

ROBERT JACKSON'S OPINION ON THE DESTROYER DEAL AND THE QUESTION OF PRESIDENTIAL PREROGATIVE

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INTRODUCTION

The topic for our panel is *How Far Can The Executive Go To Defend The Constitution?* I shall approach this question inductively, that is to say by focusing closely on a concrete case in which that question was posed with unusual vividness rather than starting with abstract principles. Moreover, the case I shall offer for study is designedly not a recent one, over which the fires of contemporary controversy still burn hot, but one on which the dust has more or less settled. Thus, I hope to gain the benefit of historical distancing, or a perspective freer from current partisanship and rancor. I am referring to Attorney General (later, Associate Justice) Robert Jackson's *Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers* of August 27, 1940.¹ Jackson's opinion raises our problem in a fascinating way, although it does not solve it.

There are at least three additional reasons for concentrating on Jackson's opinion. First, the student has the benefit of the acute critical commentary on it that flowed from some of the country's finest legal and constitutional scholars of the time—among them Edwin Borchard of the Yale Law School,² Herbert W. Briggs of the Cornell Law School,³ Edward Corwin of Princeton University,⁴ and Quincy Wright of the University of Chicago.⁵

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1. Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers (*Destroyer Deal*), 39 Op. Att'y Gen. 484 (1940).

2. Edwin Borchard, *The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases*, 34 AM. J. INT'L L. 690 (1940).

3. Herbert W. Briggs, *Neglected Aspects of the Destroyer Deal*, 34 AM. J. INT'L L. 569, 587 (1940). Briggs also attacked the legality of the destroyer deal in an August 17, 1940 memorandum of law published in 86 CONG. REC. 10,560 (1940).

4. Edward S. Corwin, *Executive Authority Held Exceeded in Destroyer Deal*, N.Y. TIMES, Oct. 13, 1940, at 6-7.

5. Quincy Wright, *The Transfer of Destroyers to Great Britain*, 34 AM. J. INT'L L. 680 (1940).

Second, Jackson's opinion has also been the subject of renewed interest in recent scholarship, including studies from the viewpoints of political science,⁶ history,⁷ and law.⁸ Moreover, some of these recent scholars, even if otherwise vocal critics of claims to Executive power, do not object to Jackson's defense of the legality of the destroyer deal.⁹

Third and most important, the thought and personality of Robert Jackson are extraordinarily fascinating. He was a figure of unusual personal magnetism and ability, well acquainted with the highest levels of government, and possessing a striking capacity to clothe his thought in memorable and expressive language. When writing this opinion, Jackson found himself at the center of presidential election year politics, constitutional law, and the grand strategy of the United States. Adolf Hitler seemed poised to win dominion over Europe and Britain, his only significant antagonist seemed ready to go under. Jackson brought to the question of presidential prerogatives in (near) wartime a unique combination of political gifts, legal probity, and practical experience. Moreover, his views on this topic developed—though not in any direct and linear way—during his later years as a Supreme Court Justice. Thus, his

6. Richard M. Pious, *Franklin D. Roosevelt and the Destroyer Deal: Normalizing Prerogative Power*, 42 PRESIDENTIAL STUD. Q. 190, 190, 196 (2012) [hereinafter Pious, *Prerogative Power*]. See also Richard M. Pious, *Inherent War and Executive Powers and Prerogative Politics*, 37 PRESIDENTIAL STUD. Q. 66, 73 (2007) [hereinafter Pious, *Inherent War*] (discussing Jackson's views on executive power in emergencies).

7. DAVID REYNOLDS, *THE CREATION OF THE ANGLO-AMERICAN ALLIANCE, 1937–1941: A STUDY IN COMPETITIVE CO-OPERATION* 121 (1982). ROBERT SHOGAN, *HARD BARGAIN: HOW FDR TWISTED CHURCHILL'S ARM, EVADED THE LAW, AND CHANGED THE ROLE OF THE AMERICAN PRESIDENCY* (1999).

8. W.R. Casto, *Attorney General Robert Jackson's Brief Encounter With the Notion of Preclusive Presidential Power*, 30 PACE L. REV. 364, 368 (2010) [hereinafter Casto, *Brief Encounter*]; W.R. Casto, *Advising Presidents: Robert Jackson and the Destroyers-For-Bases Deal*, 52 AM. J. LEGAL HIST. 1, 8 (2012) [hereinafter Casto, *Advising Presidents*]. Francis X. Fellmeth, *A Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935-1941*, 3 BUFF. J. INT'L L. 413, 469 (1996–1997).

9. Thus, Professor Pious finds that the decision to transfer the destroyers “was unilateral in form but highly political in fact—and was neither dictatorial nor arbitrary.” Pious, *Prerogative Power*, *supra* note 6, at 200. Pious bases this conclusion on the facts that the President consulted with, and obtained the approval of, his Cabinet; that he secured a promise from the Republican Vice-Presidential candidate and Senate minority leader that he would not object to the decision if the President could find a way to avoid a Senate vote on it; that the Republican minority leader in the House “also gave discrete support to the deal”; and that congressional leaders in the President's own party assured him that they would “take no negative action.” *Id.* Likewise, Professor Casto finds that “in respect of one technical but crucial legal issue Jackson rendered an opinion that was contrary to the law,” but that despite this crucial error “his misrepresentation of the law . . . was proper and . . . he should be praised for it.” Casto, *Advising Presidents*, *supra* note 8, at 9.

thoughts on our issue in the circumstances of the anxious summer of 1940 deserve the most careful consideration.

This Article has five parts. In Part I, I shall briefly outline the political and military circumstances in which Jackson composed his opinion. Thereafter, I shall successively address the three categories of legal issues implicated in—though not necessarily considered by—Jackson's opinion: international law (Part II); statutory law (Part III); and constitutional law (Part IV). In Part V, I will conclude with an attempt to fashion a view of presidential prerogative out of the materials that Jackson left behind, including not only the destroyer deal opinion, but also later published and unpublished opinions and articles.

Before going further, however, I must explain briefly what is meant here by the term “prerogative”—a concept that will eventually prove central to the analysis.¹⁰ In general, the term “prerogative” signifies a (claimed) presidential authority to violate statutory law on the grounds of compelling public necessity.¹¹ Indeed, it may also be taken to include the authority to perform actions that were, or in other circumstances would be, unconstitutional. Abraham Lincoln's unilateral suspension of the writ of habeas corpus at the outbreak of the Civil War, which Chief Justice Roger Taney held to be unconstitutional in *Ex parte Merryman*,¹² is a striking illustration of an exercise of the prerogative in the latter sense.¹³

10. John Yoo and I have recently examined this concept at length in Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Tex. L. Rev. 781, 808–28 (2013). I refer readers to that article for fuller discussion than is possible here.

11. “Prerogative” is also sometimes used to designate particular presidential authorities, such as the pardon power or the power to conduct the Nation's foreign affairs. That the President has “prerogative powers” in that sense is, of course, undeniable.

12. *Ex parte Merryman*, 17 F. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9,487).

13. Congress declined to ratify Lincoln's original 1861 suspension of habeas specifically, although it did ratify other actions that Lincoln had taken at the outbreak of war, including his naval blockade of the Confederacy. See *The Prize Cases*, 67 U.S. (2 Black) 635, 670–71 (1862) (explaining that Congress ratified Lincoln's naval blockade through legislation). Several courts followed *Merryman* in holding the suspension of the habeas writ to be unconstitutional. See, e.g., *In re Kemp*, 16 Wis. 359, 367 (1863) (finding the power to suspend the writ of habeas corpus is vested in Congress, not the executive); see also *Ex parte Field*, 9 F. Cas. 1, 8 (C.C.D. Vt. 1862) (No. 4,761) (analyzing the President's authority to suspend the writ of habeas corpus when the martial law is lawfully imposed). In 1863, Congress enacted the Habeas Corpus Suspension Act. An Act relating to *Habeas Corpus*, and regulating Judicial Proceedings in Certain Cases, ch. 81, § 1, 12 Stat. 755 (1863). See *People ex rel. Starkweather v. Gaul*, 44 Barb. 98, 98 (N.Y. Sup. Ct. 1865) (addressing whether the President may issue a proclamation suspending *habeas corpus*). But it is does not appear that Congress specifically ratified any of Lincoln's various suspensions of habeas. In fact, Lincoln seems *not* to have wanted congressional ratification, as that might have undercut his claim to have suspension authority himself; and Republicans in Congress may have followed Lincoln's lead, thus preventing ratification. See James A. Dueholm,

The idea of a “prerogative” arose from the customs and practices of the English kings in their dealings over the centuries with Parliament. Americans of the founding generation were also likely to have been aware of the idea of the prerogative, not only from their understanding of English law and practice, but also from their reading of the seventeenth century philosopher and political theorist John Locke.

Locke’s conception of “the prerogative” included two different aspects: (1) the power to take discretionary actions for the sake of the public good in unprovided-for cases, in other words, matters that the law simply does not address; and (2) the power to act in an emergency or other extreme situation for the sake of preserving the society in a manner contrary to law.¹⁴ We can call these, respectively, the “law-supplementing” and the “law-violative” forms of the prerogative. The law-violative form of Locke’s prerogative is of greater relevance to us here. In support of this type of prerogative, Locke argued that “a strict and rigid observation of the laws may do harm, as not to pull down an innocent man’s house to stop the fire when the next to it is burning.”¹⁵ A private person who performed such an act, Locke argues, should merit a royal pardon.¹⁶ His analogy further suggests that the executive itself is empowered to destroy private property when such destruction is necessary to prevent a greater harm.

In Locke’s highly pragmatic view, the exact contours of the prerogative power are undefined, and perhaps undefinable.¹⁷ For Locke, an exercise of the prerogative is valid if the “community” or the “people” *take* it to be so.¹⁸

Lincoln’s Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis, 29 J. ABRAHAM LINCOLN ASS’N 47, 49 (2008) (citing *Ex parte Merryman*, 17 F. Cas. 144 (1861)), available at <http://hdl.handle.net/2027/spo.2629860.0029.205> (discussing Lincoln’s suspension of Habeas Corpus and the Supreme Court’s opinion of it as unconstitutional).

14. JOHN LOCKE, *Essay Two*, in TWO TREATISES OF GOVERNMENT ¶¶ 159–60 (Rod Hay ed., 2000) (1689) [hereinafter LOCKE, *Second Treatise*].

15. *Id.* ¶ 159.

16. *Id.*

17. See George Thomas, *As Far as Republican Principles Will Admit: Presidential Prerogative and Constitutional Government*, 30 PRESIDENTIAL STUD. Q. 534, 535 (2000) (“Prerogative cannot be neatly defined, a priori, in legal terms because it attempts to reconcile law and necessity and, as such, depends on the peculiar circumstances of its use.”).

18. See LOCKE, *Second Treatise*, *supra* note 14, ¶¶ 161, 164.

This power, whilst employed for the benefit of the community and suitably to the trust and ends of the government, is undoubted prerogative, and never is questioned. For the people are very seldom or never scrupulous or nice in the point or questioning of prerogative whilst it is in any tolerable degree employed for what use it was meant—that is, the good of the people, and not manifestly against it. But if there comes to be a question between the executive power and the people about a thing claimed as a prerogative, the tendency of the exercise of

In other words, popular acquiescence in or approbation of a prerogative act, including one that violates the law, tends to establish that the exercise was lawful, or at least legitimate.

Controversies over whether the President possesses any law-violative prerogative power; whether, if he does, the power arises under the Vesting Clause together with other provisions of the Constitution or is extra-constitutional; and what, if such power exists, its scope and duration may be, have been as intense as they are longstanding. In all, three basic views emerge: (1) that the President has a prerogative power, at least in highly exceptional circumstances, pursuant to the Vesting Clause of Article II of the Constitution, together with his other constitutional powers, such as the Take Care Clause; (2) that the President has an *extra*-constitutional prerogative power in cases of extreme exigency; and (3) that the President has *no* prerogative power.¹⁹

I shall not address these competing views here. Instead, in Part V, I will take up the question whether Robert Jackson acknowledged a *form* of law-violative presidential prerogative—what might be called a *de facto*,

such prerogative, to the good or hurt of the people, will easily decide that question. . . . [P]rerogative can be nothing but the people's permitting their rulers to do several things of their own free choice where the law was silent, and sometimes too against the direct letter of the law, for the public good and their acquiescing in it when so done.

Id.

19. Clinton Rossiter wrote that “[t]he Lockean theory of prerogative has found a notable instrument in the President of the United States, and executive initiative has come to be the basic technique of constitutional dictatorship in this country.” CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT AND THE MODERN DEMOCRACIES* 218 (Transaction Publishers 2002) (1948). For other early scholarship, see EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957* 14–15 (4th rev'd ed. 1957) (explaining Framers' mindset for developing a “balanced constitution”); EDWARD S. CORWIN, *PRESIDENTIAL POWER AND THE CONSTITUTION* 23 (Richard Loss ed., 1976) (defining presidential prerogative powers during times of war and peace). For more recent accounts, see David Gray Adler, *The Framers and Executive Prerogative: A Constitutional and Historical Rebuke*, 42 *PRESIDENTIAL STUD. Q.* 376, 381–83 (2012) (arguing that the Framers cut off prerogative power); Larry Arnhart, “*The God-Like Prince*”: *John Locke, Executive Prerogative, and the American Presidency*, 9 *PRESIDENTIAL STUD. Q.* 121, 125 (1979) (“[T]he only emergency powers the President possesses are those given him by the Constitution, and . . . none of these powers allows him to go outside of the Constitution. This means that the Lockean prerogative enters the American regime in only a modified form.”); Ross J. Corbett, *The Extraconstitutionality of the Lockean Prerogative*, 68 *REV. POL.* 428, 448 (2006) (defending extra-constitutional conception of Lockean prerogative); Jack N. Rakove, *Taking the Prerogative out of the Presidency: An Originalist Perspective*, 37 *PRESIDENTIAL STUD. Q.* 85, 91 (2007) (stating that the framers circumscribed, but did not entirely eliminate, prerogative power); and Thomas, *supra* note 17, at 535 (“[P]rerogative is constitutional in the broadest sense—prerogative, that is, is exercised within the confines of the American regime as a constitutional regime.”).

rather than a *de jure*, type of prerogative. To anticipate, a *de facto* prerogative would be exercised when the President acts in particular categories of cases in violation of an act of Congress, a judicial order, or a constitutional clause, *but the courts would hold that the constitutionality of such actions was not susceptible to judicial review*. To say that the President has a *de facto* prerogative is emphatically *not* to say that the President's action is authorized or lawful; it may well be clearly unconstitutional. But it *is* to say that the remedy for any illegality lies with the political process, not with constitutional review by the judiciary. I shall argue that Jackson, both as an Associate Justice of the Supreme Court and before that as Attorney General, seems to have considered some categories of presidential action to be matters of a *de facto* prerogative.

I. HISTORICAL BACKGROUND

Winston Churchill had hardly assumed the premiership of a beleaguered Great Britain when, on May 15, 1940, he first sought assistance from Britain's old ally, the United States.²⁰ The circumstances in which Churchill wrote were critical: Hitler conquered neutral Norway in April, 1940; then unleashed *blitzkrieg* against the West.²¹ In swift succession, the Low Countries fell to Hitler's armies: on the very day that Churchill wrote, the Dutch government had announced its capitulation.²² Hitler's forces were also swarming in northern France: they had reached the Meuse River and occupied a broad front from Liege to Sedan.²³ In the month that followed, Britain's situation became even more desperate. Some 330,000 troops from the British Expeditionary Force and other allied contingents were hastily evacuated from the French port of Dunkirk in late May and early June; Hitler's armies arrived in Paris on June 14; and on June 22, France signed an ignominious armistice with the Germans and was out of the war.²⁴

Churchill's May 15 cable to President Franklin Roosevelt described the strategic situation and set out his most urgent needs in this way:

20. Letter from Winston Churchill, Prime Minister, U.K., to Franklin Roosevelt, President, U.S. (May 15, 1940), <http://www.rialto.k12.ca.us/rhs/planetwhited/AP%20PDF%20Docs/Unit%2012/WorlWarII/CHURCH5.PDF>.

21. *See id.* at 1 (describing the swift spread of the Nazis throughout Europe).

22. *See id.* (stating that small European countries were "smashed up . . . like matchwood").

23. *See* SHOGAN, *supra* note 7, at 15.

24. 1 GEORGE FELDMAN, *WORLD WAR II ALMANAC* 51, 53-54 (Christine Slovey ed., 2000).

[T]he scene has darkened swiftly. The enemy have a marked preponderance in the air, and their new technique is making a deep impression upon the French. I think myself the battle on land has only just begun. . . . The small countries are simply smashed up, one by one, like matchwood. We must expect, though it is not yet certain, that Mussolini will hurry in to share the loot of civilization. We expect to be attacked here ourselves, both from the air and by parachute and air borne troops in the near future, and are getting ready for them. If necessary, we shall continue the war alone and we are not afraid of that. But I trust you realize, Mr. President, that the voice and force of the United States may count for nothing if they are withheld too long. You may have a completely subjugated, Nazified Europe established with astonishing swiftness, and the weight may be more than we can bear. All I ask now is that you should proclaim nonbelligerency, which would mean that you would help us with everything short of actually engaging armed forces. Immediate needs are: first of all, the loan of forty or fifty of your older destroyers to bridge the gap between what we have now and the large new construction we put in hand at the beginning of the war. This time next year we shall have plenty. But if in the interval Italy comes in against us with another one hundred submarines, we may be strained to breaking point.²⁵

Without American destroyers, Churchill was warning, Britain would be unable to fight the Battle of the Atlantic against German, and likely Italian, submarines.²⁶ And without a steady and continuing supply of weaponry and war materiel from the United States and its own Dominions, Britain would lose the war.²⁷ Furthermore, the defeat of Britain would be a strategic calamity for the United States, leaving its defensive perimeter in the north Atlantic open to Axis penetration, depriving it of a powerful ally, and exposing it to the risk of a war on two fronts—against both Japan in the Pacific and Germany in the Atlantic. Churchill was too tactful to mention a related point—that despite its vast industrial strength, the United States was utterly unprepared in mid-1940 to fight a major war on its own.

As it happened, the United States had a spare supply of over-age, but still serviceable, destroyers, left over from the First World War.²⁸ Sixty-two

25. Letter from Winston Churchill, *supra* note 20, at 1–2.

26. *Id.* at 1.

27. *See id.* (“[T]he weight may be more than we can bear.”).

28. SHOGAN, *supra* note 7, at 74.

of these old destroyers were still in commission at the outbreak of the Second World War, and the President thereafter ordered the overhauling and recommissioning of over 100 others.²⁹ Altogether, the United States had a fleet of more than 200 destroyers.³⁰ Britain, by contrast, had only about 130 destroyers, half of which were unfit for service.³¹

Despite the compelling urgency of Churchill's request, Roosevelt promptly rebuffed him.³² First, the President remarked that "nothing could be done to provide the destroyers 'without the specific authorization of Congress,'" which the President doubted he could obtain.³³ Further, given the United States' own defensive needs, its commitments elsewhere in the Americas, and the need to maintain its position in the Pacific, Roosevelt doubted that he could spare the destroyers, "even temporarily."³⁴ Finally, Roosevelt noted that it would take at least six or seven weeks before the destroyers would be ready for active service in the Royal Navy.³⁵

In fact, despite Britain's agony in the early summer of 1940, the deal under which the United States provided it with over-age destroyers was not consummated until September 2, 1940—some three-and-a-half months later.³⁶ At least six circumstances converged to explain what happened.

First, Roosevelt and some of his close advisers mistrusted Churchill for some while.³⁷ They doubted his capabilities as a war leader, in view both of his age and his fondness for alcohol.³⁸ But Roosevelt's doubts gradually dissipated as Churchill proved his extraordinary resourcefulness, eloquence, and strength of purpose.³⁹

Second, and more important, Roosevelt doubted whether Britain could ward off a German victory; he told a member of his Cabinet, James Farley, that Britain's chances of survival were "about one in three."⁴⁰ If the United

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. The causes and circumstances of the delay have been sufficiently well documented by other historians and academics. See *id.* at 210–11, for a detailed discussion on the topic.

37. *Id.* at 18. Roosevelt's personal misgivings were not finally overcome until August 1941, when he and Churchill met personally in Newfoundland to issue the Atlantic Charter. See BARBARA C. BIGELOW, *WORLD WAR II PRIMARY SOURCES* 21, 22 (Christine Slovey ed., 2000) (giving an historical account of the Atlantic Charter).

38. SHOGAN, *supra* note 7, at 18.

39. *Id.* at 19.

40. *Id.* at 97 (internal quotation marks omitted).

States had provided Britain with a fleet of destroyers, not only would the U.S. Navy have been weakened, but the destroyers that had been sent to Britain might fall into German hands and be turned against us. These hesitations were overcome during the course of the summer, perhaps especially after the British ruthlessly sank the French fleet at Mers el-Kébir on July 3, 1940.⁴¹ Britain's action provided the United States with assurance that it would not confront the combined German, Italian, and French navies in the North Atlantic.

Third, even when the United States was ready to consider a deal for its destroyers, Roosevelt and Churchill could not at first agree over terms.⁴² Thus, at one point in the negotiations, Roosevelt wanted a public pledge from Churchill that if Britain surrendered, it would not convey the Royal Navy to the victorious Germans.⁴³ Churchill refused, fearful that such a statement would demoralize the British public.⁴⁴ Likewise, Churchill envisaged the transaction as an exchange of gifts between two friendly and associated English-speaking democracies.⁴⁵ But the Americans preferred to structure it as an exchange of destroyers for the valuable consideration of the leases of naval bases.⁴⁶

Fourth, the presidential election campaign of 1940, in which Roosevelt would seek an unprecedented third term, complicated the negotiations. Roosevelt feared both Republican and isolationist criticisms of the proposed destroyer deal, especially the charge that the transfer would leave the United States less prepared for a possible German attack.⁴⁷ Consequently, Roosevelt tried to receive assurances from the Republican Party's presidential nominee, Wendell Willkie, that he would not make a campaign issue of the destroyer deal.⁴⁸

Fifth, the President also confronted powerful opposition in Congress to providing military aid, including destroyers, to Britain. Even powerful members of Roosevelt's own party opposed the destroyer deal, including Senator David Walsh of Massachusetts, the Chair of the Senate Naval Affairs Committee and a militant isolationist.⁴⁹ Walsh learned of the

41. *Id.* at 159.

42. *Id.* at 210–11.

43. *Id.* at 203.

44. *Id.* at 204.

45. *Id.* at 206–07.

46. *Id.* at 206.

47. *Id.* at 209.

48. *Id.*

49. *Id.* at 89.

proposed destroyer deal from a Navy witness before his committee.⁵⁰ Soon thereafter, the Assistant Secretary of the Navy Department told Walsh that the Navy had been secretly providing torpedo (or “mosquito”) boats to Britain through the intermediation of the Navy’s private defense contractors, on the pretense that the vessels in question—though none of them had yet been delivered to the Navy—were surplus or obsolete.⁵¹ Walsh was enraged by the transfer of the torpedo boats and resolved to abort any deal to transfer surplus destroyers.⁵² He pushed through the “Walsh Amendment” to the naval appropriations bill then pending before Congress.⁵³

The Walsh Amendment applied to all U.S. military equipment and supplies, including destroyers, and prohibited their disposal “in any manner” except on the condition that the Army’s Chief of Staff (General George Marshall) or the Navy’s Chief of Naval Operations (Admiral Harold Stark) certified that such material was “not essential to the defense of the United States.”⁵⁴ Admiral Stark was strongly disinclined to make the required certification for the destroyer deal, even hinting at resignation if ordered to do.⁵⁵ Jackson’s legal opinion virtually instructed Stark to make the certification, and he did so with obvious reluctance.⁵⁶

Similarly, Representative Carl Vinson, the Chair of the House Naval Affairs Committee, also introduced a provision in a naval expansion bill that was designed to prevent the transfer of torpedo boats and other naval vessels to Britain. The “Vinson Amendment” was enacted on July 19, and provided that “[n]o vessel, ship, or boat . . . now in the United States Navy . . . shall be disposed of by sale or otherwise . . . except as now provided by law.”⁵⁷

Sixth, and finally, “substantial legal obstacles,” of both domestic and international law, complicated the destroyer deal.⁵⁸ Jackson and his legal colleagues in the Administration spent much of the summer attempting to resolve them. Among other concerns, the President himself told Churchill

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 182.

54. Act of June 28, 1940, ch. 440, § 14(a), 54 Stat. 676, 681 (1940).

55. See Briggs, *supra* note 3, at 574 (referencing Letter from Admiral Harold Stark, Chief of Naval Operations, to Franklin Roosevelt, President of the United States, in which Admiral Stark states that he considered himself to be required not to certify the release of the destroyers).

56. *Id.*

57. Act of July 19, 1940, ch. 644, § 7, 54 Stat. 779, 780 (1940) (codified at 34 U.S.C. § 493a (1940)).

58. SHOGAN, *supra* note 7, at 177–78.

that the destroyer deal required specific congressional authorization; and he had thereafter signed the Walsh and Vinson Amendments into law, thus seeming to eviscerate whatever statutory authority he might earlier have had to transfer surplus destroyers to Britain.⁵⁹ Moreover, at a Cabinet meeting on June 20, Jackson gave the President his “informal opinion” that the then-ongoing transfer of torpedo boats to Britain violated the Espionage Act of 1917 (a position echoed in Jackson’s final opinion on the destroyer deal).⁶⁰ One day afterward, Walsh announced the cancellation of the torpedo boat deal in the Senate.⁶¹

These obstacles were gradually overcome, and on September 2, 1940, the United States and Great Britain signed the destroyer deal. Under the terms of the deal, the United States acquired “for immediate establishment and use naval and air bases and facilities” in the Bahamas, Jamaica, St. Lucia, Trinidad, Antigua and British Guiana under a ninety-nine year lease “in exchange for naval and military equipment and material,” including “fifty United States Navy destroyers.”⁶²

Two points regarding the aftermath of the deal should be noted. First, Congress ultimately *ratified* the transaction by appropriating more than \$66 million for the construction of naval bases on the islands Britain leased to the United States and by passing other enabling legislation.⁶³ Second, despite the urgency and insistence of Britain’s repeated requests, only nine of the destroyers were in British service by the year’s end, and only thirty were by May 1941—a year after Churchill’s first cable.⁶⁴

II. INTERNATIONAL LAW

Jackson’s opinion was all but silent on the question of the legality of the destroyer deal under international law. He stated that he was concerned only with “questions of constitutional and statutory authority,” but offered no explanation for declining to deal with international legal issues.⁶⁵

59. *Id.* at 183.

60. Casto, *Advising Presidents*, *supra* note 8, at 41; Fellmeth, *supra* note 8, at 469. Casto notes that Jackson’s advice on this subject was guarded.

61. See 86 CONG. REC. 8,777 (1940) (“These vessels are the ones, 23 of them, which were involved in this transaction, which, I am happy to say, is now ended . . .”).

62. Letter from Cordell Hull, United States Secretary of State, to Lord Lothian, British Ambassador to the United States (Sept. 2, 1940) (on file with author).

63. See Pious, *Prerogative Power*, *supra* note 6, at 201 (explaining that Congress appropriated funds for the construction of bases on the islands and passed enabling legislation after the deal was announced).

64. REYNOLDS, *supra* note 7, at 131.

65. Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers (*Destroyer*

Perhaps this was because the State Department Legal Adviser's Office, rather than the Justice Department, was the proper agency to address those issues; or perhaps it was because the Roosevelt Administration perceived no serious international law problem in the proposed transaction. (Jackson subsequently insisted that whatever the explanation, his silence was *not* due to indifference on the Administration's part to international legality.)⁶⁶ In any event, Jackson's scholarly critics attacked the opinion fiercely for bypassing international law.⁶⁷ For example, Edwin Borchard contended that without a discussion of international law "the opinion could hardly be complete."⁶⁸ In private correspondence, Borchard was less restrained: he considered that Jackson's opinion was "really disgraceful and abandons . . . all vestiges of respect for law."⁶⁹

The chief focus of these criticisms was—or ought to have been—on Article 6 of the 1907 Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War.⁷⁰ Article 6 reads: "The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden."⁷¹

Article 6 applies in terms to the conduct of *governments*, not that of private persons.⁷² The United States considered itself bound by the

Deal), 39 Op. Att'y Gen. 484, 485 (1941).

66. See ROBERT JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 102–03 (John Q. Barrett ed., 2003) (arguing that the President did not "disregard international law").

67. For a general review of the legal critics of the New Deal's interventionist policies, see Justus D. Doenecke, *Edwin M. Borchard, John Bassett Moore, and Opposition to American Intervention in World War II*, 6 J. LIBERTARIAN STUD. 1, 1–2 (1982) (discussing several prominent anti-interventionists).

68. Borchard, *supra* note 2, at 690; see also *id.* at 695–96 (asserting that international law should have been considered because the case involved trade between two governments).

69. Doenecke, *supra* note 67, at 17 (internal quotation marks omitted).

70. See Wright, *supra* note 5, at 685 (arguing that criticisms of the transfer of destroyers to Great Britain are properly grounded in Article Six of the Hague Convention); Briggs, *supra* note 3, at 587. Briggs, a Professor of International Law at Cornell University, also attacked the legality of the destroyer deal in an August 17, 1940 memorandum of law he submitted to Senator David Walsh of Massachusetts, later published in 86 CONG. REC. 10,560 (1940).

71. Convention Between the United States and Other Powers Concerning the Rights and Duties of Neutral Powers in Naval War, art. 6, Oct. 18, 1907, 36 Stat. 2415, 2428 [hereinafter *The Hague Convention*]. This language was echoed in Article 16(a) of the Pan-American Maritime Neutrality Convention of 1928, to which the United States was a party. See *Maritime Neutrality Convention Between the United States of America and Other American Republics* art. 16, Feb. 20, 1928, T.S. No. 845 ("The neutral state is forbidden . . . [t]o deliver to the belligerent, directly or indirectly, or for any reason whatever, ships of war, munitions, or any other war material . . ."). See James W. Garner, *The Pan American Convention on Maritime Neutrality*, 26 AM. J. INT'L L. 574, 574–75 (1932), for discussion of this Convention.

72. See Wright, *supra* note 5, at 685 ("Article 6 . . . deals with the neutral government's duty

provision: in October, 1914, the State Department had said that “[f]or the Government of the United States itself to sell to a belligerent nation would be an unneutral act.”⁷³ And, as Borchard pointed out, it was no defense to argue that because Great Britain was not a party to the Hague Convention, the United States would not be breaching it by transferring its destroyers to Britain: Article 6 had long since become a rule of customary international law, having been generally accepted since 1793.⁷⁴ What argument could Jackson have offered, then, to counter the charge that the destroyer deal violated international law?

Jackson had a powerful answer to his critics, and it was not long before he delivered it. In an address on March 27, 1941 to the Inter-American Bar Association in Havana, Cuba, Jackson argued forcefully that the traditional, nineteenth century law of neutrality—on which Borchard and other critics relied—had been superseded. More particularly, Jackson contended that the Pact of Paris of 1928 (the Kellogg-Briand Pact)⁷⁵ provided legal justification for States that were not themselves belligerents to aid and assist states that were the victims of unlawful aggression—such as that of Nazi Germany.⁷⁶

Jackson began by outlining the two main aspects of the Roosevelt Administration’s wartime foreign policy: “It is the declared policy of the Government of the United States to extend to England all aid ‘short of war.’ At the same time it is the declared determination of the government to avoid entry into the war as a belligerent.”⁷⁷

How could these two policies be reconciled with international law, Jackson asked? How could the United States provide England with all aid “short of war,” while excluding any assistance to Germany, without violating the constraints of the law of neutrality? How could the United States exchange its destroyers for Britain’s naval bases?

The first part of Jackson’s answer was to deny that the traditional, nineteenth century rules of neutrality embodied in The Hague Convention remained controlling. He attacked that belief by assailing the very foundations of the doctrine: the assumption of a particular conception of

itself to abstain from certain acts” (emphasis added)).

73. *Id.*

74. Borchard, *supra* note 2, at 694.

75. Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, T.S. No. 796 [hereinafter Kellogg-Briand Pact].

76. Robert H. Jackson, Attorney General of the United States, Address at the Inter-American Bar Association, Havana, Cuba (March 27, 1941), in 35 AM. J. INT’L L. 348, 349–50, 355 n.5 (1941).

77. *Id.* at 349.

state sovereignty and the understanding of war that accompanied it.⁷⁸ Jackson wrote:

I do not deny that particular rules of neutrality crystallized in the nineteenth century and were codified to a large extent in the various Hague Conventions which support this view. But the applicability of these rules has been superseded. Events since the [First] World War have rejected the fictions and assumptions upon which the older rule rested. To appreciate the proper scope of that doctrine of an impartial neutrality we must look to its foundations. Its cornerstone is the proposition that each sovereign state is quite outside of any law, subject to no control except its own will, and under no legal duty to any other nation. From this it is reasoned that, since there is no law binding it to keep the peace, all wars are legal and all wars must be regarded as just.⁷⁹

For Jackson, however, international law had reached the point of rejecting this untrammled conception of state sovereignty. State sovereigns were now answerable to the international community and its laws, not outside or above them.⁸⁰ Their sovereignty had been truncated, subordinated in some measure to legal requirements imposed on them by other states.⁸¹ Above all, states no longer had the right to make war when and as they saw fit.⁸² Every state had an interest in the decision of another state to wage war—and

78. *Id.* at 350. See also Antonio Cassese, *Realism v. Artificial Theoretical Constructs: Remarks on Anzilotti's Theory of War*, 3 EUR. J. INT'L L. 149, 149–50 (1992) (“It is well known that before 1919 States were at liberty to resort to war either to enforce a legal right or simply to realize their economic or political interests.”); F.H. HINSLEY, *SOVEREIGNTY* 229–31 (2d ed. 1986) (discussing the tension between state sovereignty and the League of Nations); 2 CHARLES CHENEY HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 189 (1922) (“It always lies within the power of a State to endeavor to obtain redress for wrongs, or to gain political or other advantages over another, not merely by the employment of force, but also by direct recourse to war.”); Robert H. Jackson, *Nürnberg in Retrospect*, 27 CAN. B. REV. 761, 762 (1949) (“[E]ach state is sovereign, its right absolute, its will unrestrained, and free to resort to war at any time, for any purpose.”).

War was a fact, an international phenomenon, and classic [nineteenth century] international law was indifferent towards it. . . . A ‘legality’ of war supposed distinction between just and unjust wars, which may have lingered on in public opinion and may have been defended by some authors, but was not, according to the majority of them, part of international positive law.

C.A. POMPE, *AGGRESSIVE WAR: AN INTERNATIONAL CRIME* 301–02 (1953)

79. Jackson, *supra* note 76, at 349–50.

80. *Id.* at 349–51.

81. *Id.* at 349–52.

82. *Id.* at 352, 354.

international law had come to acknowledge and reflect that interest.⁸³ In the aftermath of the First World War, the “sovereign” decision to wage war had become subject to international regulation and control.⁸⁴ Third-party states could and should lawfully sanction belligerent states that violated their international duties by making wars of aggression and conquest against other states.⁸⁵ Non-belligerents could therefore lawfully “discriminate” between belligerents on the basis of the justice or legality of a belligerent’s decision to take recourse to war.⁸⁶

Jackson based his argument, in part, on the transformation introduced into international law by the collective security system established by the League of Nations Covenant.⁸⁷ But because the United States had rejected the Versailles Treaty and was not a League Member, Jackson could not, and did not, rest there.⁸⁸ Instead, he placed the throw weight of his argument on the Kellogg-Briand Pact of 1928, to which the United States, Britain, Germany, Italy, Japan, and eleven other States had been parties.⁸⁹ He reasoned:

83. *Id.* at 353.

84. *Id.* at 350, 352.

85. *Id.* at 350–52, 354.

86. *Id.* at 353.

87. *Id.* at 350; see also League of Nations Covenant pmb. (promoting international cooperation to achieve peace and security).

88. Furthermore, the League system did not formally negate the older right to make war, nor were its collective security provisions robust. See ALEX BELLAMY, JUST WARS FROM CICERO TO IRAQ 101–03 (2006). See also Robert J. Delahunty & John C. Yoo, *Peace Through Law? The Failure of a Noble Experiment*, 106 MICH. L. REV. 923, 926–32 (2008) (surveying developments in post-World War I international law of war). In 1923, the Permanent Court of International Justice recognized the continuing existence of internationally lawful neutrality. See *S.S. Wimbledon (U.K. v. Japan)*, 1923 P.C.I.J. (ser. A) No. 1, at 30 (Aug. 17) (construing the Versailles Treaty), available at <http://www.icj-cij.org/pcij/series-a.php?p1=9&p2=1>. For pre-1940 studies of the impact of the League of Nations Covenant on the law and practice of neutrality, see Malbone Watson Graham, Jr., *The Effect of the League of Nations Covenant on the Theory and Practice of Neutrality*, 15 CALIF. L. REV. 357, 361 (1927) (“The Covenant did not outlaw all wars, nor did it endeavor to make each breach result in a new World War. In the *media sententia* of procedural restrictions on resort to war was found, for the time being, the solution of the problem of the future role of neutrality.”); Josef L. Kunz, *The Covenant of the League of Nations and Neutrality*, 29 AM. SOC. INT’L L. PROC. 36, 38 (1935) (discussing how the Covenant altered but did not abolish war).

89. Jackson, *supra* note 76, at 353. In the same connection, Jackson also relied on the Argentine Anti-War Treaty of 1933. He did not, however, refer to the Litvinov Pact of 1929 (known also as the “Eastern Kellogg Briand Pact”), in which the Soviet Union entered into similar engagements of non-aggression with its neighbors Poland, Romania, Latvia, and Estonia. The Soviets had brazenly disregarded this pact by invading three of those States in 1939. Protocol for the Immediate Entry into Force of the Treaty of Paris of August 27, 1928, Regarding Renunciation of War as an Instrument of National Policy, Feb. 9, 1929, 89 L.N.T.S. 369, 371 (1929), available at <http://www.worldlii.org/int/other/LNTSer/1929/123.html>.

[S]ince 1928 . . . the place of war and with it the place of neutrality in the international legal system have no longer been the same as they were prior to that date. Th[e] right to resort to war as an instrument of national policy was renounced by Germany, Italy and Japan in common with practically all the nations of the world. . . . [The treaty] destroyed the historical and juridical foundations of the doctrine of neutrality conceived as an attitude of absolute impartiality in relation to aggressive wars. It did not impose upon the signatories *the duty* of discriminating against an aggressor, but it conferred upon them *the right* to act in that manner. This right they are indisputably entitled to exercise as guardians both of their own interests and of the wider international community. It follows that the state which has gone to war in violation of its obligations acquires no right to equality of treatment from other states It derives no rights from its illegality.⁹⁰

Jackson's argument here does more than merely repair the omission of a sustained discussion of international law in his "destroyer deal" opinion. He had grasped the true nature and tendency of the epochal changes in international law that had begun in the wake of the First World War, and his critics, like Borchard, had not. International law, as Jackson saw it, was moving in the direction of a global system not unlike that of the United States, in which the separate States would be bound not to "engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay,"⁹¹ relying instead on the promise of assistance from their sister states. Here, Jackson is laying the foundation for the jurisprudence of the later Nuremberg Trials (in which he played a conspicuous role), especially its subordination of State sovereignty to the demands of the international community and its criminalization of aggressive war. In this 1941 address, Jackson foreshadowed many of the fundamental changes in the international legal order that developed after the Second World War.⁹²

90. Jackson, *supra* note 76, at 353–54.

91. U.S. CONST. art. I, § 10, cl. 3.

92. Reflecting the new spirit of international legal scholarship in the immediate aftermath of the Second World War, Philip Jessup observed in 1946 that "[s]overeignty, in its meaning of an absolute, uncontrolled state will, ultimately free to resort to the final arbitrament of war, is the quicksand upon which the foundations of traditional international law are built." PHILIP JESSUP, *A MODERN LAW OF NATIONS: AN INTRODUCTION* 2 (1948); *see also id.* at 157 ("The most dramatic weakness of traditional international law has been its admission that a state may use force to compel compliance with its will."). Among the innumerable later expositions of these post-War changes, *see generally* Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 *FORDHAM L. REV.* 1 (1999) (discussing the United Nations, the disfavoring of war, and the pursuit of cooperation

This is not to say that Jackson's international law argument was flawless, however. Critics could have raised at least four points of varying force against it.

First, even assuming the Kellogg-Briand Pact gave third-party non-belligerents the right to go to war in the defense of a victim of another State's aggression, did it follow that those non-belligerents had the (assumedly lesser, included) right to engage in measures *short of war* against the aggressor? Jackson's inference, though not irresistible, was highly plausible. Permitting third-party States to render assistance *short of war* to victims of aggression seems more consonant with the policy of the Kellogg-Briand Pact than leaving them only the alternatives of full scale war against the aggressor or indifference to the plight of the victim.

Second, as Borchard pointed out, "[b]y what right are nations permitted to pass judgment upon each other's political morals and take discriminatory action accordingly?"⁹³ Who, in other words, had the right (or ability) to *judge* whether a war is "aggressive" or "unjust"? This epistemic problem has cast its shadow over just war theory since at least the time of the Spanish scholastics.⁹⁴ But as Jackson observed, if anything were ever to be counted as a war of naked aggression, surely the Nazi attempt to conquer Europe was.⁹⁵ Even setting apart Nazi Germany's brutal aggression against Poland and its collaboration in the Soviet takeover of the Baltic States, its invasion and conquest of its neutral Western neighbors—Belgium, the Netherlands, and Luxemburg—disqualified it from pleading the traditional international law of neutral rights on its own behalf.

Third, although the Kellogg-Briand Pact did indeed commit its parties to renounce war as an instrument of national policy, its operative sections

among nations).

93. The point was noted, and answered, in Georg Schwarzenberger, *The "Aid Britain" Bill and the Law of Neutrality: Some Reflections on the Scope of the Functional Approach to International Law*, 27 TRANS. GROTIUS SOC. 1, 25 (1941). Borchard, *supra* note 2, at 696. In an earlier article, Borchard had similarly argued that it was impossible to violate the Pact of Paris because virtually *any* State going to war would profess that it was acting in lawful self-defense. See Edwin M. Borchard, *The Multilateral Treaty for the Renunciation of War*, 23 AM. J. INT'L L. 116, 117 (1929) (asking how the Pact could ever be legally violated if no modern nation went to war other than in self-defense).

94. See BELLAMY, *supra* note 88, at 53–54 (stating that only rulers had the power to assess the causes of war, and therefore their subjects had no ground to question participation in "unjust wars"); see also Robert J. Delahunty and John C. Yoo, *From Just War to False Peace*, 13 CHI. J. INT'L L. 1, 15 (2012) (discussing just war theory).

95. To be sure, at least one prominent scholar has doubted even that seemingly incontrovertible view. See A.J.P. TAYLOR, *THE ORIGINS OF THE SECOND WORLD WAR* 247, 272–73, 277–78 (1961) (identifying attempts at diplomacy as contributing causes of World War II); *contra* Norman J.W. Goda, *A.J.P. Taylor, Hitler, and the Origins of the Second World War*, 23 INT'L HIST. REV. 97, 98–99 (2001) (finding Taylor's work to be of "dubious value").

included no enforcement mechanisms. On what, then, did Jackson base his claim that the treaty permitted third-party States to engage in discrimination against aggressors? The answer lay in the treaty's *preamble*, not in its operative sections. The preamble recited, in part, that the parties were

convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war a should be denied the benefits furnished by this Treaty.⁹⁶

The “benefits furnished by this Treaty” presumably included a commitment to take recourse only to peaceful methods of dispute resolution; hence, it was argued, other parties could use war, or forcible measures short of war, against a state party that had violated the treaty.⁹⁷ Whatever one thinks of the plausibility of the inference, it is not normal to give preambulatory language such operative effects.⁹⁸

Finally, some critics argued that the destroyer deal violated the Panama Declaration of October 2, 1939. In that Declaration, the Western Hemisphere States had pledged to work against “the fitting out, arming, or augmenting of the forces or armament of any ship or vessel to be employed in the service of one of the belligerents, to cruise or commit hostilities against another belligerent, or its nationals or property.”⁹⁹

III. STATUTORY CONSTRUCTION

Almost as soon as Jackson's opinion was released, critics fastened on the serious weaknesses in its statutory analysis. More recent critics have also been unsparing. It is therefore unnecessary for me to provide a detailed critique of those parts of the opinion. What follows is merely a summary of the most important points.

96. Kellogg-Briand Pact, *supra* note 75, at 1.

97. See Jackson, *supra* note 76, at 353 (stating that member states could respond to an aggressive war by aiding the defending government as much as the state desired).

98. See G.G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT'L L. 1, 10 (1951) (stating that a treaty preamble “does not and should not have direct operative force” but may be taken to “indicat[e] the general purposes and spirit of the treaty”).

99. *Consultative Meeting of Foreign Ministers of American Republics*, 34 AM. J. INT'L L. SUP 1, 10 (1940); accord Panama Declaration of October 2, 1939, *pmbl. available at* <http://www-rohan.sdsu.edu/dept/polsciwb/brianl/docs/1939DeclarationofPanama.pdf>.

The chief difficulties Jackson faced were two-fold: first, had Congress *authorized* the President to transfer the destroyers and, second, had Congress *forbidden* their transfer? Let us start with the apparent prohibition.

A. The Espionage Act of 1917

Jackson's analysis focused on section 3 of Title V of the Espionage Act of June 15, 1917. That provision read:

During a war in which the United States is a neutral nation, it shall be unlawful to send out of the jurisdiction of the United States any vessel built, armed, or equipped as a vessel of war, . . . with any intent or under any agreement or contract, written or oral, that such vessel shall be delivered to a belligerent nation, . . . or with reasonable cause to believe that the said vessel shall or will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States.¹⁰⁰

Jackson argued that section 3 was “inapplicable to vessels, like the over-age destroyers, which were not built, armed, equipped as, or converted into, vessels of war with the intent that they should enter the service of a belligerent.”¹⁰¹ The vessels had been built with the intention of serving in the U.S. Navy during the First World War, and not with a view to their service in the Royal Navy in the Second World War. The “intent” clause, in Jackson's view, modified “built, armed, or equipped,” not “send out.”¹⁰²

Jackson failed to mention the penalty section (section 6 of the Act), which made clear that section 3's prohibition was aimed at *sending out* the vessels, not at *building* them.¹⁰³ Section 6 provided that whoever “shall take . . . or authorize the taking of any such vessel, out of port or from the jurisdiction of the United States, shall be fined . . . or imprisoned . . .”¹⁰⁴

Jackson also ignored the title of the part of the code where section 3 appeared, which would have been useful in resolving any ambiguity. The

100. Espionage Act of 1917, ch. 30, 40 Stat. 217, 222 (1917). *See also* Charles Cheney Hyde, *The Espionage Act*, 12 AM. J. INT'L L. 142, 142 (1918) (providing an in-depth analysis of the then recently passed Espionage Act); Fellmeth, *supra* note 8, at 423 (quoting Espionage Act of 1917, ch. 30, 40 Stat. 217, 222 (1917)).

101. Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers (*Destroyer Deal*), 39 Op. Att'y Gen. 484, 494 (1940).

102. *Id.* at 496.

103. Espionage Act § 6, 40 Stat. at 222.

104. *Id.*

title read, “Sending out armed vessel for delivery to belligerent nations at peace with United States, unlawful.”¹⁰⁵

Moreover, the legislative history of section 3 belied Jackson’s interpretation, though he barely alluded to it.¹⁰⁶ Originally drafted by Woodrow Wilson’s Department of Justice, section 3 was intended to ensure that the United States was fully compliant with its international legal obligations as a neutral state in the event of a maritime war.¹⁰⁷ Attorney General T.W. Gregory noted that prior law had prohibited only the “fitting out or arming,” but not the “building or dispatching” of covered vessels.¹⁰⁸ Thus, the United States had not fulfilled all of its duties under Rule 1 of the Treaty of Washington of 1871 and Article 8 of the 1907 Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War.

Rule 1, in relevant part, required the United States to use “due diligence” to “prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war [against a power with which the United States was at peace], such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.”¹⁰⁹ Likewise, Article 8, in relevant part, bound the United States to “employ the means at its disposal . . . to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war.”¹¹⁰

Based on this record (and other evidence), Herbert Briggs argued that

the drafters of Sec. 3 intended to make it unlawful, when the United States is a neutral, to send out *any* war vessel with intent of delivery to a belligerent or with cause to believe that it will be put to the use of any belligerent after its departure from the United States.¹¹¹

The statute, Briggs contended, was aimed not at the *building* of vessels with the intent of delivering them to a belligerent, but against the departure or

105. *Id.* § 3, 40 Stat. at 222. *See also* *Maguire v. Comm’r*, 313 U.S. 1, 9 (1941) (noting that the title of a federal statute may aid in resolving ambiguities).

106. Briggs, *supra* note 3, at 576.

107. *Id.*

108. *Id.* (emphasis omitted).

109. On the origins of this provision (in the *Alabama Claims* dispute between the United States and Great Britain after the American Civil War), see Elizabeth Chadwick, *Gone with the War? Neutral State Responsibility and the Geneva Arbitration of 1872*, 12 LEIDEN J. INT’L L. 787, 808 (1999) (quoting the Treaty of Washington of 1871) (discussing due diligence and the *Alabama Claims* dispute).

110. The Hague Convention, *supra* note 71, at 2,428.

111. Briggs, *supra* note 3, at 578 (emphasis in original).

sending out of such vessels for delivery to a belligerent.¹¹² Briggs showed that the prohibition against *building* was covered by prior law, and that the purpose of the 1917 Act was therefore to forbid their being *sent out*.¹¹³ Briggs' counter-argument succeeded in defeating Jackson's analysis.¹¹⁴

In fairness to Jackson, one might argue that section 3 was not aimed against the *U.S. Government's* delivery of naval vessels to a belligerent in wartime, but rather against such delivery *by private U.S. persons*.¹¹⁵ The ratification history of the Treaty of Washington could be cited to lend support to that interpretation.¹¹⁶

Edward Corwin, one of Jackson's fiercest critics, thought that the purpose of section 3 was "to impose a rule of conduct upon private persons for whose acts a belligerent would be entitled to hold the United States responsible."¹¹⁷ And Jackson's able collaborator on the opinion, Benjamin V. Cohen, had suggested this argument to him.¹¹⁸ But Jackson decided not to make this argument. For one thing, the unqualified language of the section—"it shall be unlawful"—could readily be taken to apply to both governmental and private action.¹¹⁹ Moreover, Jackson had opined that section 3 banned the release of torpedo boats to the British because these had been built, armed, and equipped in the United States for Britain's use in war, and so he probably understood section 3 to apply to the Government as well as to private U.S. persons.¹²⁰

112. *Id.*

113. *See id.* (discussing the intent of the Act).

114. *See also* Fellmeth, *supra* note 8, at 474–75 (clarifying that it appeared Congress wanted to make it illegal to deliver any type of war vessel to a belligerent).

115. *See also* Application of the Neutrality Act to Official Government Activities, 8 Op. O.L.C. 58, 58 (1984) (construing different provision of Neutrality Act to apply to private but not governmental actors).

116. Before and during the American Civil War, British domestic law had prevented the arming and equipping, but not the supplying, of armed ships to the Confederacy. The United States objected when British subjects supplied such ships to the Confederates, arguing that by tolerating the practice Britain was in violation of international law. The American point of view prevailed in the Treaty of Washington. *See* Chadwick, *supra* note 109, at 803–04, 810 (examining Great Britain's actions during the American Civil War, exploring the United States' complaints about those activities, and presenting the treaty rules). One might therefore conclude that Rule 1 of that treaty did not apply to *governmental* provision of armed ships to a belligerent.

117. Corwin, *supra* note 4, at 6. Quincy Wright, a friendlier critic, made the same point. Wright, *supra* note 5, at 684.

118. *See* Casto, *Brief Encounter*, *supra* note 8, at 379 n.92 ("In dealing with the Espionage Act, Benjamin Cohen had concluded that, because the Act was a criminal statute whose terms did not expressly apply to government action, the Act should be limited to private citizens.").

119. Espionage Act of 1917, ch. 30, § 3, 40 Stat. 217, 222 (1917).

120. Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers (*Destroyer Deal*), 39 Op. Att'y Gen. 484, 494 (1940).

Jackson might also have argued that the concepts of “belligerency” and “neutrality,” as used in the Act of 1917, were outdated in international law as it stood in 1940.¹²¹ But again, he made no such argument.

B. Statutes Relating to the Disposal of Surplus Navy Vessels

Jackson also argued that Congress had authorized the President to sell or exchange over-age naval vessels “as he finds necessary in the public interest.”¹²² His argument fell into two parts. He first analyzed section 5 of the Act of March 3, 1883, 34 U.S.C. § 492, under which Congress had authorized the sale of surplus naval vessels.¹²³ Then he parsed out the Walsh Amendment, construing it not to limit the President’s discretion.¹²⁴

By section 5 of the Act of 1883, Congress had provided a procedure for the sale of naval vessels that had been found unfit for further use and stricken from the naval registry. The procedure involved appraising the value of such a vessel, advertising its appraised value, offering the vessel for sale to the highest bidder above the appraised value, and a host of other requirements.¹²⁵ The section concluded by saying:

But no vessel of the Navy shall hereafter be sold in any other manner than herein provided, or for less than such appraised value, unless the President of the United States shall otherwise direct in writing.¹²⁶

Jackson read the concluding clause to leave the President free, as Commander-in-Chief, to dispose of surplus naval vessels in whatever way he judged best served the public interest. He relied for that interpretation on a 1922 Supreme Court decision, *Levinson v. United States*, which had interpreted that language to permit the President to vary the prescribed procedures.¹²⁷ In *Levinson*, the Court found that the President could not only accept a sale price lower than the appraised value, but could also

121. Quincy Wright alluded to such an argument. See Wright, *supra* note 5, at 684 (“[The] Act [of 1917] seems irrelevant to the case at hand.”).

122. *Destroyer Deal*, 39 Op. Att’y Gen. at 489.

123. Act of March 3, 1883, ch. 141, § 5, 12 Stat. 582, 599.

124. *Destroyer Deal*, 39 Op. Att’y Gen. at 490.

125. See Act of March 3, 1883, ch. 141, § 5, 12 Stat. at 599–600 (providing for the appraisal of naval vessels).

126. *Id.* at 600.

127. *Levinson v. United States*, 258 U.S. 198, 201 (1922).

decline to advertise the sale for the required three month period and permit a different form of deposit from that specified in the statute.¹²⁸

Jackson overread the *Levinson* decision. It did *not* interpret the concluding language of section 5 to authorize the President to dispose of surplus naval vessels in, effectively, any manner that he thought fit. Rather, *Levinson* construed that language to permit minor, incidental variations from the procedures otherwise mandated by the prescriptive parts of the statute. Jackson essentially read the section as a restriction on the President's otherwise plenary power, as Commander-in-Chief, to dispose of naval vessels—including, but not limited to, *surplus* vessels—as he saw fit. From Jackson's viewpoint, the statute merely specified procedures that the President could alter or waive at his option. But the *Levinson* opinion did not remotely support the constitutional underpinnings of Jackson's reading. As Borchard was to say, “[i]t had never heretofore been supposed that the President as Commander in Chief of the Army and Navy could transfer a part of the Navy to a foreign Power.”¹²⁹

Jackson then turned to the Walsh Amendment, section 14(a) of the very recent Act of June 28, 1940. That section read:

Notwithstanding the provision of any other law, no military or naval weapon, ship, boat, aircraft, munitions, supplies, or equipment, to which the United States has title, in whole or in part, or which have been contracted for, shall hereafter be transferred, exchanged, sold, or otherwise disposed of in any manner whatsoever unless the Chief of Naval Operations in the case of naval material, and the Chief of Staff of the Army in the case of military material, shall first certify that such material is not essential to the defense of the United States.¹³⁰

Senator Walsh had introduced that amendment after learning that the Navy was planning to release torpedo boats whose construction it had commissioned from its private contractors to Britain.¹³¹ Enraged, Walsh had

128. *Id.*

129. Borchard, *supra* note 2, at 692. Fellmeth suggests that Jackson's invocation of *Curtis-Wright* earlier in the opinion was intended to provide the constitutional basis for the later assertion that Congress could not limit the President's power to dispose of military vessels. See Fellmeth, *supra* note 8, at 478–79 (discussing Jackson's reliance on *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318–20 (1936)). But if so, it is hard to understand why this section of Jackson's opinion rested primarily on statutory construction rather than on constitutional law.

130. Act of June 28, 1940, ch. 440, § 14(a), 54 Stat. 676, 681 (1940).

131. See 86 CONG. REC. 10,560 (1940) (introducing a letter from Herbert W. Briggs to Senator Walsh outlining his complaints).

introduced his amendment in order to restrict transfers of such military materials.¹³² As Herbert Briggs explained in a memorandum to Senator Walsh that Walsh introduced into the Congressional Record, the purpose of the amendment

was not to facilitate the transfer of ships from our Navy to a foreign power, but to restrain the Chief Executive from such action. The administration had been caught red-handed in a scheme to release torpedo boats to Britain (through private intermediaries) on the ground that the vessels were “surplus” or “obsolete,” although none of the boats had as yet been delivered. Congress decided to establish as a prerequisite that the technical heads of the Army and Navy might veto such transfers, and for fear that the President, as Commander in Chief, might order his subordinates to approve the release of vessels as “not essential to the defense of the United States.”¹³³

Jackson’s opinion remarked that the Walsh Amendment was “of questionable constitutionality,” insofar as it conditioned action by the Commander-in-Chief on the certification of a subordinate military officer.¹³⁴ But he did not pursue that suggestion. Instead, he argued that Admiral Stark could—and should—find that the destroyers were not “essential to the defense of the United States” after taking account of what the United States was to receive in exchange for them: “staff officers may and should consider remaining useful life, strategic importance, obsolescence, and all other factors affecting defense value, not only with respect to what the Government of the United States gives up in any exchange or transfer, but also with respect to what the Government receives.”¹³⁵ In other words, the question was the effect of the transaction on “the total defensive position” of the United States.¹³⁶ Here, it seems to me that Jackson *did* have the better legal argument. Although his reading of the Walsh Amendment plainly did not hew to the intentions of its framer, it is a defensible, even plausible, reading of the statutory text.

Overall, though, Justice Jackson’s statutory analysis is unimpressive and unconvincing. He may, of course, have persuaded himself of its

132. SHOGAN, *supra* note 7, at 89.

133. 86 CONG. REC. 10,560 (1940).

134. Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers (*Destroyer Deal*), 39 Op. Att’y Gen. 484, 490 (1940).

135. *Id.* at 492.

136. *Id.*

correctness, but if so, he hardly displayed his formidable legal talents at their best on this occasion.

IV. THE CONSTITUTIONAL QUESTIONS

In view, perhaps, of Jackson's dismal performance on the statutory analysis, some scholars have understood the legal defense of the destroyer deal to have rested squarely on an assertion of presidential prerogative. For example, Richard Pious writes:

At some time near the end of August [1940], the president decided to rely . . . on prerogative powers. FDR decided . . . that the presidential prerogative to 'take care' that the laws be faithfully executed meant that the laws should be executed based on *his* interpretation of their meaning. He made this decision with the support of Attorney General Robert Jackson¹³⁷

In fact, however, Jackson based his defense of the legality of the destroyer deal almost entirely on statutory law, not on any claims of a constitutional, or extra-constitutional, prerogative power, nor on any extraordinary interpretative power drawn from such a prerogative.¹³⁸ Indeed, Jackson was emphatic in his *Steel Seizure* opinion that the destroyer deal opinion had *not* been based on constitutional analysis.¹³⁹

As I have argued, Jackson's reading of the President's statutory authority was tendentious and misguided. Had Jackson acknowledged the infirmity of his statutory arguments, he might well have been forced to address the constitutional question whether the President, in the

137. Pious, *Prerogative Power*, *supra* note 6, at 195–96.

138. See Casto, *Brief Encounter*, *supra* note 8, at 378 (“When Jackson turned to the President’s authority to dispose of the vessels, the idea of a general presidential authority to ignore congressional directives was completely gone.”).

139.

In 1940, President Roosevelt proposed to transfer to Great Britain certain overage destroyers and small patrol boats then under construction. He did not presume to rely upon any claim of constitutional power as Commander in Chief. On the contrary, he was advised that such destroyers—if certified not to be essential to the defense of the United States—could be ‘transferred, exchanged, sold, or otherwise disposed of,’ because Congress had so authorized him.

Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 645 n.14 (1952) (Jackson, J., concurring).

circumstances, could nonetheless have acted on his own authority. But Jackson chose to pitch his case instead on statutory grounds, even if his interpretation of the statutes “def[ie]d] common sense.”¹⁴⁰

Jackson’s opinion attempted to find a way to position the President in what his famous concurrence in the 1952 *Steel Seizure* case would describe as the height of his power: the situation in which “the President acts pursuant to an express or implied authorization of Congress,” together with all the powers that he “possesses in his own right.”¹⁴¹ In fact, if the analysis of the statutes in Part III is correct, President Roosevelt’s power was “at its lowest ebb” insofar as he was taking a measure “incompatible with the expressed or implied will of Congress.”¹⁴² To carry out the destroyer deal, as Jackson was later to write, the President would have had to lay claim “to a power at once so conclusive and preclusive” that it would threaten “the equilibrium established by our constitutional system.”¹⁴³ In other words, the President would have had to claim a prerogative power.

We may therefore divide our consideration of the constitutional aspects of Jackson’s opinion into two sub-parts. First, we will examine his treatment of the one significant constitutional issue that he *did* address. Then we may turn to the question of what he would or might have said if he acknowledged that his statutory argument had failed. In other words, what would the destroyer deal opinion have said if Jackson had addressed the claim that the President had a “conclusive and preclusive” power to act?

A. *Transfers by Sole Executive Agreements*

Jackson’s opinion began by addressing a constitutional issue: could the President acquire property or territory from a foreign government by means of an executive agreement, or was an Article II treaty necessary for the purpose? From the viewpoint of international law, the two types of instruments would be equivalent,¹⁴⁴ but that did not settle the constitutional issue. The Constitution does not expressly specify how, if at all, the United States might acquire foreign property or territory;¹⁴⁵ if such power existed,

140. Pious, *Inherent War*, *supra* note 6, at 72.

141. *Steel Seizure*, 343 U.S. at 635 (Jackson, J., concurring).

142. *Id.* at 637.

143. *Id.* at 638.

144. See *Weinberger v. Rossi*, 456 U.S. 25, 29–32 (1982) (discussing whether Congress intended to distinguish executive agreements from Article II treaties and concluding it did not).

145. See GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 52 (1919) (noting the Constitution’s silence regarding the federal government’s power to acquire new territory). On the other hand, the Constitution recognizes other forms of international agreements than “treaties,

it would have to be inferred from powers that *were* specified.¹⁴⁶ The Constitution's silence led President Thomas Jefferson to doubt whether the United States could acquire the Louisiana Territory for the United States by means of an Article II treaty or, still more, whether the United States could incorporate it.¹⁴⁷ But since the Louisiana Purchase, it had been generally acknowledged that the Treaty power extends so far.¹⁴⁸

The relevant question for Jackson was whether foreign property and territory might also be acquired by means of *an executive agreement*—a form of international agreement not mentioned in the Constitution. However, governmental practice and Supreme Court case law supplied the makings of an answer to that question, and Jackson was on fairly safe ground in claiming that the United States could constitutionally acquire foreign property or territory by executive agreement.¹⁴⁹ The New Deal

alliances, and confederations,” which it distinguishes from “compact and agreements.” Quincy Wright, *The United States and International Agreements*, 38 AM. J. INT'L L. 341, 344 (1944). And the Constitution does not specify that the grant of the treaty-making power is to be exclusive. *See id.* (stating that the Article II grant of power is not explicitly exclusive).

146. *See* *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42 (1890) (discussing the origins of the treaty making power with regard to the power to acquire territory).

The power to acquire territory, other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty.

Id. *See also* *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542 (1828) (stating that federal government's power to acquire territory is a consequence of its power to make war and treaties). Further, the Court's opinion in *Missouri v. Holland* indicates that the treaty-making authority may outstrip Congress's enumerated powers. *See Missouri v. Holland*, 252 U.S. 416, 433–34 (1920) (indicating that the treaty-making authority may override rights previously thought to be reserved for the states).

147. *See* *Downes v. Bidwell*, 182 U.S. 244, 252 (1901) (referencing Thomas Jefferson's grave doubts concerning his power to purchase or right to annex the territory). *But see id.* at 322–23 (White, J., concurring) (discussing Jefferson's consultation with Attorney General Lincoln as to incorporation); *Steel Seizure*, 343 U.S. at 638–39 n.5 (Jackson, J., concurring) (citing Letter from Thomas Jefferson to John Breckenridge (August 12, 1803)).

148. *See* *Wilson v. Shaw*, 204 U.S. 24, 32 (1907) (“It is too late in the history of the United States to question the right of acquiring territory by treaty.”); Douglas W. Kmiec, *Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea*, 1 TERR. SEA J. 1, 12–13 n.36 (1990) (discussing how the authority of the U.S. to acquire territory has been settled).

149. *Cf.* *Jones v. United States*, 137 U.S. 202, 224 (1890) (holding the United States might acquire title to the Guano Islands by discovery). In the *Jones* case, Congress had acted to ensure United States title; but even before any congressional action, the executive branch had affirmed that the lands in question belonged to the United States. *Id.* at 205, 212.

Supreme Court had held in the *Belmont* case,¹⁵⁰ and was soon to hold in the *Pink* case,¹⁵¹ that the President might work significant legal changes by means of executive agreements based solely on his Article II authority, at least when those agreements were related to the recognition of a foreign government.¹⁵² President Roosevelt himself was accustomed to using sole executive agreements in the service of his national defense and foreign policies. On August 18, 1940, for example, he implemented the “Ogdensburg Agreement,”¹⁵³ an executive agreement with Canada, under which the two nations created a Permanent Joint Board on Defense.¹⁵⁴ And earlier history provided Jackson with cases in which the President, at least when authorized by Congress, had acquired foreign territory on behalf of the United States.¹⁵⁵ Furthermore, Jackson emphasized that in the destroyer deal, the United States was not actually acquiring either sovereignty over, or title to, foreign land, but was only obtaining *leases* of naval bases.¹⁵⁶ The United States undertook no obligation to protect or defend either the territories or their inhabitants, which remained under British jurisdiction.¹⁵⁷ As Jackson stressed, it was entirely for Congress to decide whether or not to fund the Navy’s eventual use—if any—of the leaseholds.¹⁵⁸

Although most of Jackson’s contemporary critics saw little reason to probe this part of his opinion, at least one of them questioned whether the President—in the absence of congressional authorization—could unilaterally acquire rights over foreign property or territory (including leaseholds) on behalf of the United States.¹⁵⁹

150. *United States v. Belmont*, 301 U.S. 324, 330 (1937).

151. *United States v. Pink*, 315 U.S. 203, 208, 249 (1942).

152. *Belmont*, 301 U.S. at 330. *Cf.* *Goldwater v. Carter*, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting) (“[T]he Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes.”).

153. Agreement for Permanent Joint Board on Defense, U.S.–Can., Aug. 18, 1940, 6 *Bevans* 189.

154. See H.L. Keeney, *The Canada-United States Permanent Joint Board on Defense, 1940-1945*, 16 *INT’L J.* 50, 52 (1960–1961) (discussing the “Ogdensburg Agreement” and the joint defense of North America).

155. Jackson cited the precedent of President Fillmore’s acquisition in 1850 of Horseshoe Reef from Great Britain. What he did not note, however, was that this acquisition had been impliedly authorized by an earlier appropriation for the purpose. Quincy Wright, *The Control of Foreign Relations in the United States: The Relative Rights, Duties, and Responsibilities of the President, of the Senate and the House, and of the Judiciary, in Theory and in Practice*, 60 *AM. PHIL. SOC’Y. PROC.* 99, 325 (1921).

156. Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers (*Destroyer Deal*), 39 *Op. Att’y Gen.* 484, 485 (1940).

157. *Id.*

158. *Id.*

159. See Lawson Reno, *The Power of the President to Acquire and Govern Territory*, 9 *GEO. WASH. L. REV.* 251, 261 (1941) (expressing that this issue has not been directly considered).

B. The Latent Issue of the Prerogative

Not far below the surface, however, lurked a second, and far more difficult, constitutional problem for Jackson.¹⁶⁰ This was whether the President could *transfer* the destroyers to Britain in the face of both the Property Clause of the Constitution and the federal statutes that appeared to preclude any such transaction.¹⁶¹ As we have seen in Part III above, Jackson attempted—unpersuasively—to argue that the President was statutorily authorized to transfer the destroyers. Consequently, Jackson was not obliged to address—and did not address—the question whether the President would have had the legal authority to make the transfer even if the statutes had forbidden it. That is to say, Jackson avoided considering the question of the existence of a presidential *prerogative* in the matter.

The chief constitutional obstacle the President encountered was, of course, the Property Clause, which declares: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”¹⁶²

Congress’s power over federal property is extensive. In a then recent Supreme Court opinion, *United States v. San Francisco*, the Court rejected the argument that Congress had unconstitutionally invaded California’s right to regulate the distribution of electricity within the State by attaching certain conditions to the grant of certain federal lands and rights of way to the City of San Francisco.¹⁶³ With regard to the Property Clause, the Court said:

The power over the public land . . . entrusted to Congress is without limitations. “And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.” Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy. And the policy to govern disposal of rights to develop hydroelectric power in such public lands may, if Congress chooses, be one designed to avoid monopoly and to bring about a wide-spread distribution of benefits. The statutory requirement that Hetch-Hetchy power be publicly distributed does not

160. Indeed, in a preliminary draft of his opinion, Jackson had linked the two constitutional issues together, arguing that “the power to acquire includes the power to give compensation” Casto, *Brief Encounter*, *supra* note 8, at 389 (reprinting Preliminary Draft of Jackson’s Opinion).

161. *Id.* at 370; Casto, *Advising Presidents*, *supra* note 8, at 57.

162. U.S. CONST. art. IV, § 3, cl. 2.

163. *United States v. City of S.F.*, 310 U.S. 16, 29–30 (1940).

represent an exercise of a general control over public policy in a State but instead only an exercise of the complete power which Congress has over particular public property entrusted to it.¹⁶⁴

If this language were construed as saying that Congress's power to dispose of the property of the United States is *exclusive*, the Court might have gone too far, since there is a strong argument that federal property may also be disposed of by means of the Treaty power.¹⁶⁵ But certainly nothing in the Court's opinion left open the possibility that *the President* had concurrent authority with Congress to dispose of federal property—let alone that he might do so in the teeth of a legislative prohibition.

Jackson did not seek to counter these arguments with any claim based on presidential prerogative. Indeed, as Professor Casto has shown, Jackson *excised* a prerogative argument that had appeared in a preliminary draft of his final opinion. But that should not lead us to conclude, as Casto does, that Jackson had only a “brief encounter” with the problem of the prerogative.¹⁶⁶ It would be truer to say that he had a sustained, anguished, and inconclusive affair with it. That suggestion brings me to my next, and final, section.

V. JACKSON AND THE PREROGATIVE POWER

I can hardly provide an exhaustive account in this short paper of Jackson's later thoughts on this issue. But let me pick out three important episodes in his incomplete and evolving thinking. The first is from mid-1941, while he was still Roosevelt's Attorney General; the second is from his period as a Supreme Court Justice, specifically in the 1944 *Korematsu* case; and the third is from his celebrated 1952 concurrence in the *Steel Seizure* case.

First, less than a year after his destroyer deal opinion, but still before the United States' entry into the war, Attorney General Jackson issued an Opinion entitled *Training of British Flying Students in the United States*. In this, he stated:

164. *Id.*(citations omitted). Later case law affirms this expansive interpretation of the Property Clause. See *Kleppe v. New Mexico*, 426 U.S. 529, 539–40 (1976) (affirming an expansive interpretation of the Property Clause).

165. See *Disposition by Treaty of Territory or Property Belonging to the United States*, 43 Op. Att'y Gen. 96, 101 (1977) (concluding President and Senate could dispose of Panama Canal Zone through self-executing treaty without authorization or approval from Congress).

166. Casto, *Brief Encounter*, *supra* note 8, at 364–65.

[T]he President's responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their immediate movements and operations designed to protect the security and effectuate the defense of the United States. . . . [T]his authority undoubtedly includes the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country.¹⁶⁷

Had Jackson taken that line on the destroyer deal, it would hardly have been necessary for him to consider the purely statutory questions he analyzed there.¹⁶⁸

Second, consider Justice Jackson's celebrated but enigmatic dissent as a Supreme Court Justice in the 1944 *Korematsu* case¹⁶⁹—an opinion that Professor Eugene V. Rostow, in a famous post-War article, called “a fascinating and fantastic essay in nihilism.”¹⁷⁰

In that opinion, Jackson advanced two main propositions: first, that there should be no judicial review of the constitutionality of military commanders' orders made in belief of their military necessity; but second, that the courts should review the constitutionality of convictions under a statute that attached criminal penalties to the violation of a military commander's order.¹⁷¹ As summarized in Jackson's 1951 Address entitled *Wartime Security and Liberty under Law*:

167. *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 61–62 (1941) (emphasis added).

168. True, Jackson noted that the provision of instruction to the British Flying students in Air Corps schools would offend no Act of Congress and was in fact authorized by the Lend Lease Act (which had been enacted after the destroyer deal opinion). Moreover, though he chose to rest the President's authority on constitutional grounds alone, he also cited the Lend Lease Act as evidence that “Congress has explicitly enunciated the policy that the defense of . . . Great Britain[] is vital to our own defense and that the furnishing of aid to [Britain] is essential to the security of the United States.” *Id.* at 62. Nonetheless, the language I have highlighted does plainly state that in light of the constitutional texts on which Jackson has relied, the *Commander-in-Chief* authority “undoubtedly includes the power to dispose of . . . equipment” as the President sees fit. *Id.* at 61–62 (emphasis added).

169. *Korematsu v. United States*, 323 U.S. 214, 242–48 (1944) (Jackson, J., dissenting). For in-depth studies of Jackson's *Korematsu* opinion, see generally Dennis J. Hutchinson, “*The Achilles Heel*” of the Constitution: Justice Jackson and the Japanese Exclusion Cases, 2002 SUP. CT. REV. 455 (2002) (providing an in-depth analysis of Jackson's opinion in *Korematsu*); John Q. Barrett, *A Commander's Power, A Civilian's Reason: Justice Jackson's Korematsu Dissent*, 68 LAW AND CONTEMP. PROBLEMS 57, 59 (2005) (“Justice Jackson's dissent in *Korematsu* . . . merits its very high place in both the American legal and the human canons.”).

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

171. Hutchinson, *supra* note 169, at 480–81.

It seemed to me then, and does now, that the measure [*i.e.*, the military order for breach of which Korematsu was convicted] 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 theatre for military operations. I can add nothing to my dissent in the case¹⁷²

Jackson, in other words, was altogether excluding certain military and, therefore, executive decisions in wartime from the purview of judicial review. And this, it seems to me, effectively acknowledges that some form of presidential prerogative exists, *de facto* if not *de jure*. Jackson's good friend, Charles Fairman of Harvard Law School, read the *Korematsu* dissent as telling "officers of the Executive that in practice, in order to preserve the nation, they may have to violate its Constitution."¹⁷³ And Jackson himself, in the 1951 Address just mentioned, went on to say: "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."¹⁷⁴

In holding that the constitutionality of military and executive decisions of this kind was not subject to judicial review, Jackson seems to be acknowledging the existence of a *de facto* presidential prerogative. Congress might choose later to ratify them, as it did with Lincoln's blockade of the Confederacy.¹⁷⁵ If Congress left the decisions unrati-

172. Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 *BUFF. L. REV.* 103, 115–16 (1951).

173. Charles Fairman, *Associate Justice of the Supreme Court*, 55 *COLUM. L. REV.* 445, 453 n.30 (1955).

174. Jackson, *supra* note 172, at 116.

175. *See, e.g.*, *Wilson v. Shaw*, 204 U.S. 24, 32 (1907) (discussing Congress's ratification of the Executive's acts as being acceptable in the case of the Panama Canal).

[Plaintiff] contends that whatever title the Government has [to the Panama Canal Zone] was not acquired as provided in the act of June 28, 1902, by treaty with the Republic of Colombia. A short but sufficient answer is that subsequent ratification is equivalent to original authority. . . . These [previously cited legislative actions] show a full ratification by Congress of what has been done by the Executive.

however, their constitutionality could be challenged only through the political process, or at the extreme through an impeachment proceeding.¹⁷⁶ They were ring-fenced against constitutional review *in the courts*.

Third, when Justice Jackson came to write his *Steel Seizure* concurrence in 1952, his hostility to prerogative claims was manifest. Among much else, he remarked in that concurrence that the “description of [the] evils in the Declaration of Independence” of the English Crown’s prerogative power “leads [one] to doubt that [the Framers] were creating their new Executive in his image.”¹⁷⁷ When carefully read, however, his *Steel Seizure* opinion is perfectly consistent with his *Korematsu* dissent. Thus, he speaks of “the Constitution’s policy that Congress, not the Executive, should control utilization of the war power as an instrument of *domestic policy*.”¹⁷⁸ And he writes that “[one] should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, *at least when turned against the outside world* for the security of our society.”¹⁷⁹

Can we discern any underlying logic or coherence in Jackson’s successive opinions, which from first to last spanned a period of twelve years? Perhaps not; he may simply have changed his mind over years of reflection. But let me hazard the attempt to find an underlying structure. It would be a useful exercise, at least, to attempt to construct a unified, Jacksonian theory of the prerogative that did not focus exclusively—as most studies have done—on the *Steel Seizure* case. Such a theory would not, of course, be an “originalist” one. Rather, it would be the kind of “pragmatic” constitutional theorizing which Judge Richard Posner espouses, and of which he considers Jackson a master.¹⁸⁰

Viewing his opinions as a totality, then, we find that Jackson did *not* say that wartime in and of itself would give birth to a prerogative claim: both the destroyer deal and the training of British flying students had occurred when the United States was *near* war, but not actually engaged in

Id. See generally Note, *Recapturing the War Power*, 119 HARV. L. REV. 1815 (2006) (discussing Congress’s appropriations power as the main constraint to presidential action, but noting Congress may still ratify presidential action after the fact).

176. Note, *supra* note 175, at 1832 n.88.

177. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

178. *Id.* at 644 (emphasis added).

179. *Id.* at 645 (emphasis added).

180. See RICHARD A. POSNER, *LAW, PRAGMATISM, & DEMOCRACY* 293 (2003) (hailing Jackson as “one of the greatest pragmatic Justices”).

it; the steel seizure, by contrast, was a wartime measure, but invalid.¹⁸¹ Thus, wartime was neither a *necessary* nor a *sufficient* condition for a prerogative claim.

It is closer to the mark to say that for Jackson, the more nearly the circumstances in which the Executive action was to take hold resembled a *battlefield*, the stronger the defense of Executive power—for the Commander-in-Chief authority was at its apex on the field of battle. As he explained in *Steel Seizure*, legal advice to the President regarding the domestic or peacetime use of military power was to be “measured by the command functions usual to the topmost officer of the army and navy.”¹⁸²

A reasonable approximation to an internally consistent overall “Jacksonian” view of the prerogative, based on the materials surveyed above, could therefore go somewhat like this:

First, a claim of presidential prerogative—in the sense of an Executive action unsupported by or contrary to an Act of Congress or the Constitution—would be judicially reviewable and should presumptively be invalidated, whether in wartime or not, if it injured a class of American nationals and did not concern a zone or theater of military operations (even in a wide sense). Thus, even though President Truman’s seizure of the steel mills occurred in the midst of active hostilities during the Korean War, it was subject to judicial review and should have been held invalid: it injured an identifiable class (the owners and managers of the nation’s steel mills) and it did not relate to a scene, even in a broad sense, of actual or anticipated military operations.

Second, General Dewitt’s orders (or at least some of them) directed against persons of Japanese ancestry—and, by extension, the presidential Order that underlay DeWitt’s orders¹⁸³—though based on an odious and unconstitutional racial classification, should not have been reviewed nor struck down. This was so because the entire Pacific Coast (or, in the *Merryman* case, the State of Maryland) could reasonably have been considered a zone of military activity—or, at least, a zone of intense

181. *Steel Seizure*, 343 U.S. at 645–46 (Jackson, J., concurring).

182. *Id.* at 645. Jackson was perhaps alluding to his own legal advice to the President in 1941, which had argued that the President had the legal authority to seize a plant belonging to the North American Aviation Corporation. In that opinion, Jackson sought to characterize the situation facing the President as “more nearly resembl[ing] an insurrection than a labor strike.” See 89 CONG. REC. 3,992 (1943) (reprinting Jackson’s 1941 opinion). To the extent the situation did indeed resemble an insurrection, the Commander-in-Chief authority would be heightened.

183. See Exec. Order No. 9,066, 7 Fed. Reg. 1,407 (Feb. 19, 1942) (“I hereby authorize and direct the Secretary of War, and the Military Commanders . . . to prescribe military areas . . . from which any or all persons may be excluded . . .”).

military interest and sensitivity—at the time the orders (or some of them) were given.

Third and finally, the destroyer deal would occupy, for Jackson, a position midway between the two prior cases. It was not a presidential wartime decision—although war was looming—and the threat to the nation's security from inaction was extremely grave. But even though it violated traditional separation of powers principles, and even though the problem had partly been brought on by the President's own political and electoral calculations, the decision did not cause an injury to any identifiable class of citizens. Moreover, executive action seemed critical in staving off the defeat of a likely ally at a decisive moment of the war and to weaken a likely enemy whose strength might be overpowering if we were to stand alone against it. And to any reasonable mind it would have been obvious that by exchanging the destroyers for bases in the Caribbean, the United States had bolstered, not weakened, its strategic position. As historian David Reynolds notes, “[b]ases in the West Indies and Newfoundland had been a long-standing aim of the U.S. Navy, facilitating patrols far out into the Western Atlantic and strengthening defence of the Canal Zone.”¹⁸⁴ If supplying the British with destroyers was not, in a literal sense, a “battlefield” decision because the United States was not at war, it was certainly the kind of decision that the Commander-in-Chief could have taken on behalf of a distressed ally in an air and naval battle over the control of vital sea routes. Thus, if Jackson had been forced in August 1940 to give a candid answer to the constitutional question, I believe that he would have considered the destroyer deal an exercise of presidential prerogative whose constitutionality was off-limits to judicial review.

How convincing is the theory—or, better, *approach*—that I have sketched in? Arguably, a “Jacksonian” approach maps onto our current war powers jurisprudence fairly well. Through the political question doctrine, the concept of constitutional standing, absolute or qualified immunity, and other devices, the courts have effectively foreclosed judicial review of many kinds of combat-related military and executive actions or barred personal liability on account of them.¹⁸⁵

Thus, the political question and constitutional standing doctrines have been held to preclude review of an executive decision to target a U.S. citizen for a lethal drone strike on what was considered, in an extended

184. REYNOLDS, *supra* note 7, at 132.

185. For a review and negative assessment of these devices, see Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1305–16 (1988) (offering a review and negative assessment of these devices).

sense, a “battlefield.”¹⁸⁶ The doctrine of standing has been held to bar congressional plaintiffs from seeking judicial enforcement of the War Powers Resolution, leaving the President free to launch a large scale air war in central Europe.¹⁸⁷ And several federal courts of appeal have recently rejected invitations to create *Bivens*-type rights of action against troops or their superiors in the chain of command for abusive interrogation of military prisoners or inadequate supervision of their detention.¹⁸⁸ All of these results are consistent with the pragmatic or “Jacksonian” model outlined here.¹⁸⁹ Even the current Supreme Court’s readiness to provide for review of military detention orders seems consistent with that model,¹⁹⁰ because those cases deal with *post*-capture situations in which detainees are *hors de combat* (no longer active on a battlefield), and because the detainees are being held in conditions of a kind, over which reviewing courts normally exercise supervision.¹⁹¹

186. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 52 (D.D.C. 2010).

187. *See Campbell v. Clinton*, 203 F.3d 19, 20 (D.C. Cir. 2000) (finding the Congressmen lacked standing); *id.* at 24 (Silberman, J., concurring) (opining that no one, not even the military, would have standing because the claims are not justiciable); *see also Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (“Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.”).

188. Judge Frank Easterbrook’s opinion for the *en banc* court sounds several “Jacksonian” themes. *See Vance v. Rumsfeld*, 701 F.3d 193, 195 (7th Cir. 2012) (*en banc*) (declining to create right of action against soldiers “who abusively interrogate or mistreat military prisoners”). *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (rejecting the theory of supervisory liability of high-ranking Executive branch officials for allegedly discriminatory acts of subordinates in the aftermath of 9/11).

189. Note, however, that under nineteenth century case law, the judgments and actions of a military commander in operational or even wartime conditions were indeed subject to judicial review. *See, e.g., Little v. Barreme*, 6 U.S. 170, 179 (1804) (holding a U.S. Navy Captain liable for damages for an unauthorized seizure of a neutral vessel during Quasi-War with France despite following a presidential order); *The Eleanor*, 15 U.S. (2 Wheat.) 345, 356–57 (1817) (discussing potential liability of naval squadron commander for trespass); *Smith v. Shaw*, 12 Johns. 257, 265 (N.Y. 1815) (holding the commanding officer liable for wrongful arrest of citizen not subject to court martial due to a lack of jurisdiction). Furthermore, Civil War courts reviewed (and rejected) the constitutionality of Lincoln’s suspension of the habeas writ.

190. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (reviewing the legality of holding a U.S. Citizen as an enemy combatant); *Hamdan v. Rumsfeld*, 548 U.S. 557, 572 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (reviewing whether military commission had authority to try prisoner); *Boumediene v. Bush*, 553 U.S. 723, 732 (2008) (holding aliens detained at Guantanamo had habeas corpus privilege). Furthermore, the D.C. Circuit has refused to extend the scope of habeas corpus review required under *Boumediene* to noncitizens detained in Afghanistan. *Al-Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010).

191. This is not to deny that Jackson’s opinion in *Eisentrager*, is in tension with the Bush era cases. *See Eisentrager*, 339 U.S. at 779 (discussing the effectiveness of an enemy combatant’s ability to initiate a lawsuit against an opposing field commander).

In short, as Jackson would have had it, a commander's orders are largely exempt from judicial review if given in a combat-related situation, but not otherwise. In the destroyer deal case itself, since no congressional or citizen plaintiff could have claimed to have suffered an actual injury from the transaction, it too, under current doctrine, would be judicially unreviewable.¹⁹² As a matter of constitutional theory, the destroyer deal seems best understood as an exercise of a *de facto* presidential prerogative.

If this sketch of a Jacksonian account of the prerogative is broadly correct, then we can no longer view Jackson's work as Attorney General and as an Associate Justice as if they were sharply distinct. Instead, we must acknowledge that Jackson's thinking about executive power, though obviously influenced by the roles he occupied, showed a marked continuity and, indeed, consistency over time. Furthermore, we must see Jackson's tripartite categorization of executive power in the *Steel Seizure* case as only a partial and incomplete account of that subject—one that must be read in the light of his *Korematsu* dissent and his opinions as Attorney General.

Let me emphasize once more that none of this is to say that Jackson considered the absence of judicial review to be tantamount to an endorsement of the legality or constitutionality of a presidential action like the destroyer deal. As the Supreme Court was to say in *Nixon v. Fitzgerald*, there remain, in addition to impeachment, powerful “formal and informal checks” on the President.¹⁹³ For example, he is “subjected to constant scrutiny by the press,” exposed to “[v]igilant oversight by Congress,” and motivated by “a desire to earn reelection, the need to maintain prestige as an element of . . . influence,” or the “traditional concern for his historical stature.”¹⁹⁴ Furthermore, as Jack Goldsmith has recently argued, a President encounters checking mechanisms, not only in Congress, the media, or public opinion, but also within the Executive branch, for example, through oversight by lawyers and inspectors general in the military, intelligence and

It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

Id.

192. See *Clapper v. Amnesty Int'l, USA*, 133 S. Ct. 1138, 1155 (2013) (finding no standing for plaintiffs claiming prospective injury from wiretapping under Foreign Intelligence Surveillance Act).

193. *Nixon v. Fitzgerald*, 457 U.S. 731, 757 (1982).

194. *Id.*

civilian agencies.¹⁹⁵ Jackson knew that even a popular and dominant President like Franklin Roosevelt, operated under intense media scrutiny, met with bureaucratic resistance, and confronted severe political constraints. If Jackson believed in a *de facto* prerogative, it was not because he believed in an unchecked Executive, but because he believed in the vitality and efficacy of democratic politics.

195. JACK GOLDMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, xi–xv (2012).