloo was the most dramatic tendency of that era and thrones went down or granted concessions before its progress. . . .

Henley was the poet who caught the spirit of our times with his inspiring lines. William James, unfettered pragmatist, spoke our philosophy. Such political divisions as we had were represented by the little differences between a Wilson, a Taft and a Theodore Roosevelt, who, after all, had much the same outlook on life and bickered only as to details. It was, I assure you, a very comfortable era, one in which life might be hard but never hopeless, in which we might contemplate struggle but never defeat. We were certain, or now seem to have been certain, that—

“The year’s at the spring,  
And day’s at the morn:  
God’s in His heaven –  
All’s right with the world!”<sup>25</sup>

When war began in Europe in 1914, Jackson was a new lawyer, only twenty-two years of age.<sup>26</sup> Active in politics and public speaking, he took pacifist stands and urged U.S. non-involvement in the foreign conflict. Even in 1917, when Jackson’s early political hero Woodrow Wilson obtained the congressional declaration that took the United States into the War, Jackson offered loyal, but general and distant, support. Jackson spoke favorably of President Wilson, but while many of Jackson’s contemporaries enlisted in the military, he remained in civilian life, practicing law in Jamestown and nearby Buffalo.

This youthful Jackson is the Justice Jackson who emerged as the *Korematsu* dissenter three decades later. In his civilian-ness, he considered civilian judges like himself incompetent to assess, and deferential when faced with, military judgments. He also understood and sympathized with fellow civilians, such as Fred Korematsu, who sought merely to live their lives in peace and free space. And he declined judicially, as he had personally in 1917, to enlist—this time in President Roosevelt’s and General DeWitt’s military programs for Japanese Americans living in the United States.

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25. Robert H. Jackson, typescript draft of his James McCormick Mitchell lecture, n.d. [winter/spring 1951], p. 4, in RHJ Papers, Box 48. Jackson was quoting lines sung by a little Italian girl named Pippa in Robert Browning’s 1841 poem, “Pippa Passes” (part 1, lines 221-28). Jackson continued to revise this lecture and, by the time he delivered it at the University of Buffalo on May 9, 1951, it no longer included the material quoted above. The lecture was later published as Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103 (1951).

26. See generally JOSEPH E. PERSICO, *ELEVENTH MONTH, ELEVENTH HOUR: ARMISTICE DAY, 1918, WORLD WAR I AND ITS VIOLENT CLIMAX* 19, 22 (2004).

## B. Jackson's Pre-*Korematsu* Experiences with Executive Power

Robert Jackson's acquaintance with Franklin Roosevelt began in their respective young adulthoods, long before either man was perceived (except by their mothers and teachers) as destined for greatness. They first met in Albany when Jackson was about nineteen years old and studying to be a lawyer and Roosevelt was twenty-eight or twenty-nine and a freshman state senator.<sup>27</sup> Over the next thirty years, their stars ascended together. Jackson benefited considerably from Roosevelt's highest-rising star, which gave him significant official powers, and from his very high regard for his younger friend. Roosevelt ultimately made Jackson his Solicitor General, then his Attorney General, and later a Supreme Court Justice. If history had taken slightly different turns at various points, Jackson might have become Roosevelt's successor in the White House or, at three separate moments, the Chief Justice of the United States.<sup>28</sup>

When Jackson joined FDR's administration in 1934, he served under Roosevelt in metaphorical but very real political "wars" for the rest of that decade. In a wide range of realms, Jackson saw, and was part of exercising, determined executive power. Unlike almost all of his later Supreme Court colleagues, Jackson was present at ringside in the FDR era—and sometimes in the ring itself—to see military and command power run up against civilian government in the form of the judiciary and against civilian law in the form of the Constitution. Jackson saw in his Roosevelt administration years—he knew—what truly governs, and gives way to, what.

One particular Roosevelt experience that marked Jackson was being a presidential confidante when litigants brought three Supreme Court cases challenging the constitutionality of the president's decision to take the United States off the gold standard, government contractual commitments notwithstanding. Jackson was present with FDR in early 1935 when he learned that the Justices had been hostile to the executive-branch position during oral argument. Jackson witnessed, was involved in preparing to implement, and never forgot, the President's determination to announce publicly, in the event of adverse Supreme Court decisions, that he would act in the national interest to flout the Court's rulings.<sup>29</sup>

In 1940, as President Roosevelt moved this isolationist country carefully but steadily toward involvement in the European war that would become World War II, he made Jackson his attorney general. In that position, Jackson, still a civilian in his core sense of himself, became an attorney general whose primary

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27. See generally ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 2-3 (John Q. Barrett ed., 2003).

28. Three Presidents contemplated appointing Jackson when they had opportunities to fill the chief justiceship: President Roosevelt in 1941, following the resignation of Chief Justice Hughes; President Truman in 1946, following the death of Chief Justice Stone; and President Eisenhower in 1953, following the death of Chief Justice Vinson.

29. See Jackson, *supra* note 27, at 65-66.

legal work addressed war preparation and related issues.<sup>30</sup> Jackson worked with the President and the War Department to accomplish increased military support for Great Britain, including the “Destroyer Deal” that navigated legal complexities and evaded congressional approval to provide vital assistance when Britain stood alone against Hitler in summer and fall 1940. Roosevelt ordered a reluctant Jackson to assume responsibility to oversee management of immigration affairs and border security, to resume Federal Bureau of Investigation wiretapping of suspected threats to national security, to implement the new alien registration law, to supervise FBI investigations of suspected enemy aliens from Germany and Italy who were then in the United States, and to prepare to arrest specified individuals from those groups if and when the United States and their nations of origin actually went to war.<sup>31</sup>

Jackson's pre-Supreme Court experience with President Roosevelt's determination as a military commander concluded with a major event that occurred just south of downtown Los Angeles. In June 1941, Jackson was still attorney general when President Roosevelt sent 20,000 soldiers marching into Inglewood, California to take over the North American Aviation Company's aircraft production facility. At the president's command, the Army takeover kept the company operating when labor disputes would otherwise have halted the production lines that were turning out the B-25 bombers that later played vital roles in the Pacific theater of World War II.<sup>32</sup>

In 1944, Justice Jackson argued in the second part of his *Korematsu* dissent that civilian courts probably should abstain from assessing military actions during wartime because courts that engage in such reviews ultimately will give their approval to military actions, thus sometimes creating bad constitutional law and

30. See generally GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 280-86 (2004).

31. One cryptic but striking example of the last is a handwritten note that President Roosevelt jotted and apparently gave to Attorney General Jackson, likely in spring 1941, during one of their many conversations about dealing with the threat of enemy aliens inside the United States:

1. Overstay alien—Can't just go back.  
no country or transportation.
  - (a) Send to Lisbon  
or Japan or China.
  - (b) Keep here but report  
once a month.
2. Criminal—Jail.
3. Resisters—non criminal.  
Set up a camp.

Franklin D. Roosevelt handwritten note, n.d., in RHJ Papers, Box 90. In the Library of Congress, this FDR note is in a file containing Jackson's attorney general papers on the subject of issues concerning “Immobilized Foreign Ships.”

32. See EDWARD S. GREENBAUM, *A LAWYER'S JOB: IN COURT—IN THE ARMY—IN THE OFFICE* 137-41 (1967) (describing his role as War Department representative on the scene of the Army takeover of the North American Aviation bomber production plant in Inglewood, California); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 648-49 & n.17 (1952) (Jackson, J., concurring in the judgment and in the opinion of the Court) (discussing President Roosevelt's and the Army's seizure of the North American Aviation plant and Jackson's involvement in those events as attorney general).

always leaving the military unregulated. This pragmatic perspective palpably reflects Jackson's direct pre-Court career knowledge of the quantity, mentality, and determination of executive—including military—power and commanders.

### C. Jackson on Power and Reason

Robert Jackson developed and succeeded through a long run of practical experiences: he was a rural farm boy; a diligent student, both in school and on his own initiative; an apprentice who learned law from two mentors; a lawyer who succeeded because of his skilled advocacy, advising, and writing; a politician who found the successes that are measured by elections and policy outcomes; and a figure of national prominence based on accomplished results. Every aspect of Jackson's life was grounded in experience, in the realities of getting from here to there. Things made sense to Jackson when they worked, when they did the job at hand, and ideas made least sense to him when they proved useless in the farm field, in the community, in the marketplace, in politics, or in the law. Pragmatism was Jackson's framework in his judging, including in *Korematsu*.

Jackson also was a brilliant, reflective thinker about the experiences he lived and observed. As he made his way, he saw life constantly offering a choice between two competing forces, two contending approaches, two polar positions. At the level of greatest generality, Jackson labeled these poles "power" and "reason." In specific contexts, he saw them as embodying the differences that separate selfish and selfless, majority and minority, group and individual, insider and outsider, expediency and principle, capacity and self-restraint. Jackson regularly described these poles in his speaking and writing, both on and off the bench, and they came to be reflected, explicitly and implicitly, in his judicial opinions.

Robert Jackson first spoke formally in the Supreme Court chamber about "power" and "reason" and their relevance to constitutional adjudication on February 1, 1940, when, as the newly appointed attorney general, he addressed the justices on the formal occasion of the Supreme Court's 150<sup>th</sup> anniversary.<sup>33</sup> Jackson began his very eloquent speech on this occasion by describing the Court in its very early days. He then discussed how its work had changed as the Constitution "became less a living and contemporary thing—more and more a tradition."<sup>34</sup> Turning then to the respective work of the Court he was addressing and the Executive branch and the bar he was representing, Jackson spoke about how the judiciary fits with, and depends upon, the other branches of government and the democratic system they reflect:

However well the Court and its bar may discharge their tasks, the destiny of this Court is inseparably linked to the fate of our democratic system of representative government. Judicial functions, as we have evolved them, can be discharged only in that kind

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33. See 309 U.S. v-xii (1939). With the exception of the newly appointed Justice Murphy, the full Court was present. See *id.*

34. *Id.* at vi.

of society which is willing to submit its conflicts to adjudication and to subordinate power to reason. The future of the Court may depend more upon the competence of the executive and legislative branches of government to solve their problems adequately and in time than upon the merit which is its own.<sup>35</sup>

Five years passed, encompassing his appointment to the Court and many judicial decisions, including *Korematsu*, before Jackson returned, again in that courtroom, to his touchstone concepts of power and reason. In May 1945, just days after President Truman announced the appointment of Justice Jackson to prosecute Nazi war criminals in Europe, Jackson closed a dissenting opinion by invoking his polar positions and stating his preference between them: "Power should answer to reason none the less because its fiat is beyond appeal."<sup>36</sup>

Less than six months later, Jackson voiced the same perspective on these contending forces and approaches to life as he explained, in his majestic opening statement in the Palace of Justice at Nuremberg, the legal proceedings that he had led the Allies to create:

May it please Your Honors:

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.<sup>37</sup>

Jackson continued to voice his perspective on the relative places of power and reason, and on the interrelationship between them, after he returned to the Court from Nuremberg in 1946. In his famously stinging *Chenery II* dissent regarding the limits of judicial deference to administrative agency actions, for example,<sup>38</sup> Jackson penned a two-level reflection on the difference between ac-

35. *Id.* at VII.

36. *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 196 (1945) (Jackson, J., joined by Stone, C.J., and Roberts and Frankfurter, JJ., dissenting); *see also Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 897 (1945) (Jackson, J., concurring in denial of petition for rehearing). Jackson's second, solo opinion in this case went unnoticed by the press and general public in the days and months after it was handed down on June 18, 1945, but the next spring, following Chief Justice Stone's April 1946 death, President Truman's June 1946 appointment of Chief Justice Vinson to succeed Stone, and Jackson's ensuing public attack from Nuremberg on Justice Black's ethics, the *Jewell Ridge* opinions came to be understood as quite revealing of the serious personal divisions among many of the justices.

37. *See* ROBERT H. JACKSON, *THE NÜRNBERG CASE* 30 (1947).

38. *Securities & Exchange Comm. v. Chenery Corp.*, 332 U.S. 194, 210-18 (1947) (Jackson, J., joined by Frankfurter, J., dissenting) (stating, "I give up. Now I realized fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it'" and stating his inability in this case "to comprehend the processes by which other minds reach a given result"). Earlier, when Justice Murphy had delivered the Court's opinion in this case on June 23, 1947, Justices Frankfurter and Jackson had briefly stated their dissent, the lack of time for them to prepare "a response adequate to the issues raised by the Court's opinion . . . concern[ing] the rule of law in its application to the administrative process and the function of the Court in reviewing administrative action," and their resolve that "detailed grounds for dissent will be filed in due course." *Id.* at 209. Over the ensuing summer, Jackson drafted and polished his dissent, which Frankfurter joined and they filed when the Court began its new Term on October 6, 1947. *See id.* at 210.

tions that reflect mere power and those that are grounded in reason: he condemned an administrative agency for exercising its power without offering any reasons for its action,<sup>39</sup> and he condemned the Supreme Court for changing its previous approach to this very case four years earlier simply because a new Court majority now had the power to do so.<sup>40</sup> Jackson also implicitly employed the power/reason dialectic, to cite just one more example, when he coined the phrase “neutral and detached magistrate” to explain the core of the Fourth Amendment’s Warrant Clause protection for civilian liberties.<sup>41</sup>

Power and reason also continued to be present in Jackson’s post-Nuremberg extrajudicial writing. One of the very final projects that he worked on before his sudden death in October 1954 was drafting the Edwin Lawrence Godkin lectures he had agreed to deliver at Harvard University in February 1955. In those drafts, which Justice Jackson prepared during the summer and early fall of 1954, he made explicit the relationship he saw between *Korematsu* and his views on power and reason. After describing the Supreme Court majority’s *Korematsu* decision quite generously as an instance of the judiciary deferring to the military’s view of what best served ultimate liberty,<sup>42</sup> Jackson concluded his final draft lecture by quoting from his own 1941 speech on the occasion of the Court’s sesquicentennial. “Judicial functions, as we have evolved them” in the United States, Jackson reiterated,

“can be discharged only in that kind of society which is willing to submit its conflicts to adjudication and to subordinate power to reason. The future of the Court may depend more upon the competence of the executive and legislative branches of government to solve their problems adequately and in time than upon the merit which is its own.”<sup>43</sup>

When Jackson’s Godkin lectures were published posthumously in 1955, this articulation of the human potential to subordinate power to reason became literally his final public words on law itself.

39. *Id.* at 216 (“The truth is that in this decision the Court approves the Commission’s assertion of power to govern the matter *without* law, power to force surrender of stock so purchased [i.e., by corporate officers and directors after they had filed a voluntary reorganization plan] whenever it will, and power also to overlook such acquisitions if it chooses. The reasons which will lead it to take one course as against the other remain locked in its own breast, and it has not and apparently does not intend to commit them to any rule or regulation. This administrative authoritarianism, this power to decide without law, is what the Court seems to approve in so many words . . .”).

40. *Id.* at 209-10 (“The Court by this present decision sustains the identical administrative order which only recently it held invalid. . . . There being no change in the order, no additional evidence in the record and no amendment of relevant legislation, it is clear that there has been a shift in attitude between that of a controlling membership of the Court when the case was first here and that of those who have the power of decision in this second review.”).

41. *Johnson v. United States*, 333 U.S. 10, 14 (1948) (Jackson, J., for the Court). See generally Hon. Albert M. Rosenblatt, Speech at the Annual Conference and Banquet of the New York State Magistrates Association (Oct. 5, 2004), in 44 THE MAGISTRATE 4-5 (Dec. 2004) (describing Jackson’s coinage in *Johnson* of the “neutral and detached magistrate” formulation, and concluding, “I cannot think of better words that identify what the public expects of judges than neutral and detached.”).

42. ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 75, 92 n.92 (1955).

43. *Id.* at 82-83 (quoting 309 U.S. v, vii (1939)).



What Jackson stood for and believed to his core, in other words, was that power can be exercised, but that reason sometimes, and nonetheless, declines to do so.

#### D. Jackson's Optimism

What civilian Justice Jackson really recognized and described candidly in *Korematsu* was the power of the Executive branch, in the form of General DeWitt's orders and in general, and the powerlessness of the Supreme Court in comparison. Jackson also suspected strongly that DeWitt's directives reflected less than the thinking, judgment, and restraint that reason makes possible. But these insights did not reduce Jackson to pessimism. While he believed he could do little about it from the bench, Jackson's dissent gave hopeful voice to the prospects that reason could, from within the realm of government and military power itself, make its impact. He explicitly held out the prospect that reason could play its reflective, self-restraining role inside the military itself, in the persons of military officers and the Chief Executive who commands them:

If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.<sup>44</sup>

In other words, Jackson's seemingly pessimistic dissent came to a hopeful conclusion about our commanders-in-chief and military commanders: We get to elect, and thus to change, the former. And the latter, Jackson knew, need not behave, and they need not exercise their powers, as General DeWitt had.

In his Nuremberg experience soon after *Korematsu*, Jackson got to be, and he got to see a number of military officers being, the kinds of Executive-branch actors who were the hope of his dissenting opinion.

## IV

### JACKSON AFTER *KOREMATSU*

#### A. Jackson at Nuremberg

Although Justice Jackson never became President or Chief Justice, he did, shortly after Roosevelt's death but pursuant to his design, become a historical category of one: Jackson was the chief American prosecutor at Nuremberg, Germany, following the Allied military victory in Europe. Justice Jackson accepted President Truman's assignment less than five months after Jackson had read his *Korematsu* dissent from the Supreme Court bench. He absented himself from the Court and went, first to England and ultimately to Nuremberg, to bring law and due process to the wreckage and criminal perpetrators of war. Indeed, Jackson in 1945 and 1946 was the architect of the post-war international

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

legal system in which surviving Nazi leaders and other alleged war criminals in the European theater were charged, prosecuted, defended, judged, and, for those who were convicted, punished.<sup>45</sup>

It was well recognized in 1945 that Justice Jackson, in going to do what we now summarize as “Nuremberg,” was embarking on a *military* task. The military defeat of Germany, its subsequent unconditional surrender, and the Allied military occupation of Europe was the context for his work. As Jackson put it directly in his closing statement, the Nuremberg trial occurred during a state of war.<sup>46</sup> He devised, with Allied counterparts, a trial system and structure that was an international military tribunal. And it is semantically interesting to note that while Jackson was engaged in this diplomatic, organizational, and, at Nuremberg, prosecutorial work, he had for the first time in his life the experience of being a military officer—the President, through the War Department, gave Jackson the assimilated rank of a senior general, which gave him command authority and administrative power in the American sector of occupied Germany.

More substantively, what Jackson did at Nuremberg in the trial process he designed and in his prosecution of the American cases against Nazi individuals and organizations was to exercise some of the reason and something less than the full power that a military position embodies. His core vision and accomplishment at Nuremberg was to insist on a real trial—meaning due process and the genuine possibility of acquittal, as happened in some cases. He refused to conduct a trial in form that really would have been Executive action dispatching vanquished adversaries to predetermined fates.

Jackson had, before both Nuremberg and *Korematsu*, given voice to the reason-based view of the legal process that they have in common: the real judicial function, he explained, is to provide a judgment on law and evidence.<sup>47</sup> In *Korematsu*, this view became Jackson’s skepticism about judges permitting themselves to be used militarily when they cannot or will not provide judgments on law and evidence. At Nuremberg, this view animated Jackson’s confident creation of an independent tribunal and contributed to his comfort about prosecuting before such a court. He, as the Executive branch and military leader at

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45. See generally TELFORD TAYLOR, ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1992); EUGENE C. GERHART, AMERICA’S ADVOCATE: ROBERT H. JACKSON (1958).

46. See JACKSON, *supra* note 37, at 121-22:

[W]e should not overlook the unique and emergent character of this body as an International Military Tribunal. It is no part of the constitutional mechanism of internal justice of any of the [London Agreement] Signatory nations. Germany has unconditionally surrendered, but no peace treaty has been signed or agreed upon. The Allies are still technically in a state of war with Germany, although the enemy’s political and military institutions have collapsed. As a Military Tribunal, it is a continuation of the war effort of the Allied nations.

See also *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 147 (1948) (Jackson, J., concurring) (“We are still technically in a state of war . . . [and] I find no reason to conclude that we could find fairly that the present state of war is merely technical. We have armies abroad exercising our war power and have made no peace terms with our allies, not to mention our principal enemies.”).

47. See *Cleavages Widen in U.S.*, *Jackson Says*, WASH. POST, Jan. 23, 1944, at M4 (reporting on and quoting Jackson’s speech the previous day to the New York State Bar Association).

Nuremberg, went into that court because he wanted, and he was electing to permit, real judgment on law and evidence by the judges.

*Korematsu* also connects to Nuremberg in Jackson's own rhetoric and imagery. He surely had his *Korematsu* dissent in mind when he wrote and then spoke, in his Nuremberg summation, the charge that the defendants had given Adolf Hitler a "loaded gun."<sup>48</sup>

## B. Jackson and the Military

Jackson's work during his time at Nuremberg included regular interactions and substantive discussions with his American military peers, including Generals Dwight Eisenhower, William J. Donovan, Lucius Clay, and others. Private papers indicate that among the topics Jackson explicitly discussed and reflected on while working on the military-power side of the divide were the military issues and policies that had produced *Korematsu*.

One of these moments occurred on paper. In spring 1945, just days after President Truman had assigned Jackson to the task of prosecuting Nazi war criminals, he received a letter from an American soldier who was fighting in the Pacific. He described his combat and other experiences fighting Japanese military forces during the previous seventeen months. He then explained that he was a "former attorney" who was receiving West publishing company's *Supreme Court Reporter*, and that he recently had received and read *Korematsu*. This soldier let the civilian Jackson know, from the battlefield, that he had gotten it right:

When I finished reading [the Court's opinion], I was so shocked. . . .

As a member of the armed forces I am in fullest sympathy with any broad reading of the war powers of the government. We in the battle realize full well, perhaps better than those of you at home, how much is dependent on centralized leadership. Indeed, many of us are perhaps too ready to utilize the concept of "military necessity" as a justification for the government exercising powers which may help in shortening the war. Because we are in the last resort a group of young men who wish to end the bloody battles and return to the States to resume our place in society. Our selfish interests, it might be said, support that which will help us defeat the enemy.

But the instant decision is the type of blow from which we cannot recover so easily. It introduces racialism, the very racialism we are fighting so strenuously to eliminate.

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48. Jackson's summation regarding the conspiracy charge against Nuremberg defendants included the following paragraph:

What these men have overlooked is that Adolf Hitler's acts are their acts. It was these men among millions of others, and it was these men leading millions of others, who built up Adolf Hitler and vested in his psychopathic personality not only innumerable lesser decisions but the supreme issue of war or peace. They intoxicated him with power and adulation. They fed his hates and aroused his fears. They put a loaded gun in his eager hands. It was left to Hitler to pull the trigger, and when he did they all at that time approved. His guilt stands admitted, by some defendants reluctantly, by some vindictively. But his guilt is the guilt of the whole dock and every man in it.

JACKSON, *supra* note 37, at 153. Although press accounts at the time highlighted Jackson's "loaded gun" metaphor, see, e.g., *Death Asked for Nazi Leaders [sic], Guilty as Hitler, Says Jackson*, N.Y. TIMES, July 27, 1946, at 4, I have found none that connected this Jackson "loaded gun" at Nuremberg to the "loaded weapon" that he had had warned against in *Korematsu*.

The Supreme Court in recent years—at least from the scattering reading I have been able to do in the jungles and tropics—has been preaching religious tolerance. It has declared invalid the “flag-salute” statutes; it has struck down discrimination against Negroes in the South: all laudatory let us admit. To be sure, these cases failed to involve the war power and are not strictly analogous. But the spirit behind the decisions is certainly pertinent. In deciding the [Fred] Toyosaburo Korematsu cases, the Court has however deprived an American citizen of his rights utterly devitalizing the constitutional principles which are included within the word “citizen.”

To you and the other Justices who dissented from the majority, whose specious reasoning is hardly deserving of criticism except as to reveal the evils lurking in it, let me convey my thanks and the thanks of many others for exposing the vicious doctrine which is being engrafted onto our constitutional structure.<sup>49</sup>

Another of these moments occurred on April 15, 1946. At that time, at a point in the defense cases at Nuremberg when Jackson was not personally handling the cross-examination of any witness, he made a side trip to Austria. He met there with General Mark Clark, who had commanded the American 5<sup>th</sup> Army in the War's Italian campaign and was at that time American High Commissioner in occupied Austria. They met at Clark's headquarters in Vienna. Among the various topics that he and Jackson discussed in detail, in addition to the Nuremberg trial, was General John DeWitt and the orders he had issued four years earlier as military commander of the American West Coast. General Clark told Jackson of his 1942 opposition to DeWitt's orders deporting Japanese Americans to inland areas and camps.<sup>50</sup> Clark reported that, in his view, it would have been militarily sufficient in 1942 to detain only Japanese American *leaders*, while moving others back from coastal areas but letting them live normally. Clark also reported to Jackson that the Japanese American 100<sup>th</sup> Infantry Battalion, which had fought under Clark in Italy, had been loyal and effective soldiers.<sup>51</sup>

The point is not that General Clark's views were perfectly correct or enlightened, either in 1942 or in 1946. The point is that “General” Jackson found confirmation in Europe, as he spoke in confidence with a *real* general, that all generals are not General John DeWitt, that a military perspective does not always insist that power be exercised fully, and that reason can lead to self-restraint in a military commander's decisionmaking. Jackson's experiences, with Clark and others as with his own powers as U.S. Chief of Counsel, cor-

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49. Letter from 1<sup>st</sup> Lt. (Air Corps) Felix F. Stumpf to Justice Jackson (Apr. 18, 1945), in RHJ Papers, Box 132. Jackson, swamped with juggling his end-of-Term Supreme Court work with his new presidential assignment, scrawled “Acknowledge with thanks R.H.J.” on the letter and later signed a very short note, composed by his secretary, that thanked the writer and said Jackson was interested in his views. See letter from Justice Jackson to Lieutenant Felix F. Stumpf (May 5, 1945), in RHJ Papers, Box 132.

50. See generally PETER IRONS, *supra* note 5, at 51, 61 (reporting Clark's February 1942 testimony to a congressional committee that the U.S. Pacific coast was well-defended, and his advice to Secretary of War Henry Stimson that he (Clark) disapproved of the “mass exodus” proposed by General DeWitt).

51. See generally MARK W. CLARK, *CALCULATED RISK* 220-21, 418 (1950) (“I was proud to have them in the Fifth Army,” and further describing the 100<sup>th</sup> Battalion, the first Japanese American unit in the U.S. Army, as high-performing, brave, skilled, and highly decorated.).

roborated his *Korematsu* belief that military commanders with all their power in the horrible realm of war nonetheless can find it in their own rational capacities to do something less than their full powers would allow and their fears might otherwise lead them to perpetrate.

## V

### JACKSON ON *KOREMATSU*

Following Nuremberg, Justice Jackson returned to the Supreme Court in fall 1946. He served with skill and distinction, especially in wielding his own pen to write opinions that expressed strong, often personal, perspectives in uniquely eloquent prose, until his sudden death at age 62 in October 1954.<sup>52</sup> During those years, Jackson openly discussed *Korematsu* and reaffirmed his conviction regarding the approaches—certainly the approach to protecting civil liberties, and less so the approach to defining judicial power—that he had taken in his 1944 opinion.

#### A. Jackson on *Korematsu* as a Civil Liberties Decision

Justice Jackson always viewed *Korematsu* as a civil liberties decision. In a major public speech, “Wartime Security and Liberty Under Law,” that he delivered in May 1951, a time when the United States was involved in the Korean War and Cold War combats against global communism, Jackson described the Court’s opinion as “the precedent that I fear will long be most useful to justify wartime invasions of civil liberties.”<sup>53</sup> His own dissent, by contrast, was one of the statements about constitutional civil liberties in which he retained true pride. When a Smith College senior wrote to ask him, for example, about “civil liberty cases in which you have rendered an opinion,” Jackson jotted a list of nine case names in the margin of her letter for his secretary to use in composing a reply for Jackson to sign—the first of these cases being “*Korematsu*.”<sup>54</sup>

#### B. Jackson on His *Korematsu* Approach to Executive and Judicial Power

Justice Jackson also confronted, in private reflection and writing, and then in public speaking, the tougher part of his dissenting opinion in *Korematsu*. Jackson delivered “Wartime Security and Liberty Under Law” to a large crowd at the University of Buffalo, a school with which he had long and deeply personal connections.<sup>55</sup> The speech, which he drafted personally and rewrote many

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52. See generally Philip B. Kurland, *Robert H. Jackson*, in IV THE JUSTICES OF THE UNITED STATES SUPREME COURT 1283-1311 (Leon Friedman & Fred L. Israel eds., 1997); Fairman, *Associate Justice of the Supreme Court*, *supra* note 24.

53. Jackson, *supra* note 25.

54. Letter from Judith Plessner to Justice Jackson (Sept. 30, 1952), in RHJ Papers, Box 18; accord letter from Elsie L. Douglas to Judith Plessner (Oct. 6, 1952), in RHJ Papers, Box 18 (alphabetizing Jackson’s list of cases).

55. See John Q. Barrett, *A Jackson Portrait for Jamestown*, “A Magnet in the Room,” 50 BUFF. L. REV. 809, 810-11 (2002).

times before it reached final form, considers many complex historical episodes and difficult political and legal topics, including the World Wars, American Communists, emergency powers under various foreign constitutions, President Lincoln's suspension of habeas corpus during the Civil War, the military commission that tried his assassins, the rejection of *Lochnerism*, and the protection of personal rights. And then Jackson spoke directly about the conundrum of *Korematsu*:

I suppose the American people, on whose eternal vigilance liberty ultimately depends, are well agreed that what they want of the courts is that they both preserve liberty and protect security, finding ways to reconcile the two needs so that we do not lose our heritage in defending it.

The issue that usually comes to the courts, however, is not a clear and simple one between security and liberty. The issue as we get it is more nearly this: Measures violative of constitutional rights are claimed to be necessary to security, in the judgment of officials who are best in a position to know, but the necessity is not provable by ordinary evidence and the court is in no position to determine the necessity for itself. What does it do then? The best study of the impact of such claims upon the judicial process during wartime is *Korematsu v. United States*, the precedent that I fear will long be most useful to justify wartime invasions of civil liberty. It was not a case where the Court was asked by a citizen to obstruct execution by military authorities of a military order. It was a case where the Government asked the Court to become, itself, the agency to enforce against the citizen, by criminal process, a military policy of dubious constitutionality. That policy was to remove all persons of Japanese ancestry, including native born American citizens, from the West Coast and herd them into camps in the interior. When enforcement of that measure came squarely before the Supreme Court, three judicial policies were advocated, none of which can be said to be wholly satisfying.

One view . . . held exclusion and detention of citizens of Japanese ancestry constitutionally valid. *Korematsu*, it reasoned, was detained because military authorities feared an invasion and felt constrained to take proper security measures. "The need for action was great, and time was short." The Court refused to say that the "actions were unjustified" and held them constitutional. Another course . . . refused to yield to the doctrine of military necessity and declared the measure "a clear violation of constitutional rights," let the chips fall where they would. It seemed to me then, and does now, 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. I thought the courts should not lend themselves to its enforcement and we should discharge the prisoner from custody under judicial commitment. But had the military authorities attempted to enforce the measure by their own force and authority, the Court should not attempt active interference, since the West Coast was then a proper theater for military operations. I can add nothing to my dissent in the case, though I have to admit that my view, if followed, would come close to a suspension of the writ of habeas corpus or recognition of a state of martial law at the time and place found proper for military control.<sup>56</sup>

### C. Robert Jackson and Fred Korematsu

In his optimistic conclusion, *Korematsu* was, to Jackson, a case about the civilian people of the United States. Jackson saw regular civilians as having a kind of front-end, self-governing power to prevent abuses of military power. It

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56. JACKSON, *supra* note 24, at 115-16 (footnote deleted).

was “the people,” he wrote, who should, and thus in his view presumably *could*, not “ever let command of the war power fall into irresponsible and unscrupulous hands . . . .”<sup>57</sup> And it was the prospect that military commanders might care about public reaction, “the political judgments of their contemporaries,”<sup>58</sup> that gave Jackson some hope that these executive branch officials would restrain themselves when deciding how to exercise their enormous powers.

But the case was not, for Jackson, merely about nine civilian justices, nor was it only about 120,000 civilians interned in this country and his hope that the moral force, the reason, of liberty interests such as theirs could penetrate a military power mindset and lead to military self-restraint. The case also seems to have struck Jackson individually at the level of Fred Korematsu, the individual litigant.

Jackson’s opinion seems to articulate this personal identification. Korematsu’s crime, wrote Jackson, “consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.”<sup>59</sup> Jackson’s dissenting opinion does not mention Warren County, Pennsylvania, his place of birth and early boyhood, or the adjacent Chautauqua County, New York, where he grew up, went to school, raised his family and practiced law for more than twenty years. There can be little doubt, however, that Jackson’s deep commitment to citizen Korematsu’s constitutional right not to be classified a criminal simply for living where he had lived all his life was written with citizen Jackson and his regional roots also clearly in mind.

This is an identification that was, decades later, reciprocated quite beautifully on that very land of Jackson’s life. When I first met and had the opportunity to interview Fred Korematsu in Chautauqua County in 2002, he mentioned with deep gratitude his lawyers during the War, the people whose reason led them to take his side in his legal battle to be a free American. He mentioned first Ernest Besig, the ACLU lawyer who stood by him through his wartime trial and appeals. And then, in a wonderful layman’s statement that captured it all, Mr. Korematsu named three others whom he regarded as having been his “lawyers”: Frank Murphy, Owen Roberts, and Robert Jackson.<sup>60</sup>

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

58. *Id.*

59. *Id.* at 243.

60. Interview with Fred Korematsu, at the Robert H. Jackson Center, Jamestown, N.Y. (Sept. 27, 2002).