What Would Jackson Do? Some Old Advice for the New Attorney General

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The new Attorney General will face a breathtakingly broad range of issues. From developing principles for criminal prosecutions and antitrust investigations and the enforcement of environmental and fair housing laws, to the coordination with and support of state and local law enforcement and the protection against and pursuit of terrorists in the post-September 11 world, the challenges have never been greater. In thinking about what advice we might reasonably offer to the new Attorney General, we have found ourselves repeatedly drawn to an unlikely source of guidance: in a series of remarkably eloquent speeches delivered in the middle of the last century, Robert H. Jackson, who served as President Roosevelt's third Attorney General, addressed some fundamental questions with a wisdom that is as relevant today as it was then. Specifically, Jackson had much to say about three topics that continue to challenge us: how to ensure that federal prosecutors exercise their discretion both independently and responsibly, how to define the appropriate roles for federal and local law enforcement, and how to strike the proper balance between protecting civil liberties and maintaining national security. In addressing these questions, Jackson applied a degree of common sense and practical wisdom that remains astonishingly perceptive.

In our view, the next Attorney General would benefit greatly from reviewing what Jackson had to say in these areas, not only because it is interesting to see how timeless these issues really are, but also because Jackson managed to say some genuinely important things about them. In particular, the next Attorney General will have to (1) find a proper balance between providing democratically responsive policy direction to ninety-four United States Attorneys and unduly influencing the independent exercise of their prosecutorial discretion, (2) develop methods for supporting federal law enforcement objectives without impinging on the sovereign prerogatives of local representatives, and (3) manage efforts to protect America's domestic security through surveillance and other traditional law enforcement methods while ensuring the preservation of our constitutional liberties. In each of these areas, Jackson recognized that federal lawyers must exercise their significant powers with both humility and restraint. These tasks are not easy to accomplish, but it is essential that the next Attorney General try.

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I. The Responsible Exercise of Federal Prosecutorial Discretion

In April 1940, three months after becoming Attorney General, Jackson gave a speech to the U.S. Attorneys, who had assembled in the Great Hall of the Justice Department for their annual conference.[1] This speech has justifiably become quite famous for the way it eloquently and honestly explains the essence of prosecutorial responsibility: "The prosecutor has more control over life, liberty, and reputation than any other person in America. . . . While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst."[2] The critical message that Jackson sought to deliver to the gathered federal prosecutors was that their greatest power lay in their ability to temper their prosecutorial authority with practical wisdom.

In this short speech, Jackson made several important points that bear repeating. First, he stressed the need to balance local control and responsibility with the development of "uniformity of policy which is necessary to the prestige of federal law."[3] Jackson appreciated the U.S. Attorneys' "knowledge of local sentiment and opinion," particularly when it came to local courts and juries; their responsibility in the several districts for law enforcement and for its methods "ought not be assumed" by Main Justice.[4] On the other hand, experience had demonstrated that some measure of centralized administration was necessary "[t]o promote uniformity of policy and action, to establish some standards of performance, and to make available specialized help . . . ."[5]

Second, Jackson recognized that the role of the federal prosecutor is not just to win cases but to do justice. This was not an empty platitude for Jackson. As he said to the assembled U.S. Attorneys, "Your positions are of such independence and importance that while you are being diligent, strict and vigorous in law enforcement you can also afford to be just. Although

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[1] By the beginning of 1940, Jackson had already been general counsel of the Internal Revenue Service, an Assistant Attorney General in both the Tax and Antitrust Divisions, and Solicitor General. He served as Attorney General between January 1940 and June 1941, when President Roosevelt nominated him to be an Associate Justice of the United States Supreme Court, replacing Justice Stone, who had been nominated to be Chief Justice. For a brief summary of the life and career of Robert H. Jackson, see http://www.roberthjackson.org/Man/; *see also* Eugene C. Gerhart, Robert H. Jackson: Country Lawyer, Supreme Court Justice, America's Advocate (2003).

[2] Robert H. Jackson, U.S. Att'y Gen., Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor (Apr. 1, 1940), *in* 31 J. Crim. L. & Criminology 3 (1940) [hereinafter Jackson, Federal Prosecutor]. Former Assistant Attorney General James K. Robinson also identifies Jackson's speech to the U.S. Attorneys as worthy of particular attention. *See* James K. Robinson, *Restoring Public Confidence in the Fairness of the Department of Justice's Criminal Justice Function*, 2 Harv. L. & Pol'y Rev. 237 (2008).

[3] Jackson, Federal Prosecutor, *supra* note 2, at 4.

[4] *Id.* at 3–4 ("It is an unusual and rare instance in which the local District Attorney should be superseded in the handling of litigation . . . [or] in which his judgment should be overruled.").

[5] *Id.* at 4.

the government technically loses its case, it has really won if justice has been done."[6] Jackson stressed that the federal prosecutor's reputation for fair dealing is far more important than "statistics of success," and that subjugating the former to the latter reflects "a perverted sense of practical values, as well as defects of character." Jackson's point is pragmatic: whatever the federal prosecutor may do after leaving office, "he can have no better asset than to have his profession recognize that his attitude toward those who feel his power has been dispassionate, reasonable and just."[7]

Third, Jackson emphasized the importance of impartiality. As Jackson explained, one of the major challenges for any prosecutor is how to manage the extraordinary discretion to pick which cases to prosecute.[8] With the number of federal criminal laws on the books—and that number has increased substantially since 1940—Jackson reasoned that a prosecutor stood a fair chance of pinning some technical criminal violation on just about anyone. It is essential, therefore, for the federal prosecutor to ensure that law enforcement never becomes personal—that the prosecutor never allows the unpopularity of an individual's associations or political views to become the "real crime."[9]

Jackson ended his speech by acknowledging that no one can tell a prosecutor how to be good—"those who need to be told would not understand it anyway."[10] Yet there are certainly steps that can be taken to ensure that "good" prosecutors are given sufficient guidance and freedom to carry out their responsibilities appropriately. As we consider how to apply Jackson's principles today, we must acknowledge that the need to set policy priorities in Washington means that the administration must be able to hire U.S. Attorneys who share its priorities and to fire those who do not. On the other hand, Jackson also made clear that Main Justice should not attempt to influence the exercise of U.S. Attorneys' discretion with political considerations or generally interfere with their litigation judgment.[11] By anchoring the essential qualities of an ideal federal prosecutor not only in the fair and impartial exercise of discretion but also in the devotion to protecting both "the spirit as well as the letter of our civil liberties," Jackson established a goal as suitable to twenty-first-century prosecutors as it was to their twentieth-century forebears.

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[6] *Id.*

[7] *Id.*

[8] *Id.* at 5 ("If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted.").

[9] *Id.*

[10] *Id.* at 6 ("[T]he citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.").

[11] *Id.* at 4 ("There can also be no doubt that to be closely identified with the intrigue, the money raising, and the machinery of a particular party or faction may present a prosecuting officer with embarrassing alignments and associations.").

II. Balancing the Authority of the Department With the Needs of Local Law Enforcement

Five months after delivering his speech to the U.S. Attorneys, Jackson addressed the U.S. Conference of Mayors in New York City, taking that occasion to focus attention on the relationship between the Justice Department and local municipalities.[12] Although less well known than his earlier address, this speech perceptively recognized a central challenge in our federal system of government: how the Justice Department should assist and influence local law enforcement without intruding upon its sovereign authority.

Jackson had already sounded this theme in his earlier speech to the U.S. Attorneys when he warned them to respect the limits of federal power. Although he recognized the paramount importance of prosecuting federal crimes notwithstanding "local sentiment" and "regardless of whether it makes or breaks local politicians," he was careful to urge federal prosecutors to resist the temptation to enlarge their powers over local affairs.[13] Jackson reminded the U.S. Attorneys that "the only long-term policy that will save federal justice from being discredited by entanglements with local politics is that it confine itself to strict and impartial enforcement of federal law, letting the chips fall in the community where they may."[14]

Jackson began his talk to the Conference of Mayors by invoking the first clause of Article I, Section 8 of the Constitution: "[T]he real power the Federal Government is exercising [is] . . . the power to raise revenues and spend money for the common defense and the general welfare."[15] In Jackson's view, however, this original understanding of the federal role had been "rent asunder by a philosophy of government which held that the Federal Government had really no concern with those things which happened to the peoples of the localities: that all of the problems that affected their individual and collective welfare had to be solved locally."[16] Jackson was unabashedly supportive of the changing role of the federal government in American society, one that he described as a return to the original intent of the Founders—that is, to the notion that common defense and general welfare are "two things that belong together."[17]

Jackson's commitment to New Deal politics came through most clearly when he discussed the securing of the "general welfare" as a central purpose of federal power. In discussing this source of federal authority, he described

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[12] Robert H. Jackson, U.S. Att'y Gen., Address at the Annual Conference of the U.S. Conference of Mayors: The Department of Justice and the Cities (Sept. 19, 1940) [hereinafter Jackson, Conference of Mayors], *available at* http://www.roberthjackson.org/documents/The%20Department%20of%20Justice%20and%20the%20Cities.pdf.

[13] Jackson, Federal Prosecutor, *supra* note 2, at 6.

[14] *Id.*

[15] Jackson, Conference of Mayors, *supra* note 12, at 2.

[16] *Id.* at 2–3.

[17] *Id.* at 3.

the principal challenge as one of handling this power "so as not to interfere with the prestige or the right or the dignity of local governments."[18] His shining example of such cooperative federalism was the Public Works Administration ("PWA")—"that great project financed with federal funds, which has placed school houses, sewer systems, water systems and public buildings and auditoriums . . . across this country."[19] Jackson argued that while the PWA might be criticized for not having spent enough on "great national projects," no one could argue that "the wishes of the localities" were not taken fully into account.[20]

Jackson emphasized in his speech to the mayors that federal and local governments must work together, not "as rivals or at arms length." The goal was not only "that cooperatively we may realize for this country a defense, which will keep any enemy at a distance," but also that we adhere to "a concept of General Welfare which will direct our social order against the injustices and privations which result in social unrest or in social upheaval."[21] Jackson also stressed the importance of common sense.[22] He was confident that by enhancing the professionalism of local law enforcement agencies—by supporting, for example, the FBI's efforts to help train police officers in the most modern methods of law enforcement—the federal government could secure the national defense through cooperation and coordination with local authorities.

Jackson's principles are at work today. The challenge of applying federal resources to help local communities is the primary mission of the Justice Department's Office of Justice Programs ("OJP"). Since 1984, OJP has helped to develop the nation's capacity to prevent and control crime, improve the criminal and juvenile justice systems, increase knowledge about crime and related issues, and assist crime victims. Through its funding programs, OJP works to form partnerships among federal, state, and local government officials to control drug abuse and trafficking; rehabilitate neighborhoods; improve the administration of justice in America; and address problems such as gang violence, prison crowding, juvenile crime, and white-collar crime. Although some research and technical assistance is provided directly by OJP's bureaus and offices, most of the work is accomplished through federal financial assistance to scholars, practitioners, experts, and state and local governments and agencies. Jackson's principle of securing the general welfare while honoring "the wishes of the localities"

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[18] *Id.* at 11.

[19] *Id.* at 13. The Public Works Administration was created by the National Industrial Recovery Act of 1933, ch. 90, 48 Stat. 195, *invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[20] Jackson, Conference of Mayors, *supra* note 12, at 13.

[21] *Id.* at 14.

[22] *Id.* at 10 ("I want the spirit of my department to be one of practical sensible law enforcement, and not the effort to make sensational cases. This problem of law enforcement is not a matter of building up a few sensational shocks. What we want to do is to have a continuously common sense dealing with the problems of your communities.").

is reflected, for example, in OJP's financial support to communities that developed innovative methods for reintegrating former prisoners into their societies. In 2000, OJP announced support for "reentry courts," which were to be tailored to state and local needs and which use the power of judicial authority to more aggressively monitor released offenders and provide essential assistance to support the offender's reintegration into the community.[23]

Although Jackson did not specifically address how federal prosecutors ought to coordinate their law enforcement efforts with the sovereign interests of Native Americans, this issue of respecting the boundaries of federal power was of critical importance when the Department created the Office of Tribal Justice in 1995. After holding a series of extensive meetings with tribal leaders, the Justice Department concluded that it would support its commitment to tribal sovereignty by strengthening tribal justice systems, particularly their abilities to respond to family violence and juvenile issues by providing training and technical assistance where needed.[24] On the other hand, where tribal courts do not have jurisdiction—such as over misdemeanor crimes committed by non-Native-American offenders in Indian Country—the Justice Department has committed resources to ensure that such crimes do not go unprosecuted. The key, as Jackson stated to the U.S. Attorneys nearly seventy years ago, is to recognize that "[j]ust as there should be no permitting of local considerations to stop federal enforcement, so there should be no striving to enlarge our power over local affairs and no use of federal prosecutions to exert an indirect influence that would be unlawful if exerted directly."[25]

Striking an appropriate balance between federal and local law enforcement is one of the hardest and most important issues that the new Attorney General will face. Jackson's advice was to recognize that "the project of carrying this Constitutional power of common defense and General Welfare into efficient and sensible application" requires that federal and local governments become genuine "partners in that purpose."[26]

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[23] Janet Reno, Remarks of the Honorable Janet Reno, Attorney General of the United States, on Reentry Court Initiative, (Feb. 10, 2000), *available at* http://www.usdoj.gov/archive/ag/speeches/2000/doc2.htm; *see also* Jeremy Travis, *Reflections on the Reentry Movement*, 20 FED. SENT'G REP. 84, 85 (2007) (discussing such courts as one of the "big ideas" of the past decade).

[24] *See generally* Kim Baca, *The Changing Federal Role in Indian Country*, NAT'L INST. JUST. J., Apr. 2001, at 8, *available at* http://www.ncjrs.gov/pdffiles1/jr000247c.pdf.

[25] Jackson, Federal Prosecutor, *supra* note 2, at 6. Jackson stressed this same point with the Conference of Mayors: "The powers of the Federal Government, of course, do not extend to regulation or interference with municipal affairs and should not extend to that, and I know of no disposition on the part of anybody any place to try to expand them to anything of that type." Jackson, Conference of Mayors, *supra* note 12, at 2.

[26] Jackson, Conference of Mayors, *supra* note 12, at 14.

III. Protecting National Security While Guaranteeing Civil Liberties

The Senate confirmed Jackson to be an Associate Justice of the United States Supreme Court in July 1941. Four years later, President Truman appointed him to be Chief United States Prosecutor at the International War Crimes Tribunal in Nuremberg, Germany. By all accounts, Jackson viewed his experience at Nuremberg to be his crowning achievement.[27] After he returned to the Supreme Court in 1946, Jackson continued to give speeches and write articles, but his focus turned principally to war crimes and related issues of international law.[28]

His interest in national security issues did not start with his Nuremberg assignment. Indeed, he expressed concern about surveillance and safeguarding civil liberties back in 1940 when he addressed the U.S. Attorneys. He took care to warn against overreacting in times of fear or hysteria, and he was particularly cognizant of the challenges associated with prosecuting cases involving subversive activities, which he believed posed the greatest potential threat to civil liberties.[29] Moreover, with respect to the enforcement of laws that protect "national integrity and existence," he argued that we should prosecute "any and every *act* of violation, but only overt acts, not the expression of opinion, or activities such as the holding of meetings, petitioning of Congress, or dissemination of news or opinions."[30] Jackson stressed that "[o]nly by extreme care can we protect the spirit as well as the letter of our civil liberties, and to do so is a responsibility of the federal prosecutor."[31]

Jackson also echoed this theme when addressing the Conference of Mayors. He stressed the importance of local law enforcement to national security: with the war already underway in Europe, Jackson was acutely

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[27] *See, e.g.*, Gerhart, *supra* note 1, at 441; *see also* Robert H. Jackson Ctr., *Robert H. Jackson and the Nuremberg Trial*, http://www.roberthjackson.org/International_Law/ ("It was through the energy, intelligence and leadership of Justice Jackson that the International Military Tribunal was organized and the trials carried out, standards of evidence developed, rights of defendants defined, and prosecutorial action commenced. Jackson was the driving force behind the conduct of the trials themselves. Some in the United States, including fellow members of the Supreme Court, criticized Jackson's decision to go to Nuremberg, yet he believed that it was a mission important to the nation and to the world. Jackson said the most important work of his life was at Nuremberg, where his diligence and vision set legal precedents that continue to affect the international community in a positive way to this day.").

[28] *See* Robert H. Jackson Ctr., Bibliography of Extrajudicial Writings by Robert H. Jackson, http://www.roberthjackson.org/Man/theman2-5/ (listing and providing links to Jackson's writings by decade).

[29] Jackson, Federal Prosecutor, *supra* note 2, at 5 ("They are dangerous to civil liberty because the prosecutor has no definite standards to determine what constitutes a 'subversive activity,' such as we have for murder or larceny. . . . Those who are in office are apt to regard as 'subversive' the activities of any of those who would bring about a change of administration.").

[30] *Id.* at 6.

[31] *Id.*

aware of the threat of sabotage and of the role of local enforcement in helping to prevent it.[32] And long before the creation of FISA or Title III, Jackson addressed particular concerns about the Justice Department's "surveillance" over groups sympathetic to Nazi and Communist causes.[33] "It is frequently said that that sort of activity is an infringement of civil liberties," Jackson remarked.[34] While reminding his audience that he "believe[d] that the civil liberties embodied in our Constitution are essential to the functioning of any democratic form of government," he was also quick to insist that, although we are a tolerant people, we must not remain ignorant of potential threats against us.[35] Once again, Jackson stressed the need to balance a respect for civil liberties with the legitimate needs of national security; it is no answer, for either Jackson or us, to sacrifice one to the other.

Eleven years later, in 1951, Jackson delivered an address at the Buffalo Law School, entitled *Wartime Security and Liberty Under Law*.[36] There are few issues that the next Attorney General will face that are more important than finding an appropriate method of ensuring national security while respecting individual liberty. Once again, Jackson has provided a set of principles for doing just that.

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[32] Jackson, Conference of Mayors, *supra* note 12, at 4 ("[Y]ou . . . are infinitely closer to the lives of the people than any administration in Washington can ever be. . . . And you have forces—your police forces, your forces of city officials—to penetrate the lives of your communities in a way that the Federal Government never can penetrate those lives and never ought to."); *id.* at 5–6 ("[O]ur department has tried to center on the problem of prevention, because we all agree that sabotage prevented is infinitely better than sabotage punished. And in that effort, the cooperation of local authorities is vital—vital because it's the local authorities who are close to the conditions.").

[33] FISA refers to the Foreign Intelligence Surveillance Act, which established in 1978 a legal regime for "foreign intelligence" surveillance separate from ordinary law enforcement surveillance. *See* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95–511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.). Title III refers to a portion of the Omnibus Crime Control and Safe Streets Act of 1968, which requires law enforcement to obtain a court order before setting up a wiretap. *See* Pub. L. No. 90-351, 82 Stat. 197 (codified as amended at 18 U.S.C §§ 2510–2520 (2002)). Before issuing a Title III wiretap warrant, a judge must find that: (1) "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous"; (2) there is probable cause for believing "that an individual is committing, has committed, or is about to commit" one of a list of specifically enumerated crimes; (3) the wiretap will intercept particular communications about the enumerated offense; and (4) the communications facilities to be tapped are either being used in the commission of the crime or are commonly used by the suspect. *Id.* at § 2518(3).

[34] Jackson, Conference of Mayors, *supra* note 12, at 7.

[35] *Id*. at 7–8. Jackson would return to this theme nine years later in his famous dissent in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), where he wrote: "The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Id.* at 37 (Jackson, J., dissenting).

[36] Robert H. Jackson, U.S. Att'y Gen., Address at Buffalo Law School: Wartime Security and Liberty Under Law (May 9, 1951) [hereinafter Jackson, Wartime Security], *in* 1 BUFF. L. REV. 103 (1951).

Jackson began his address by recognizing the historical fact that individual liberty is most vulnerable during times of national emergency.[37] Although the United States had survived two world wars without, in Jackson's words, "serious or permanent impairment of our system of ordered liberty under law,"[38] this may well have been due to the good fortune that our government never had to combat "a really numerous, cohesive or well-organized internal opposition."[39] In the future, Jackson feared, we might not be so fortunate. Indeed, in the post-September 11 environment, law enforcement's efforts to prevent additional terrorist attacks have led to mistrust and uncertainty in the Arab and Muslim communities, the very communities whose help and cooperation is most urgently required.[40]

Jackson found little comfort in the view that our courts are sufficiently independent from popular passions or secure from interference by the political branches to serve as a guarantee against arbitrary government.[41] In the first place, the Constitution itself recognizes that the Great Writ of habeas corpus may be suspended if, "in Cases of Rebellion or Invasion[,] the public Safety may require it."[42] For Jackson, President Lincoln's experience during the Civil War effectively teaches that suspension of the privilege of the writ of habeas corpus means the "suspension of every other liberty."[43] Quoting extensively from Lincoln's famous Letter to Erastus Corning and Others, Jackson acknowledged the force of Lincoln's argument in favor of suspension.[44] According to Jackson, President Lincoln "voiced the impatience with the process of the civil courts that always develops in wartime

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[37] *Id.* at 104 ("Because liberty cannot exist apart from the impartial rule of law, it is vulnerable to wartime stresses, for then the rule of law breaks down. The same passions and anxieties may result from a long period of tension which may be almost as demoralizing as actual war.").

[38] *Id.*

[39] *Id.* at 105.

[40] *See* DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR 141–42 (2007) ("[I]f members of these communities feel that they have been unfairly targeted in a broad-brush way for little more than their ethnic and religious identities, cooperation will be difficult."). Jackson understood this as the particular danger posed by subversive organizations: "A secret conspiratorial group, even if not very potent itself, can goad the Government into striking blindly and fiercely at all suspects in a manner inconsistent with our normal ideas of civil liberties." Jackson, Wartime Security, *supra* note 36, at 105.

[41] Jackson, Wartime Security, *supra* note 36, at 108–09.

[42] U.S. CONST. art. I, § 9, cl. 2.

[43] Jackson, Wartime Security, *supra* note 36, at 109 (recounting how President Lincoln suspended the privilege and "resorted to wholesale arrests without warrants, detention without trial, and imprisonment without judicial conviction").

[44] *Id.* at 110 ("[I]n defending his conduct, [Lincoln] said all that ever can be said": that arrests during time of rebellion are made not "'for what has been done as for what probably would be done'"; that spies, informers, suppliers, and others take shelter "[u]nder cover of 'liberty of speech,' 'liberty of the press,' and 'habeas corpus'"; and that "'courts of justice are utterly incompetent in such cases.'" (quoting Letter from President Abraham Lincoln to Hon. Erastus Corning and Others (June 12, 1863), *reprinted in* 2 CARL SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS 165–69 (1939)).

and the demand that various conduct or speech, believed harmful to society, be punished summarily by some sort of Military Commission."[45]

Jackson proceeded to identify additional methods that the Executive Branch had used to close courts to aggrieved citizens—methods that may not be "wholly precluded by our Constitution."[46] For example, the executive branch can employ "martial law," which it did in the Hawaiian Islands during World War II.[47] In addition, Congress could simply deprive the Supreme Court of appellate jurisdiction over a class of cases.[48] Such a practice of limiting the Court's jurisdiction "could be carried to almost any extreme that public sentiment would tolerate."[49]

Even if the federal courts were to remain open to hear challenges in times of war, they had not, in Jackson's view, shown themselves to be particularly well suited to the task. Not only do juries and judges "sometimes give way to passion and partisanship," but certain constitutional rights—such as the freedom from takings without just compensation or unreasonable searches and seizures—seem to be accorded a lesser status than the so-called "preferred rights" of freedom of speech, press, and assembly.[50] Jackson viewed any "doctrine of deferred rights" to be dangerous, because "if an evil government desired to destroy freedom of a hostile press, it would approach it, not through direct suppression, but through unfair administration of property regulations."[51]

Jackson's solution to the question of how to ensure both wartime security and liberty rested on the common-sense observation that the goal must be to find a way "to reconcile the two needs so that we do not lose our heritage

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[45] *Id.*

[46] *Id.* at 111.

[47] *Id.*

[48] Jackson, Wartime Security, *supra* note 36, at 111–12 ("Under our constitutional structure, the Supreme Court has appellate jurisdiction 'with such exceptions and under such regulations as Congress shall make.'" (quoting U.S. CONST. art. III, § 2, cl. 2.)).

[49] *Id.* at 112 ("Liberties are not so inflexibly buttressed as most persons suppose and a public sentiment that would sustain closing of the courts could lead to serious consequences.").

[50] *Id.* at 112–13.

[51] *Id.* at 115. Jackson here returns to an argument that he had made a year earlier in a dissenting opinion in *Brinegar v. United States*, 338 U.S. 160 (1949). The rights guaranteed by the Fourth Amendment, Jackson wrote,

> are not mere second–class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self–reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by police.

Id. at 180–81 (Jackson, J., dissenting).

in defending it."[52] The problem is that courts are not asked to balance security and liberty in the abstract. Rather:

> [t]he 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?[53]

Jackson essentially answered this question by restating the principle from his famous dissent in *Korematsu v. United States*.[54] Jackson's position was that the military order requiring the detention of Toyosaburo Korematsu and all other American citizens of Japanese ancestry was unconstitutional, and he would have refused to enforce it. However, he would not necessarily have interfered with the military's carrying out of the order itself. As Jackson explained in *Korematsu*:

> Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But 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. 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.[55]

Jackson's point was that although courts and legislatures certainly have critical roles to play in protecting liberty, these institutions are ultimately powerless to stop the unlawful exercise of executive authority. Therefore, although institutional restraints and legal standards can certainly help, the most reliable way to guarantee liberty is to ensure that people of sound judgment and moral courage are in positions to exercise such authority. "Temperate and thoughtful people find difficulties in such conflicts which only partisans find no trouble in deciding wholly one way or the other."[56] Jackson saw danger not only in exaggerated claims of security but also in "con-

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[52] Jackson, Wartime Security, *supra* note 36, at 115.

[53] *Id.*

[54] 323 U.S. 214 (1944).

[55] *Id*. at 248 (Jackson, J., dissenting). As Jackson conceded in his speech six years later, "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." Jackson, Wartime Security, *supra* note 36, at 116.

[56] Jackson, Wartime Security, *supra* note 36, at 116.

temptuously ignoring the reasonable anxieties of wartime as mere 'hysteria.'"[57] Jackson certainly had faith that the "common sense of the American people will preserve us from all extremes which would destroy our heritage,"[58] but he placed a more specific faith in the wisdom of government officials. "Lax law enforcement is the enemy of civil rights under law."[59] It is only when "[t]emperate and thoughtful"[60] people enforce the law with diligence and fairness that we can hope to protect national security in a manner consistent with civil liberties guaranteed by the Constitution.

Jackson's emphasis on common sense is particularly apt with respect to developing a comprehensive approach to preventing terrorism. Rather than abandon traditional law enforcement techniques on the grounds that they are inadequate or ineffective at preventing terrorism, the FBI should use the "preventive possibilities of traditional law enforcement tools, including surveillance, informants, and prosecution for conspiracy and attempt" to disrupt these activities before they can do harm.[61] Moreover, these traditional tools of law enforcement must draw not only on experts in computer analysis and forensics but also on experts in foreign languages and political history. As Jackson put it, law enforcement must be "placed in the hands of men [and women, of course] who have a high sense of responsibility, . . . who know how to accomplish things without crude methods, . . . [and] who have the respect of the citizens."[62]

Conclusion

Robert H. Jackson was not Attorney General for long, and his time at the Justice Department has been largely overshadowed by his subsequent accomplishments. But, throughout his career, he gave speeches in which he forthrightly articulated a clear and ennobling vision for the role of federal law enforcement. Jackson gave substantial thought to some fundamental questions that continue to resonate today: What is the appropriate relationship between U.S. Attorneys in the field and Main Justice? What is the proper role of federal law enforcement in relation to state and local authorities? What is the best guarantee against the loss of civil liberties in times of national emergency? The next Attorney General should not only follow

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[57] *Id.* This is similar to the theme that Jackson struck in his *Terminiello* dissent:

> In the long run, maintenance of free speech will be more endangered if the population can have no protection from the abuses which lead to violence. No liberty is made more secure by holding that its abuses are inseparable from its enjoyment. We must not forget that it is the free democratic communities that ask us to trust them to maintain peace with liberty and that the factions engaged in this battle are not interested permanently in either.

337 U.S. at 36–37 (Jackson, J., dissenting).

[58] Jackson, Wartime Security, *supra* note 36, at 117.

[59] *Id.* at 116.

[60] *Id.*

[61] Cole & Lobel, *supra* note 40, at 257.

[62] Jackson, Council of Mayors, *supra* note 12, at 9.

Jackson's approach in communicating directly to lawyers both in the Justice Department and beyond, but should also embrace Jackson's ambition to describe how lawyers for the federal government can use their authority with wisdom and restraint to accomplish their essential mission.