ADVANCE SHEET – SEPTEMBER 2, 2022

President's Letter

In this issue, we present two tributes to leading personalities of the Roosevelt Court. (Few participants in recent controversies over Supreme Court politics remember that for a few months after the war, prior to the appointment of Justice Burton, that all of the Justices were Democrats.)

Felix Frankfurter and Robert Jackson, along with Burton, were regarded as the most restrained members of the Court of the early 1950s. We here offer Professor John Mansfield's tribute to Frankfurter, which echoes Professor Philip Kurland's view that "to know what he did is not to know who he was." Frankfurter, unlike most of today's academics, took an intense interest in the subsequent careers of his students. He was a shameless flatterer of both the high and low alike, as can be seen in his published correspondence with Oliver Wendell Holmes and Franklin Roosevelt. He not only populated Washington agencies and law school faculties with his former students, he also introduced important young Europeans to Washington, including Carlo Sforza and Jean Monnet.

We also include Philip Kurland's biographical sketch of Robert Jackson, noteworthy among other things for Jackson's deep fear of expansion of federal criminal jurisdiction, an issue in our time.

Readers desiring to explore a complete archive of Jackson's speeches and other writings will find them at **www.roberthjackson.org**. They provide a refreshing contrast with the political rhetoric of our time.

George W. Liebmann

Maryland Civil Practice Forms

Each year, your editor prepares revisions for his Maryland Civil Practice Forms (Thomson West). The preface to each new edition provides a capsule summary of civil procedure events in the preceding year that may be of use to lawyers generally; accordingly, the latest version covering events up to June 30, 2022 follows:

The past year, perhaps due to COVID and changes of personnel on the Court of Appeals, saw little significant rule-making, statutes, or case law on civil procedure.

There were new rules relating to electronic filing of exhibits (17.11); digital signatures (18.24); Bar discipline (23.3, 39.1); remote participation in scheduling conferences

(53.1); specialized courts (53.1, 59.14); electronic devices in courtrooms (53.1); scheduling orders (53.3); self-authentication of documents (59.6); virtual jury trials (60.14); in banc appeals (65.1); dismissal of appeals to the circuit court (87.12); petitions for certiorari (87.13); and appellate briefs (87.18; 92.1; 93.9; 93.19; and 93.20).

New forms were provided for restoration of former names (10.15.30; 10.15.50; 10.15.70); disclosures by corporate parties (15.1); elevated access to MDEC cases (17.11.50); motions for remote proceedings (53.1.50); waiver of open costs (72.1.50); notices of lis pendens (77.6.30); auctioneer's affidavits (81.28.50); garnishments (82.2.30; 82.2.70; 82.14); requests for body attachment (84.9.50) and notices of appeal (87.1.50).

Major cases related to taxpayer standing (8.1); legal recognition of gender changes (10.15); successor liability of corporations (10.16); de facto parenthood (11.10); limitations in class actions (13.1); public official immunity(26.17); liability of police (30.8); arbitration (31.7; 31.23); contributory negligence (31.11); laches (31.16); limitations in residential lease cases (31.23); limitations during COVID epidemic (31.23); third party practice (37.1); Maryland Public Information Act (48.1); designation of experts (53.3); disqualification of judges (56.6); rape shield statutes (59.6); expert testimony (59.6); child testimony (59.6); impeachment of jury verdicts (60.1); lost instruments in foreclosure cases (61.28); rent collection actions (64.11); in banc review (65.7); declaratory judgments (71.2); costs (72.1; 75.4); SLAPP actions (72.3); writs of possession (83.1; 87.12); civil contempt (84.9); post conviction appeals (87.6); and administrative mandamus (87.17)

George W. Liebmann

The United States Marshals Service
Through the Eyes of A U.S. Marshal

On Wednesday, September 7, 2022, at 12:30 p.m., Johnny L. Hughes, the United States Marshal for the District of Maryland will speak on the United States Marshals Service and the District Of Maryland. He will recount the role the Service played in numerous cases including their involvement in the 2002 D.C., Maryland., Virginia

Sniper Case. Please join us for what should be a fascinating afternoon as Marshal Hughes talks to us about the Marshals Service and recounts almost a half century in law enforcement. The program will be in-person as well as by way of Zoom.

Johnny L. Hughes is the United States Marshal for the District of Maryland. He was appointed by President George W. Bush and confirmed by the United States Senate on February 8, 2002. Prior to becoming United States Marshal, Mr. Hughes was Director of the National High Intensity Drug Trafficking Area Congressional Affairs and Public Information Office under the office of National Drug Control Policy. He was appointed to that position July 1, 1996. Hughes began his law enforcement career on July 10, 1967, as a trooper with the Maryland State Police, retiring at the rank of Major on June 30, 1996. Major Hughes worked in numerous assignments and held several command positions with the Maryland State Police. Hughes has extensive experience in congressional affairs work and has testified on law enforcement and criminal justice matters on Capitol Hill. He has served on several local, state and federal boards, committees and commissions. Hughes was the recipient of the United States Attorney General's Special Commendation Award in 1993, and recipient of the National Law Enforcement Council Achievement Award in 1992. A family man, Marshal Hughes is the father of Michael and David Hughes, both former Maryland State Troopers. Michael was shot in the line of duty and is now medically retired from the Maryland State Police while David is currently a Supervisory Special Agent with the Drug Enforcement Administration.

Time: 12:30 p.m., Wednesday, September 7, 2022, with the Library's famous wine & cheese reception immediately following.
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R.S.V.P.: If you would like to attend telephone the Library at 410-727-0280 or reply by e-mail to **jwbennett@barlib.org**. Please remember to indicate whether you will be attending in-person or by way of Zoom. If you are joining us remotely, a Zoom link will be forwarded the week of the program.

Please Help If You Can

I was going to ask if anyone knew how it got to be September already, when I thought it might lead to someone asking the related question of how it got to be 2022, and I was not ready to take the chance. Whether we are ready for it to be or not it is in fact September, and among other matters of significance emanating from that fact, it is the end of the Bar Library's fiscal year. Come October, a new membership year will be upon us.

It was in the afternoon of August 23, 2011 that the effects of an earthquake which occurred in Virginia were felt in Baltimore and "Fortress Mitchell" shook in such a manner that I initially thought it must have been a bomb. Right after it happened I talked to Judge Moylan, whose office then and now is next to the Library, and we both came to the conclusion that we had in fact seen and experienced everything there was to see and experience. Then, of course, there came COVID knocking on the door.

The last few years have been, as with many, a challenging time for the Library. Income from fees and dues is down dramatically and belt tightening of the first order has taken place. We have done our utmost best and take great pride in not having closed, even for a single day, as a result of the pandemic. We will continue with all possible effort to provide the same level of services and collections that we have over the course of the past 182 years, but, we desperately need your help.

If it is at all possible, I ask that you continue or renew your membership for the 2022-2023 membership year. It will provide money the Library is in great need of and help it to continue what a Civil War, two World Wars, a Great Depression and a prior pandemic were unable to stop. It is in fact the case, the truth, that we will not be able to make it without your help. Please do what you can and thank you.

I look forward to seeing you soon.

Joe Bennett

FELIX FRANKFURTER d1

78 Harvard Law Review 1529
June 1965
In Memoriam
John H. Mansfield a1

SPEAKING of some remarks he made a few years ago at a ceremony honoring Judge Learned Hand, Justice Frankfurter, in a pungent style so characteristic of him, observed: “I deeply wanted to say something without dumping him into a hogshead of molasses. How tricky such efforts are.” Tricky indeed, and beyond my poor power, I fear, on this occasion, when I am to speak of one who left such a deep mark on my life, and on the lives of many. My hand and voice and resolve are steadied, however, when I consider how he would disapprove if I spoke otherwise of him, especially here to you, the students and faculty and friends of the Harvard Law School. I can almost feel his grip upon my arm, that vise-like grip that was the mark of his complete attention to the particular human being who was before him. I can still see the flash and sparkle of life and interest in his eyes, and hear the spontaneous combustion of his laugh.

There are surely many others, including others of his law clerks, some who are sitting here now, who are better qualified than I to speak of this extraordinary man. They could tell of the early days when he worked for Mr. Stimson, one of his heroes, in the United States Attorney's office in New York. They could speak of his government service during the First World War and after, and his years as a teacher at this law school, which he loved so ardently. They could speak of the influential role that he played in the New Deal, and of his early years on the Court. It was very late in this rich and crowded life that I came to serve the Justice. And yet when I reflect upon the matter, that seems to make no difference: To know him at all was in a sense to know him fully, and to be set apart forever from those who had not known him. He did not hold himself back; he was the most unreserved of men. One draught of his wine, and a man

was as giddy as those who had drunk the whole bottle. And indeed, to each new law clerk and friend, he gave the whole of his life, in a rushing, bubbling stream of stories and anecdotes, memories going back over seventy years, told with such zest and enthusiasm that one might suppose he was telling them for the first time. Some of these you will find in the book of his reminiscences. That book is full of good things, but it gives pain, for it largely fails to communicate the warm, affectionate, compassionate side of his nature.

How I entered the golden circle of his acquaintance is still something of a mystery to me. I find among my papers — and it gives some idea of the generosity of his mind, that he could attribute to a relationship equality, when in truth the giving was all on his side — I find, as I say, a card in his hand, on which he has written the word "serendipity," with a definition (evidently we were discussing this word, and doubtless I had exposed my ignorance of its meaning or origin). "Serendipity," he writes, "an unexpected, unsought, happy discovery: e.g., Justice Frankfurter's happening on Professor Mansfield." The ordinary means for choosing law clerks had, as I recall, failed to function, so that although the summer months had arrived, a law clerk was still needed for the coming term. The Justice convoked the Harvard men who happened to be on the premises, a group he sometimes laughingly referred to as "the puisne judges," and asked for suggestions. "What about Mansfield?" someone volunteered. "Who's he?" replied the Justice. "I thought he was dead." Dead he may have been, but not for long, for an invitation to be a Frankfurter clerk was an invitation to life, to a wider, richer life than one had supposed oneself capable of. Justice Frankfurter was a life-giving force. His presence to those about him was a challenge to clearer thinking, to deeper feeling, to a more intense humanity.

His clerks were his friends. This is to say nothing and to say everything. When I consider many of his friendships, their achievement seems to me a minor miracle. In my own case, it is hard to see how there could have been greater differences in background, in temperament, in age and in position. Yet none of these things seemed an obstacle to an immediate, easy and spontaneous interchange. The secret was that he did not leave things to chance. He did not wait for something to happen, as most of us do. He set out to be your friend. He did not leave you alone; he knew that in fact human beings do not really want to be left alone, and he acted accordingly. He concerned himself with every aspect of our lives, from the deep recesses of the intellect and heart to the most trivial ailments of our bodies.

What shall I tell you of being his law clerk? Shall I tell you of the warm, sunlit study in the house on Dumbarton Avenue, with books open everywhere, and an invitation to sit in the old Morris chair that used to be Holmes'? Shall I tell you of walks in the Washington springtime? It always seemed to be springtime that year; I cannot remember any winter at all. Shall I tell you of talk, and talk, and more talk on a thousand subjects? Work? I can hardly remember any work at all in the usual sense of the word. The door to his office would burst open, and in he bounced with some new idea to try out, some new experience to share. What did we think about this? Had we heard about that? Look at this new book! Come and meet so and so, the ambassador from somewhere or the author of something, or just an interesting person. He certainly observed his own advice that a really good lawyer spends only a small portion of his time at specifically legal work. Most everything in life was relevant to law, grandly conceived. That was the lesson he set us to learn by example and participation. In other chambers men might labor in shirt sleeves to heap up legal memoranda and complain of overwork. That was not for us. We were to wear our learning and labors lightly — that was the badge and honor of our

office.

But appearances were deceptive. Work was in fact going forward, going forward in the way that he knew was most fruitful. He once spoke of “the conditions essential for the kind of creative tasks which are involved in the effective exercise of the Court's jurisdiction, which means essentially a feeling of serenity of mind and an absence of jostling, especially jostling due to too many problems occupying the mind at the same time.” The thinking and research that he had us do had a purpose and a point, and finally a use. To that which he was revolving in his mind, and measuring against a lifetime's experience with law, society, and human nature, we added our mite. Then suddenly, his brilliant mind seized hold of the whole matter, exposed the essence of the problem, and clothed it in that distinctive prose that seems overly elaborate only to those who prefer the desiccated language of the law reviews to the grand style of Samuel Johnson and Cardinal Newman. How completely appropriate to the Justice's view and use of language are these observations of Newman, whom he so much admired:

And, while the many use language as they find it, the man of genius uses it indeed, but subjects it withal to his own purposes, and moulds it according to his own peculiarities. The throng and succession of ideas, thoughts, feelings, imaginations, aspirations, which pass within him, the abstractions, the juxtapositions, the comparisons, the discriminations, the conceptions, which are so original in him, his views of external things, his judgments upon life, manners, and history, the exercises of his wit, of his humour, of his depth, of his sagacity, all these innumerable and incessant creations, the very pulsation and throbbing of his intellect, does he image forth, to all does he give utterance, in a corresponding language, which is as multiform as this inward mental action itself and analogous to it, the faithful expression of his intense personality, attending on his own inward world of thought as its very shadow ....

How the Justice loved the Court and worried about its work and its future. How he loved this country, both its traditions and its progress. It always surprised me that he never showed any interest in foreign travel, and — it seems somehow a related fact — though a voracious reader, he took no particular interest in works of fiction. I now see these as characteristics of a mind so completely absorbed in and stimulated by the reality immediately at hand, that it had no need of artificial stimulants to arouse the imagination. The world around him teemed with matter for his attention.

And how he idolized this School. It was on his tongue almost as much as the name of Holmes. “You don't know that, and you've been to the Harvard Law School?” “You haven't read Zimmern's ‘Greek Commonwealth,’ and you say you have been to the Harvard Law School?” Will I ever forget Zimmern's “Greek Commonwealth,” or a hundred other books that he was shocked to find I had not read! One might have supposed that there had been a golden age at the Harvard Law School, when it was free of all human failings, and that the Justice innocently believed that that state of affairs continued to the present day. I came to see, however, that he had no illusions about us at all, any more than he had illusions about those persons for whom he conceived an especial enthusiasm. It was all part of what I should call his education by expectation. No one can I think of whom it would be more terrible to disappoint, and if he took it for granted that the Harvard Law School was great, that its faculty was learned, wise, upstanding, that its students were diligent, enthusiastic, seized of noble visions, then perhaps they would be, perhaps they could be, certainly they must be.

So it was with his friendships, especially with younger men. He knew of what

poor stuff we were made. But his expectations of us did indeed arouse a desire to respond, to be what he assumed we were, to live as nobly and as usefully as he suggested we might. Here was a mystery of human converse — that he could communicate his being and his aspirations to those he touched. Surely he least of all has to fear that awful divine reproach on the last day — “But where are the others?” — for they follow him in a great throng.

There are those who say that Felix Frankfurter had no religious convictions. The answer to them is that his whole life was dedicated to the discovery of the unfolding spirit, his every word and action a testimonial to its life-giving presence. It only remains for us to say, “Lord, take away my heart of stone, and give me a heart of flesh,” like unto his.

Footnotes

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These remarks were originally delivered on Feb. 26, 1965, at a meeting at the Harvard Law School in commemoration of Mr. Justice Frankfurter.

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Professor of Law, Harvard Law School. A.B., Harvard, 1952, LL.B., 1956.

Robert H. Jackson

by

PHILIP B. KURLAND

WHEN ROBERT HOUGHWOUT Jackson left Jamestown, N.Y. in 1934 to become general counsel to the Internal Revenue Bureau, he planned to stay in Washington less than six months. Like many another pilgrim of the New Deal period, however, Jackson never went home again, except to visit. But however long he was away from it, Jamestown remained his spiritual home and he remained a somewhat sophisticated version of his own idealization, the "country lawyer." Jackson in many ways was representative of the best that the era of the 1920's could produce. But it was an era that ended with the depression and the New Deal. And so he ultimately found himself a "loner" in a group-oriented society, an individualist in a collectivist world.

"I've often said," he lamented toward the end of his life, "the great difficulty with the conservative class in this country is that they've lost their guts. The American industrialist has just ceased to be an individualist. With few exceptions, he wants mass support. He wants organization. He doesn't stand as an individual. The same thing is more or less true of the liberals. Instead of an old-fashioned liberalism, the liberals have tended to collectivism and communism. They are not individualists any more. Both groups, it seems to me, lack imagination and constructive thinking."

Jackson's American ancestry can be traced back to the Revolutionary period. They came early to Warren County, Pennsylvania and never left it. But these ancestors are more interesting for the traits that Jackson found to admire in them than for any deeds or thoughts of their own.

"The Jacksons were self-dependent and did not mix too much with other

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people. . . . There was a certain self-reliance and self-dependence in them that did not care much what other people thought, or did, or said. They were going their own way. . . . They were individualists of the strongest kind. . . . I never knew one of them to be lonesome just because he was alone." The Houghwouts displayed the same characteristics. "They were self-sufficient and self-reliant, believed that it was up to them to take care of themselves, sought no help, and taught, insofar as they consciously taught anything, thrift, industry, and self-reliance." What Robert Houghwout Jackson brought to this heritage was a talent and ambition sufficient to break out of the tradition of the yeomanry that had marked his family's history.

Jackson found the same virtues in his community that he did in his family. "The life of the community in that section of the country before the First World War was as . . . democratic as any society that ever existed. It was made up of farmers on family-sized farms, small tradespeople, with no capitalist and no servant class. . . . There was wealth, but there was very little envy of wealth, because if one had accumulated money . . . , the industry and thrift by which he did so were well understood. . . . Everybody lived on much the same level. It was a really democratic existence and a very individualistic one. . . . The way of the poor was hard, but so was the way of the not so poor."

Jackson's boyhood was what one might expect in such a community and family. The woods and fields were places to play as well as work. Jackson developed a love of horses that stayed with him. Nor did his taste for the woods and hills of rural America ever abate. Summers were spent in the local canning factory where Jackson worked his wages up from seven and a half cents per hour to twelve and a half cents per hour. Schooling was adequate but not extraordinary, except for an English teacher, Mary R. Willard, who instilled a love of language that served him throughout his life. "Her influence would be hard to overestimate." Public speaking was Jackson's forte from the beginning. On graduation from Jamestown High School, where he took an extra year after graduating from Frewsburg High School, Jackson was the class orator.

At the age of eighteen, Jackson went into the law offices of Frank Mott. Although he spent a year at Albany Law School, where he completed the two-year course in half the required time and spent his afternoons listening to arguments in the New York Court of Appeals, he learned his law essentially by the apprentice method. This training served him well. "The community was not one of large industries in general. It was a small industry community and the accident case had not taken possession of the courts. There was contract litigation, fights over land lines involving surveying problems and conversion actions. I remember one of the earliest cases I sat in with Mott was a conversion action involving a team of horses. . . . There were will contests, there were contests over claims against deceased, actions for services, actions to recover for goods sold and delivered. Contract and land litigation was a much larger part of

the court work than it is today. There were also many criminal trials, and it was not true in that day that the criminal cases were all in the hands of a few so-called criminal lawyers. The best lawyer in the community was ready to try criminal cases. . . .

"In those days, before the automobile, lawyers would go to court, stay all day—sometimes go up for the week—and gather at the tavern in the evening with the judge. There was perhaps a big table where everybody would have supper—as we called it there—together. You were always very quickly taken into the fellowship as a young lawyer if they thought you had anything in you at all. It was a very hospitable profession. . . . There was no resistance to a young man coming in.

"You had a source of education in the lawyer's discussion of cases, somewhat like the inns of court. During these court terms the lawyers gathered and discussed cases and pointed out where somebody made a mistake, perhaps had asked too many questions on cross examination. They told stories, mostly legal stories. You absorbed a great deal by association with these experienced, older men. You came into contact with them in their actual work by trying minor cases in justice courts, because in that day nobody got too big to go to justice court. . . ."

As a Democrat in a Republican community, Jackson had ample opportunity to serve his party. His activities as a professional politician were short-lived, however. "I was elected to the Democratic State Committee as soon as I was twenty-one years old. . . . With the Democratic victory [1912] . . . it rather fell to me as local party officer . . . to work out the problem of patronage for our county." The patronage consisted largely of local postmasterships. Franklin D. Roosevelt, then Assistant Secretary of the Navy, was Jackson's contact with the Wilson Administration. "If Roosevelt had not been in the little Cabinet at the time, we would have had very rough going. . . . We had no access to anybody in Washington except through Roosevelt. I came to Washington in the years 1913 and 1914 with frequency. . . . As a result of this party squabble for offices I had some acquaintance in the early years with Roosevelt and also gained some political experience. The upshot of it was, however, that when the end of my term as state committeeman arrived, I said, 'Never again!' It was taking my attention away from my law practice. I was getting into fights over these little post office jobs which didn't have any importance to anything that I was interested in in a larger way. I said that I never would again hold a party position, and I never did. I retired entirely from organization politics. I did continue to go as a delegate to the state conventions and to make political speeches in every campaign, but I closed out with the organization side of politics which had filled my office with people who came there asking political favors and waging political fights. I never returned to it. I could see that if I was going to be a lawyer I didn't have time for the organization work. . . . It was too distracting. I wanted to be a lawyer."

Jackson's organizational efforts, such as they were, were concentrated on bar associations. He was elected president of the Jamestown Bar Association in 1924. He was instrumental in forming the association of local bar associations that became an important influence within the New York State bar. And he was a leader in the fight to democratize the American Bar Association.

Before going to Washington, Jackson held but one public office, that of acting corporation counsel for the city of Jamestown. He had refused out of hand Governor Roosevelt's proffered appointment to the Public Service Commission of New York. Jackson wanted to be a lawyer and he was. His practice flourished. But he refused to tie himself to a single client, although the opportunity frequently presented itself.

"In my office we had little specialization. My wish always was to keep my practice broad and diversified as to the kind of business and to depend upon many rather than a few clients. . . . I don't think that on an average any one client contributed five percent to my gross income. . . . When I came with the government my practice was netting me about $30,000 a year even during the depression and in some years it had been much more. No government position I ever held has paid as much as my private practice in the small city of Jamestown. It was there that I laid the foundation of financial independence which is an important asset in pubic office, relieving one of fear of loss of office and contributing a general sense of security."

Jamestown had been good to Jackson. He had his large house, a farm where he raised horses, and a thirty-foot cruiser named *The Alibi*. He had an exciting practice and opportunity for leisure, weekends belonged to the family. He could take vacations. He didn't take kindly to the importunities to leave all this for Washington. His was not the crusading public spirit. But he finally succumbed to a suggestion of a short tour of duty as general counsel to the Bureau of Internal Revenue. Washington, D.C. was very far, indeed, from Jamestown, N.Y.

Jackson was invited to Washington not to be given a job but to do a job. There were hundreds of lawyers with better political credentials than his clamoring for assignments. But the New Deal needed experienced professional talent.

"When I was appointed, one of the problems was to break the log jam in the department. There was a heavy docket of pending tax cases, and they were accumulating more rapidly than they were being decided. . . . Oliphant . . . wanted a fresh viewpoint and said I could get competent tax men to assist in the technical aspects of tax questions. They had all seen the problem of congestion in the Bureau, but they hadn't seen the answer. As a matter of fact, there weren't any ready-made answers."

If Herman Oliphant, general counsel to the Treasury Department, saw the Bureau as a litigation staff for the collection of taxes that were due, it is not equally clear that Henry Morgenthau had the same concept. Morgenthau

was an extraordinarily self-righteous and vain man. He was anxious that evil plutocrats be brought to heel, so long as it did not reflect adversely on him. Jackson had a different view of his office. "New Deal politics didn't really have much effect in the workings of the Bureau of Internal Revenue. I don't think you could say that the revenue bureau was, or ought to be, New Deal or Old Deal. Its work was technical. You either had a tax due or you didn't. The social policy of the tax law didn't concern our staff very much. In the main the office ran along well. By and large the members of the staff were loyal to their jobs, and it was their job to collect taxes if any were due."

The Bureau was, nevertheless, plunged into the political maelstrom from time to time, usually by orders from above. Jackson's major trial while he was in the Bureau was largely the result of political considerations. "Andrew Mellon had been subject to a great deal of Congressional attack. . . . Before I came to Washington it was announced by the Attorney General that four cases would be submitted to the grand jury and criminal indictments would be asked." All four putative defendants were regarded as enemies of the political administration. "It was customary to hold hearings or conferences in the department to give the taxpayer a chance to show that he was not guilty of fraud. No such hearing was held before the Mellon case was referred for prosecution. . . . The Mellon case was presented to the grand jury in Pittsburgh and it failed to indict by one vote. . . . Cummings was considerably humiliated of course by that failure and was under heavy fire as a result."

The Bureau prepared a civil case against Mellon for alleged tax deficiencies. "'One of the things that [Roosevelt] hoped I could accomplish—one of the things that I hoped I could accomplish—was at least to make a case from which the public would understand that the charges weren't wholly unfounded, that it was a legitimate tax claim and that the government ought to have pressed it. Whether it should have been prosecuted as a criminal suit was a different question. But at least there was substance to the charge that Mellon was a tax evader. If that could be established, it would save the administration's face."

"The first really important question in connection with the whole affair was whether we should charge fraud or whether we would simply charge that a tax was due. I prepared a memorandum in which I proposed that the Treasury should not charge fraud. . . . I felt that it was better to let Mellon take the burden of proof which would force them to bring out their evidence first to prove that the tax was wrong. It seemed to me that if we won a decision that a large tax was due from Andrew Mellon at the time he left the Treasury, in view of his relationship to the administration of the tax laws, that would vindicate the administration. . . .

"It came to the attention of the Attorney General that I had proposed no fraud penalty. He felt very strongly that that would reflect on the Department of Justice which had asked for an indictment on the ground of fraud. . . . Cummings and the Treasury had a conference or two about it, and I stood my guns.

. . . Morgenthau, Roswell Magill, and Cummings went to the President with the question. I was not asked to the conference and was not present." Roosevelt, in effect, said, "Go ahead with the fraud charges."

"When our charge was filed with the Board of Tax Appeals it became public and *The New York Times* published an editorial criticizing us for accusing Mr. Mellon of fraud. . . . Morgenthau got very excited about that. He called me to his office. . . . 'Why had we attacked the character of Mr. Mellon?'

"I said, 'If you know any way of charging a man with fraud without attacking his character, I'd like to have it pointed out. . . . We charged him with fraud. That was what you told me was the decision at your conference with the President. I have followed directions against my better judgment.'

"The case ended with no actual finding of fraud but with a substantial tax. I do not recall the amount, but it seems to me that it was between four and five hundred thousand dollars."

The case for Mellon was opened by Frank Hogan, his counsel, announcing "the gift to the nation by Mr. Mellon of an art gallery, and his valuable collection of art. . . . There was a lot of joking about the gift after it was made. President Roosevelt, in fun, threatened to send me to help dedicate the gallery. . . . Whether, if there had been no tax case, there would have been a gallery, I have no doubts.

"The program for revision of the tax structure of the United States, which was proposed in the message of the President of June 19, 1935, was the subject of study for more than six months. It was the most important matter, apart from the Mellon case, into which I was drawn after coming to the Treasury.

"One of the things that was particularly disturbing was that the great fortunes of the country were escaping . . . taxation. . . . Many of them invested in tax-exempt securities and therefore enjoyed large income free of tax. Many of them were able to step up their wealth through tax-exempt reorganizations. . . . Holding companies were organized to become the recipients of income because they didn't have to pay taxes on dividends received. . . .

"The President, like the rest of us was discontented with the system of taxation. He felt that it was unduly burdensome to lower incomes; that the hopes of the income tax as a measure of equalizing the burden had not been achieved. . . . I recall that he made the remark that he could easily solve the problem of unemployment in this country if he would turn to rearmament as Hitler and Mussolini were doing. . . . I said then that I hoped he didn't consider doing that because it would be a tragic way of solving the depression. He agreed." Would there have been a World War II if Britain and the United States had turned to such devices?

"The proposed tax measure was influenced in its thinking considerably by the Brandeis theory of 'bigness.' That is, the theory that whatever efficiency

might be achieved in an economic sense, it was bad social policy for vast industries to accumulate. . . . There was a deep conviction on this subject on the part of the men who worked on this new tax project. The President . . . gave it his hearty support.

"The fallacy of the argument that taxation should not be influenced by social considerations is that no tax that I have ever known could be laid without effect of some kind on the economic structure of the society. . . . The only departure that we made was in candidly acknowledging that fact and trying to adjust it to place the burden where it was socially most desirable. What we wanted to do was to place the burdens, as nearly as we could, where the benefits of our system of free enterprise were enjoyed.

"I've always regarded the tax project as one of the most constructive pieces of work that I had a hand in after coming to Washington."

The Bureau period was a testing period for Jackson and he quickly moved into the inner circle of the New Deal as a result. His last days at the Bureau were spent on leave to undertake supervision of the enforcement of the Public Utility Holding Company Act, a law he thought could have been made unnecessary by the passage of a tax on corporate dividends payable at each level of a holding company structure.

The Tax Division of the Department of Justice is the government agency concerned with the enforcement of the tax laws in the courts. It was a logical next step for Jackson in his move up the ladder of the Roosevelt Administration. And the Public Utility Holding Company Act case was an appropriate connective. For, "throughout" that litigation, undertaken by Jackson by specific directive from Roosevelt, "I had the assistance of Ben Cohen . . . and of Tommy Corcoran." There could hardly be better referees for admission to the inner sanctum of the New Deal. Incidentally, the litigation was brought to a most successful conclusion.

Jackson did not regard himself as a "New Dealer." "I was never strictly a New Dealer in the sense of belonging to the crowd of young college men that came to Washington and formed a sort of clique. I wasn't a member of the so-called brain trust. Neither was I one of the political groups, for I never had served in the political national committee, run for office, had a political following, or any of that sort of thing. I was pretty much outside of all those groups and yet friendly with many members of all of them. So I wasn't easily classified."

If he had to be classified, it would be as a lawyer. And his new job appealed to him on this ground. "The work of the division was clean law practice. There was very little policy involved. The only time that policy played any part was in considering compromise offers in criminal cases. In civil cases we had to determine whether a tax was collectable and determine how certain was the liability. But those were straight legal questions. . . . The appeals in the circuit courts of appeals were often argued by men from our office. The position of Assistant Attorney General often gave me access to Supreme Court

litigation. . . . I was glad, of course, to take up some Supreme Court appellate work and argued a considerable number of tax cases.

"Our recommendations that the government appeal to the court of appeals, or petition for *certiorari* to the Supreme Court, had to be approved by the Solicitor General, who had the final word as to those matters. However, very rarely would we have any difference of opinion with the Solicitor General about it. . . . The Solicitor General was Stanley F. Reed. My relations with him were very cordial on the personal side. I respected him professionally and in his motives, and I think he did me. He assigned me my choice of cases from my division and always gave me very good cases to argue. . . . It was a very happy working arrangement."

Jackson was active as a speech-maker in the 1936 presidential campaign. And his personal relations with the President grew closer. He now joined in the presidential fishing expeditions and poker games. Early in 1937, Jackson was moved to the antitrust division. "In the protocol of the Department, the antitrust [post] ranked as the highest of the assistant attorneys-general. . . . I was entirely happy in the tax division work but was, in fact, planning to get out of government and go back to private practice. The Attorney General, however, offered me this place and after consideration, I accepted it."

In his new job, Jackson faced a battle to resolve one of the fundamental splits within the New Deal, the division between the backers of a Tugwell-type controlled economy and the Brandeis crowd's atomism. The issue had been made more critical by the Supreme Court's opinion unanimously declaring the National Industrial Recovery Act (NRA) unconstitutional and by the economic "recession."

"When I was appointed to the antitrust division, I had a long discussion with Cummings about it. . . . Cummings favored a renewal of the antitrust philosophy. . . . I also had some conferences with the President before I took my new position. . . . I don't think there was much consideration at that time about the function which the antitrust division should play in the New Deal. . . . The President, however, was . . . torn between the Theodore Roosevelt theory of regulated business and the Wilsonian-Brandeis theory of free competition and retention of the smaller units.

"I thought it was essential, at that particular time, that the department become, and known to become, more aggressive in asserting the old antitrust philosophy. In [my] report to the Attorney General . . . I urged the laws be made more definite instead of 'theological tracts on corporate morality.' I wanted to get out of the antitrust laws this right and wrong concept, in the sense of comparing antitrust violations to a moral sin, and get them on the level of permissible or forbidden economic practices. . . . When we tried to choose a method or formula, there was a great difference of opinion. The result of which is that there never has been any significant constructive legislation on the subject."

Jackson conducted his attack on two levels. Within the department he instituted or reinstituted an active litigation program: Aluminum Company of America, ASCAP, the movie industry, automobile financing companies, oil companies, and others felt the lash of the new policy. The one effort that brought the greatest complaint was Jackson's prosecution of some labor unions for their inhibitory trade practices. "The antitrust division was not only concerned with business violation of the Sherman Act, but with an increasing tendency on the part of labor unions to come into conflict with the act. One of the difficulties with the labor activities was that as the power of the labor unions had grown very suddenly and very rapidly, the leadership took it as an unqualified license to get whatever they could out of the economy. They felt that the old restraints which had been imposed on them in times past were all off and the sky was the limit.

". . . in the administration generally there was great tolerance of anything a labor union did in those days. This had a good deal to do with rousing my feeling that labor was no more to be trusted than capital to conform its policies to good social practices, and that the early New Deal policy of giving labor an absolutely free hand just wouldn't work in this country."

The second level of attack was to take the case to the public in a series of speeches attacking big business for its bigness, with the hope that Roosevelt would come around and recommend the specific legislation that Jackson and his cohorts, who included Ickes, Corcoran, Cohen, Leon Henderson, and many others, thought to be necessary.

"From the earliest part of my work in the antitrust division I had strongly urged a revision of the antitrust laws. It seemed to me that having been led by the NRA in the direction of cooperation between businessmen, encouraging them to get together to make arrangements to solve their industrial problems, businessmen were entitled to more definite guidance than the antitrust law afforded in making the change from a managed economy to a free one. Furthermore, the antitrust laws had not been effective in many respects. This was due in part to court interpretations, which naturally applied hesitantly to concrete situations the statute's ambiguous generalities. I felt that a more definite list of prohibitions was in order."

It was along with Harold Ickes that Jackson took to the hustings. "For quite a time nobody paid very much attention to our efforts. It was a great surprise to us when, all of a sudden, it caught fire and burst into conflagration." Jackson quickly became the *bête noir* of the conservative press, which readily labelled him a "socialist."

"I didn't submit any of these speeches—and I believe Ickes did not—to the White House for clearance. We didn't know what the reaction would be to them and . . . we thought it was better that the President be in a position to say that they had not been read or cleared at the White House. We would take the responsibility for what was said and pay the penalty if necessary."

The campaign worked, more or less, but rather less than more. The President ultimately delivered a message to Congress that was largely written by Corcoran, Cohen, and Jackson. But it was equivocal.

"I should say that the President had been undecided about the monopoly problem and was brought to his decision to do something about it by his feeling that NRA was definitely out. He had a dislike of the unregulated concentration of productive wealth. There were two approaches. One was for government to supervise and regulate the concentration and behavior of such wealth, which was the NRA approach. The other was to prevent concentration and leave it free, which was the antitrust approach. Having been frustrated with the NRA he turned to the antitrust approach as the only open road. We had aroused considerable feeling that something ought to be done. That put some pressure on him—not that he was at all unwilling, but that helped to press for some form of action. The alternatives, which were the suggestions of Richberg and other NRA advocates, were gradually eliminated.

"The reaction in Congress, of course, was mixed. . . . It resulted ultimately not in an amendment of the law, but in the establishment of a rather mongrel organization known as the Temporary National Economic Committee. This committee called upon the various government departments to prepare reports. As to the experience with the monopoly problem, some very extensive and thoroughly fine monographs were prepared by various persons. Industry was given hearings and a vast amount of information was accumulated, but no tangible results came by way of legislation."

By this time, however, Jackson had stepped up one more rung on the ladder and had become Solicitor General of the United States.

The major event of the early days of Roosevelt's second administration was the attempt at reforming the Supreme Court. Jackson's role in the formulation of the Court-packing plan was non-existent. After the plan was announced he played a peripheral role in its attempted execution. He later sought to document the problem created by the Court's judgments and in so doing expressed the judicial philosophy that was to govern his behavior on the bench.

"Against the background of experience we were having with the courts, I made a speech to the New York State Bar Association on January 29, 1937, in which I reviewed the administration's difficulties with the Court. . . . I pointed out the difficulty of trying to meet the depression under the decisions that were being handed down. I made what was generally regarded as an attack on the Supreme Court and the philosophy of the legal profession in dealing with those matters. It was received with great hostility, as I expected it would be. However, my speech was thought by many people to be the opening gun of the fight against the judiciary which opened a few days later. As a matter of fact, it was not in anticipation of the President's plan. It was my own notion. It was not even cleared with the White House and was not connected in any way with the Court plan.

"My initial impressions of the plan were not particularly good. It didn't seem to deal with the problem that was on the minds of most of the people—the kind of decision that the Court had been making. It dealt with the number of decisions. . . . The manner in which the message was sent to Congress, the way the leaders were kept in the dark until it was sprung on them, proved to be very bad strategy. . . . I think in all candor that . . . the administration at the moment was very cocky. . . . There was too much feeling within the administration that it really didn't need to consult with anybody.

"Roosevelt thought the Court ought to cooperate with him in the emergency. . . . He would have carried the cooperative theory to the extent that he would have consultations between the President and the Court as to remedies for some of the evils of the depression. . . . Roosevelt didn't see as clearly the line of distinction between executive and judicial powers as some people did.

"Senator Henry Ashurst, chairman of the Judiciary Committee of the Senate . . . said that the committee proposed to call me as the second witness, to follow Attorney General Cummings. . . . I went to the White House and discussed my viewpoint with the President. I made clear to him that it did not . . . correspond with that of the Attorney General. . . . The President thought that . . . I should go and give the plan whatever support I could.

"I prepared a statement for the committee. . . . I made no attack on the integrity of the Court. . . . the problem of the Court was not the lack of integrity, but was its stubborn integrity in adhering to views which it honestly entertained. . . . After giving my testimony, I took no part in the struggle. . . . I had no place on the strategy board.

"There's always been a good deal of misunderstanding as to what the real difficulties with the Court were. I tried in my book, *The Struggle for Judicial Supremacy*, to outline the legal difficulties that the administration faced from decisions of the Court, and their consequences. . . . It was written with the approval and at the suggestion of President Roosevelt, because we had found that the earlier struggle between the executive and the Court was poorly recorded. We felt that a record should be assembled of our struggle with the actual cases and their consequences. That I attempted to do.

"The Court controversy is difficult to explain to laymen because they have a vague notion that the same words mean the same thing at all ages and times. The due process clause, for example, is in its essence, as it has been applied, an admonition to be reasonable in legislation. What is reasonable depends on the environment, the occasion. Take for instance, mortgage moratorium. In a normal period the effect of that would be to deprive the creditor of the right to sell the property on which he had taken a lien to secure a debt. Under normal circumstances where there are only a few foreclosures going on in any community there's a market for the property and it's fair that the creditor should have the right to expose the property for sale. He gets his debt satisfied and the surplus value which exists in the property is paid over to the debtor, or to subsequent

creditors. But the payment of the debt by a sale of property becomes an entirely different matter when half the houses on the street are for sale, or half the farms in the community are being sold by non-resident insurance companies and there are no buyers. Then you have a situation where the foreclosure wipes out any equity, inevitably results in a deficiency judgment and doesn't even get the money for the creditor. He just takes over the property. The device, as a legal device for the protection of the creditor and debtor depends on the existence of a normal market for real estate. When that fails, the remedy is no longer appropriate. That change in circumstances changes the reasonableness of the measure for a moratorium.

"The concept of due process of law as to maximum hours of labor is another example. An eight hour law, passed at a time when the normal working day was twelve hours, might be unreasonable, while an eight hour law, passed when the normal working day was eight hours, might not be unreasonable.

"Or, take the subject of interstate commerce. What was a purely local endeavor a hundred years ago has ceased to be local and depends on communications and transportation over state lines to an extent that was undreamed of years ago.

"The difficulty was that this group of judges . . . were applying the standards of their youth to the legislation of an entirely different period. They thought they were applying the Constitution, but they were really misapplying it, in our view, because what is reasonable also has to depend on the environment and the circumstances. They were not open to conviction on the facts. They were not open to conviction that conditions had changed. They were striking down a good deal of legislation on the basis of what conditions were when they were brought up on the frontier.

"There was a deep feeling in some minorities that the Court was the only protection they had against arbitrary majorities. Property holders felt that it was the only protection against the propertyless class. Negroes felt that it was their only real protection against the white tyranny. Catholics felt that the Court had protected the parochial schools. Minorities felt a certain security in the Court that they didn't think would exist if the Court were too much under the control of the executive or legislative branches. So when it came to a real test of the sentiment of the country, the country was much stronger for the Court than I think the administration realized at the time this bill was proposed.

"There's a fundamental conflict between the democratic theory of government and the theory of judicial review. Judicial review is not a democratic process. Nine lifetime appointees, representing usually prior administrations, review the current legislation. The Court isn't a democratic institution. It's the least democratic of any of our branches of government.

"On the other hand, if there were no restraint whatever, in waves of hysteria the majority would override everything. For instance, I suppose that men would be sent to jail for not convicting themselves, for not confessing crimes

before Congressional committees, if we didn't constantly reiterate that the Bill of Rights says that no man shall be required to be a witness against himself. I don't know how far search and seizure would be carried if there wasn't a Court which can limit it. Freedom of speech, freedom of press are all protected. While the Court doesn't go as far in protecting some of these things as extremists would have us go, there is a certain amount of security for liberties in the existence of the Court. Probably if it went as far as the extremists would have it go, it would discredit itself and could not be as effective as when fairly conservative. When we go too far, we create a reaction. I think the sentiment of regarding the Court as a guardian is justified within moderate limits. . . .

"One of the difficulties of perpetuating the government we have is that people don't understand what a federal system is. I think we will drift in the course of years to a unitary system of government, in fact, because people simply do not understand the theory, nor practice of a federal system. It's too complicated. Something needs to be done. Therefore let Washington do it. Washington's more efficient than the state House. That's about all the argument it takes. The importance to liberty of the localization of certain powers is completely lost sight of, although our forefathers regarded the reservation of power to the states as one of the essentials of liberty and a part of the Bill of Rights."

These views expressed in detail in his book, were written by Jackson, with extensive assistance from Paul Freund, after Jackson had become Solicitor General.

Jackson, by now, had become a public figure, closely associated in the press with what was regarded as the "left wing" of the New Deal. Roosevelt was consulting him more often. And he had been admitted to the "crony" category as among the fishing and poker-playing companions. Nevertheless, he approached Roosevelt late in 1937 with his plan to resign from the department to return to private practice in upstate New York. "That talk took place at his bedside in the morning. He said, 'Well, now, I can see your position about this, but, Bob, you can't leave now. You're in this thing. You can't quit. I want to talk with you about the New York situation. I think that you are the logical man to run for governor of New York. I don't think Lehman is going to stand for another term.' He was then annoyed at Herbert Lehman because Lehman had come out against the Court plan at a time when it was particularly harmful to the President.

"We had quite a long talk about the governorship. He said, 'If you can be elected governor in '38, you would be in an excellent position for the Presidency in 1940. I don't intend to run. Every once in a while somebody suggests that I'm going to run, but I want to get back to Hyde Park.' He went on to tell me of his plans for Hyde Park and how he wanted to lead his life up there as a sort of elder statesman.

"I said, 'Well, Mr. President, if we're thinking about doing something of this kind, shouldn't I talk with Jim Farley about it?'

" 'No,' he said, 'you don't need to talk to Jim. I think Jim and I have a very thorough understanding on the subject.'

"The President talked with various other people about it. By and by it became rumored that he was backing me for the place. The result was that some of the people in New York who wanted to be sure they were on the right side of things also started doing things about it.

"Then the legend grew very fast that the President was backing me for governor; that I was the candidate of the extreme left New Deal; and that this would put Farley out of the picture. Unfortunately, the thing was brought forward as an anti-Farley movement. . . . When it was brought forward as an anti-Farley move, it was a matter of self-defense for him to stop it.

"The President resumed the discussion with me on a fishing trip. The fact that he took me on a trip with him at that particular time was taken as notice that he might be favoring me.

"As the move began to shape up, there were several factors that counted. One was that Farley announced his opposition to it. The other was that the organization politicians who did not make any announcement were quietly against my nomination. . . . Lehman didn't like the prospect of my coming into the picture because he had a feeling that my speeches had been over-radical. . . . David Dubinsky . . . passed the word around in labor circles that he hadn't been successful in what he wanted from me. . . . Tobin [of the Teamsters] was angry about the anti-racketeering case and some of the longshoremen who were in the longshoreman racket that we broke up. . . . Labor as a group did not turn me down." Hillman was prepared to support Jackson. "Great pressure was put upon Lehman to run again. . . . He finally announced that he would run and that settled the matter. If he was to run, nobody was going to buck him.

"So the matter never came to an issue. If it had, I don't know just what would have happened. However, I'm infinitely more happy that it turned out just as it did, because it would have been a dead-end street with the situation as it developed in 1940 and 1944."

That was the last time the bug seems to have bitten Jackson. Although his name was one of the many that were suggested from time to time as a vice-presidential candidate for Roosevelt's third and fourth terms, Jackson took no steps to advance himself in this regard.

"The Solicitor Generalship has always appealed to me as the highest prize that could come to a lawyer. . . . I first learned from Tom Corcoran about [my] appointment. There were competitors for the job. But I had argued a number of cases in the Supreme Court as Assistant Attorney General . . . Justice Brandeis had sent a very favorable comment on my work to the President. . . . That was pretty nearly enough to clinch the matter. . . .

"The inquest into my socialistic, communistic, or subversive leaning which preceded my confirmation as Solicitor General, and the collapse of it, served, to

some extent to deaden the feeling that the antitrust program was the work of subversives. Those hearings were a good thing for me.

"Coming back to the practice of law, which I did in the Solicitor General's office, was like coming home after being out in a bad storm. I was delighted with the work. I cut off other types of things as fast as I could and settled down to the legal work of the Department of Justice in the Supreme Court and other appellate courts. I entered upon the most enjoyable period of my whole official life."

Jackson's behavior as Solicitor General is best revealed by his concept of that office. "The Solicitor General has a great deal to do with shaping the position that the government will take on many legal issues. [He] has power to approve or disapprove all government appeals in the lower courts. . . . He will exercise his oversight so that cases do not come up through the courts on an inadequate record, or which present a question in such a manner that it is made difficult to sustain.

"The work of determining what cases will be authorized for appeal to the courts of appeals is very important for the fruit that it will usually bear a year or two later in questions before the Supreme Court. His choice of cases also is important in guiding the administrative departments, because if the Solicitor General decided to acquiesce in a court decision which places a restrictive interpretation on their statute, they are balked by it. Therefore, his internal influence with the administration is very great. . . .

"The relations of the Solicitor General to the Supreme Court are close. He is the chief representative of the government and no case can be brought there by agencies of the government without his approval. He is responsible for the quality and type of briefs that will be filed. He not only determines the cases that will be taken there but determines the strategy of these cases when in court. Since about forty percent of the total litigation of the Supreme Court is government litigation, this makes him the most important functionary in the Court's work. He naturally comes to have friendly relations with the Justices. . . .

"The Solicitor General may, and is expected to, choose for his own personal presentation the most important issues. Sometimes that means the most difficult ones. A Solicitor General who merely wants to make a record of winning, might be tempted to select rather easy and obvious cases and delegate to someone else the argument of the difficult issues. It is the difficult issues, of course, which appeal to the real advocate.

"The Solicitor Generalship is not a place for the assertion of one's own individual eccentricities. In our system, legislation passed by the Congress must be presumed to represent the national will. It is the duty of the Solicitor General, whatever he may think of the wisdom or even the constitutionality of particular legislation, to represent the government in presenting every legitimate argument and consideration which goes to support that national will. . . .

"The Court expects a great degree of candor from the Solicitor General. He is expected to take his responsibility as a quasi-judicial officer seriously, speak

candidly, and not mislead the Court. I think a man does not prejudice his case with the Court by such candor. In fact, he probably promotes his own standing and thereby strengthens his position in cases to which he is willing to give his unqualified endorsement to the government's position.

"As long as I was Solicitor General, I was dealing with a Court on which most of the members were of the old Court and I needed them to make up a majority. . . ."

If Jackson did become thoroughly immersed in his role as barrister for the United States, Roosevelt had no intention of relieving him of his function as counsel to the President. Thus, for example, it was Jackson who was called on to advise on the legal problems of the sale of helium to Germany and to resolve the legal tangle that had prevented the building of an airport for Washington, D.C. And it was he, rather than Attorney General Murphy, who was summoned from out of town at the outbreak of the war in Europe to help frame the Neutrality Proclamation and the executive order declaring a partial state of emergency. Especially the last required a good deal of time and effort.

During Jackson's term as Solicitor General, Cummings retired as Attorney General and Roosevelt sent for Jackson. "We were upstairs in his study. The President said, 'Bob, I've got to fill the place of Attorney General. I've told you before that I want you in the Cabinet. Here's the vacancy. But here's my problem. Frank Murphy has been beaten for governor of Michigan. Frank hasn't got one nickel to rub against another. He's got to have a job . . . I can't offer him anything less than a Cabinet position. . . . I don't think Frank ought to be Attorney General. It isn't his forte, but temporarily I don't know of anything to do but to appoint him and take care of him.'

"I said, 'Mr. President, I know Murphy somewhat, not well, but I like him from what I know of him. I would be perfectly happy to stay on as Solicitor General. . . . I would be perfectly satisfied if you want to make Murphy Attorney General.'

"He said, 'That isn't what I want. That isn't what he wants. . . . He wants to be Secretary of War, and I think he would do all right as Secretary of War. . . . But I've got Harry Woodring on my hands. . . . What I want is to have the understanding that he will go to the War Department within six months, within which time I'll get rid of Woodring. . . .'

"I said, 'Well, Mr. President, I know how uncertain these things are. You may never be able to do it, but the Solicitor Generalship is delightful to me. I enjoy that work and I'm content to remain there.'

"We had further discussion then on the subject of the Supreme Court. There was a vacancy. Benjamin Cardozo had died. . . . He asked me if I had any interest in going on the Court. He answered the question before I had a chance to. He said, 'You shouldn't go on the Court at this stage. You should come up through the Cabinet. That's the place for you.' I then discussed the vacancy with him and strongly urged the appointment of Felix Frankfurter. I

made all the arguments I could. . . . I said, 'You give me Frankfurter and leave me as Solicitor General and we'll get along all right.'

"In the speculation as to a successor to Brandeis, who retired [shortly after the Frankfurter appointment to Cardozo's seat], my name played some part. . . . In connection with the Brandeis vacancy, [the President] asked if I was interested in it, if I had changed my mind about the Court. He was obviously under some embarrassment because the Murphy change had not worked out and showed no signs of doing so. I doubt if he would have turned me down if I had said yes, I wanted to go on the Court, because he felt his embarrassment. At the same time, however, he said he wanted me in his Cabinet and thought that the best place for me at my age.

"However, Brandeis, so Tommy Corcoran and Felix Frankfurter told me, had told the President that I ought to be named Solicitor General for life. Brandeis was always complimentary of my work at the bar. I knew that the President had in mind making me a member of the Cabinet. I didn't feel that I was old enough to retire to the work of the Court.

"As the fall of 1939 wore on, the President more and more called me on matters relating to the department. Then suddenly came the death of Pierce Butler . . . a Catholic. . . . Murphy was a Catholic. As Attorney General it was not illogical that he should be promoted.

"The President told me that he intended to appoint Mr. Murphy to the Court and me Attorney General. I said, 'Mr. President, I don't think that Mr. Murphy's temperament is that of a judge.'

"The President said, 'Well, probably not, but there are a number over there who can keep him straight. It is the only way I can appoint you Attorney General. I can't remove Woodring at this moment. If I could, I wouldn't dare appoint Murphy Secretary of War. So it's the opportunity to put this department in your hands, where I want it.' "

Jackson thus arrived at the long-promised Cabinet level. "The President's cabinet is thought of by those who never attended its meetings as a deliberating assembly where matters of high policy are brought out on the table, different viewpoints presented, and decisions made. It was not such in the days of Roosevelt. . . . The discussion tended to be in the nature of reports from members of the staff.

"The Cabinet has usefulness, but not in the function that is commonly attributed to it by the press and public who think that some great decisions are made at Cabinet meetings. Important decisions were rarely made at Cabinet meetings, beyond ratifying informally something the President had already decided.

"The serious matters between the President and departments were usually taken up privately. For my own part, I had lunch with him frequently, and during the lunch hour we discussed his problems and mine. Oftentimes also I went over at the close of his day, and also I went frequently to his bedroom in the morning

while he had breakfast. He did business at all hours of the day and night. You might say that Roosevelt was never closed for business."

The change in position accentuated rather than diminished Jackson's ties with the President. He had surrendered the role of barrister. His new task was different. "I think the Attorney General has a dual position. He is the lawyer for the President. He is also, in a sense, laying down the law for the government as a judge might. I don't think he is quite as free to advocate an untenable position because it happens to be his client's position as he would if he were in private practice. He has a responsibility to others than the President. He is the legal officer of the United States."

He was also more of a political aide in his new position. Jackson was one of the first to float the third-term balloon. He was one of the chief assistants at the 1940 convention, nominally in charge of the platform but actually as a general adviser to the chief. But he played little part in the campaign itself. By then his time was essentially taken up with the burdens that the European war had imposed on the Department of Justice and with advice to the President on problems growing out of the same crisis.

In the drawn-out development of the destroyer exchange for bases with Great Britain, Jackson was the counselor on the very knotty legal issues. "On the 13th of August [1940], Stimson recites that he, with Knox, Sumner Welles, and Henry Morgenthau, met with the President and formulated a proposed agreement. . . . Sometime before that the President had discussed with me the legal situation as to whether he had authority to make a disposition of these destroyers without further authorization from Congress. On the 15th of August, I had advised him that we . . . definitely believed that we did have authority to act without the consent of Congress. . . .

"I had given an . . . opinion . . . that the President was not authorized to dispose of those mosquito boats which were under construction; that they were not comprehended within the authority that Congress had given to him to dispose of obsolete materials. Also that private shipbuilders would violate the laws of the United States if they completed these boats for Britain. The decommissioned destroyers that had served in the First World War stood on quite a different basis." The distinction between the two categories was not always understood.

"Meanwhile, the President had asked me to prepare a formal opinion as to his powers to consummate the transactions without the submission to Congress and without obtaining additional legislation. . . . As I left the White House, after we had talked about the opinion and the changes in it, the President said, 'I think I will send your opinion to Congress with a message, simply saying that I have completed the transaction through an exchange of letters. If I send your opinion along, they will get into an awful row over the opinion, and probably will forget all about the transaction itself. That's rather rough on you, but after

all you're not running for office.' . . . The prophecy proved entirely accurate, if perhaps a little understated."

Jackson treated his President as a client, which required that he be given honest advice. The President was better than many clients, he took the advice. "He was strongly for upholding his authority, wherever he thought he had it. But he was . . . one of the easiest to advise on ordinary matters. If he was told that the statute did not permit something, I never had difficulty with him. Even if he did not agree, he would accept your view. It was your business to have a view. If he thought you were loyal in your opposition, he listened to you. If he felt that someone was being disloyal, then he was quite unforgiving. If he asked your opinion about a subject, I think it was because he wanted your opinion. I never had the feeling that I had to shape my opinions to what he wanted."

Jackson was the last of the Democratic Attorneys General who served this function of personal adviser to the President. "I was down at General Watson's place in Charlottesville for a week-end with the President and he told me that he was contemplating bringing into the White House a White House counsel. . . . In response to his inquiry of what I thought of it, I said that if I was Attorney General I wouldn't think much of it. After all, the Attorney General, as a matter of law, was his adviser, head of the department, and in contact with the courts. A White House counsel between the President and the Attorney General was a bad thing likely to lead to conflict and I wouldn't want it if I were Attorney General.

"He went on to say that he was thinking of bringing Sam Rosenman right in the White House to advise him on questions of law and be his legal adviser. I said to him that of course I thought he couldn't have a better man than Sam Rosenman, particularly in view of their personal relations, but I thought that would be very much a slap at the Attorney General. If I were Attorney General, I would say, 'Well, now here, you just appoint Mr. Rosenman Attorney General and let him take over.' He chuckled and said, 'Francis [Biddle] will not say that.'

"There was this, however, to be said. So busy are those department heads with trivial matters that they just do not get time to give to problems the thought that ought to be given. [But] I don't know whether a man like Rosenman in the White House got any more time."

Jackson was never attracted to administration and the European war had placed additional administrative burdens on the department, problems of treatment of aliens, confiscation of ships, espionage, conscientious objectors, sabotage, and the like. Jackson managed to stay in hot water with both sides of the ideological war being waged. He took it philosophically, for, as he wrote to Solicitor General Biddle: "We must make up our minds in these times that the world is divided into two unreasonable camps. Each will blame us for everything it does not like, and will promptly forget everything we do for it. It is probably good for us, because it keeps us humble."

The Attorney General's office never brought the satisfaction to Jackson that he had felt in the Solicitor's post. When talking with Roosevelt about Jackson's proposed appointment to the Supreme Court, "I said that I thought I would enjoy purely legal work more, that I really hadn't enjoyed it as much as I had the Solicitor Generalship, except for one thing, 'that I work much more closely with you than I did as Solicitor General.' I could say with great sincerity that in all of our work it had been a great privilege to work with him. That part of it I would relinquish with great regret. But the administrative problems were things I didn't like.

"Shortly after the Hughes resignation, the President called me into his office after Cabinet meeting and said that he wanted to talk with me. He said in substance this: 'You know I have two appointments on the Supreme Court. [Byrnes'] friends have been very urgent that he have one of them. I think I will do that. I've always felt, and we've had some talk, that I'd like to see you Chief Justice. If I thought that now was the time, I would appoint you Chief Justice. But I have doubts about whether now is the time that you should be Chief Justice.' He came to a pause.

"I said, 'So far I'm in agreement with you.'

"He said, 'I've had a talk . . . with Chief Justice Hughes about the matter. He tells me that experience as an Associate Justice is invaluable to a man who takes on the task of being Chief Justice. He's very strongly of the opinion that what I ought to do is to promote someone from within the Court, someone who knows the detail of the job. He has told me that if I was going to appoint from within the Court, the man I should appoint . . . is Stone. Hughes also told me if I was going to appoint a Chief Justice from off the Court, you were the best qualified man in sight.'

"I said very frankly, 'Mr. President, if you feel disposed to appoint Stone, which I think is probably better for the Court and the country than to appoint me, that's perfectly satisfactory. If you were going to appoint a New Dealer to [be Chief]—anyone other than Stone—then I think my claims would be entitled to consideration.'

"He said, 'So do I. I think they'd be unanswerable.' . . .

"I said, 'In any event, Mr. President, Associate Justice of the Supreme Court is a long way from the farm in Spring Creek. It's all that I'm entitled to.'

"He said, 'The only reason I hesitate is that I hate to have you leave the Cabinet. I hate to have you go. . . .'

"Byrnes was immediately confirmed and so was Stone. Objections were immediately made by Senator Millard Tydings to my name, which held up the confirmation. . . .

"Tydings' opposition was purely personal. . . . He started off with some statement to the effect that I was not morally, intellectually, or politically fit for office. If he had stopped at that, he might have had a lot of support. But he went on to give his reason, and his reason was that I would not proceed with this

criminal libel case against Pearson and Allen" who had suggested that Tydings had used his office for personal gain. "Tydings [cast] the only vote against my confirmation."

"I think my conversation with the President about the Court was conveyed to Stone because Stone said to me when he arrived at seventy, which was in only a couple of years, that . . . he was thinking of retiring. I said, 'I don't think you ought to retire. . . .'

"I was enjoying my work as Associate Justice, but I could see that if I were promoted to Chief Justice over New Dealers who'd been on the Court longer, there was going to be the bitterest feeling. In fact, rumor had gone around that there was some commitment to me. It made my work very difficult, because others had a very strong feeling that they, as seniors on the Court, were entitled to consideration ahead of me. . . . It seemed to me that the retirement of Stone would precipitate an unpleasant situation for me. . . . But he had said enough to the President, apparently, and said enough to me, so that he had some question as to whether he wasn't expected to retire."

Jackson's judicial career is explained in large measure by his attitude toward the judicial function. "Something does happen to a man when he puts on a judicial robe, and I think it ought to. The change is very great and requires psychological change within a man to get into an attitude of deciding other people's controversies, instead of waging them. It really calls for quite a changed attitude. Some never make it—and I am not sure I have.

"My viewpoint of a judge's work on the Supreme Court is the viewpoint which I learned when I practiced law in upstate New York. The kind of judge we admired was a man that didn't let the personalities on either side interfere with his deciding the case on the facts and the law. To my view, a judge who would decide a case consciously for the administration, for example, just because it was the administration, ought to be impeached. . . . Neither do I think it means that because I thought labor wasn't getting a fair deal under the old decisions that all decisions should now be in favor of labor, nor that all decisions should be conditioned by who's on the so-called liberal side. The interpretation of the law ought to be as impersonal as possible. . . .

"There ought to be a certain adherence to precedent, as Cardozo has said. By and large the way a question was decided yesterday ought to be the way in which it is decided today, even though the personalities have changed sides. . . .

"The Court functions in a way that is pleasing to an individualist. Each Justice has his own office and his own staff. It's a completely independent unit. . . . He comes to conference with his opinions, not staff opinions—that shouldn't be, at least. He's assigned his cases. He's free to write an opinion in any case he wants to, whether he writes concurring or dissenting. Nobody can stop him from expressing his view. Perhaps we carry that too far these days, but at any rate it's better than to have a suppressed court. . . .

"It's more fun to write a dissenting opinion or a concurring opinion than to

write a majority opinion, because you can just go off and express your own view without regard to anybody else. When you're writing for the Court, you try to bring your view within the limits of the views of all those who are supporting you. That oftentimes requires that you temper down your opinion to suit someone who isn't quite as convinced as you are, or who has somewhat different grounds. That oftentimes presents great difficulty. . . .

"The questions that come before the Court are interesting. If you like the philosophy of the law, they're fascinating. The great dissatisfaction that I have is that I have to let go of so many opinions before I've fully satisfied myself on every detail. I might never satisfy myself. I don't know. I just can't give the amount of time to many of the cases that I'd like to give to them before they have to come down. Most of the questions are fascinating, baffling, and deserve much more attention than they get.

"The other thing that's disappointing is the short time that's available for conference. . . . Anything like a thorough discussion, a thorough consideration of those cases, in conference is impossible. That I think is one of the reasons there's so much disagreement in the Court. If those cases could be more thoroughly considered in conference, it would eliminate some of the disagreements, and would result in better opinions. . . ."

Jackson became unhappy in his work essentially for two reasons. First, the Court seemed irrelevant to the struggle for freedom. "It was a very depressing time to be on the Court. I've never forgotten that the Monday after Pearl Harbor we heard argued two cases involving the question whether country club members were taxable on their greens fees at golf courses. I sputtered much about hearing such a damned petty question all day when the world was in flames. . . . Stone assigned the case to me to write. I always accused him of doing it just to teach me patience. It was unbearable to sit there and hear these arguments."

The second source of dissatisfaction was the conflict within the Court. In its best light it assumed an ideological basis. "As time went on the Court work settled down a good deal to routine cases which had very little importance, or to cases in which there was something of a struggle between the ideas of Chief Justice Stone, as a liberal of one school, and Mr. Justice Black, as a liberal of an entirely different school. Chief Justice Stone was a good deal of a liberal in the Holmes tradition. That is to say, he didn't agree with a good many of the legislative experiments that were going on, but he thought that the people would only learn that they wouldn't work by trying them and that they had a right to experiment. Mr. Justice Black had a different view, as his opinions will indicate. He was strongly in favor of some of the social reforms and would interpret the Constitution and text of acts to further the ends that he had in view. That is the school of thought that has been characterized as 'judicial activism.'

"I had been through the battle with President Roosevelt to confine the

Court to a strictly legal function and to restrain what we thought was the activism of a crowd who were opposed to reform in an economic and social field. In general I agreed with Chief Justice Stone that activism was no more appropriate on the part of the judiciary in favor of reforms than it was in knocking them down. The initiative should remain with the legislative branch."

Perhaps the major ideological difference between Jackson and some of his colleagues, certainly the difference between Jackson and most of his successors, inheres in Jackson's notion of a viable federalism.

"Albert V. Dicey said long ago that federalism in America had become merely a facade for a unitary form of government. That's becoming increasingly true. I . . . have been highly desirous of preserving the federalist form and keeping vitality in it. Perhaps I'm more inclined to do that since the Second World War than I was before. Because of the post-mortem examination of the Hitler regime, which took place at Nuremberg, it became apparent that until Hitler had broken down the powers of the separate German states and established a completely centralized police administration, he wasn't able to bring about the dictatorship. I think that the philosophy of the Tenth Amendment reserving the undelegated powers to the people or the states ought to be regarded as an essential part of our Bill of Rights, in the sense that our rights are secured and made safe not merely by the separation of powers in the federal government, but by a division of powers between state and federal government.

"The decided drift is in favor of a strengthened federal government. I think we should draw a line between the necessity for central regulation of commerce, in the sense of finance and trade, and the necessity for diffused control of such things as affect civil liberties. Because while the federal government occasionally may make a great advance in the direction of civil liberties that the state governments would not make—at least in some states—for many years to come, they can also make a very disastrous reversal and do more harm to civil liberties in one administration than a state government could do in a generation. . . . I think the potentialities of a federal, centralized police system for ultimate subversion of our system of free government is very great.

"I regard [the Nuremberg trials] as infinitely more important than my work on the Supreme Court." This was Jackson's judgment on his own career, rendered not long before his death. It is clear that, whatever place history affords these trials, much of the credit or the blame must certainly be Jackson's. For he was the architect of the trials, however much help he had in bringing the plans to fruition.

This is not to say that the concept underlying the trials was Jackson's. "The origin of the plan was in Secretary Stimson's office and probably was Secretary Stimson himself. He had taken a very strong position that the war was an illegal war, that a state engaged in war of aggression was an outlaw state, and that the individuals that precipitated a war were guilty of a crime against international society." But there is a long way to travel between the

notion of a trial of "war criminals" and creating a basis on which such trials can in fact be carried out.

It was on April 26, 1945 that Samuel Rosenman approached Jackson with Truman's request that he undertake the assignment. "I accepted this task because [it afforded] relief from the sense of frustration at being in a back eddy with important things going on in the world. . . . Then the work would be [that] of implementing the peace of the world, [providing a means for imposing] certain legal penalties against making wars of aggression, thus advancing the frontiers of the law into an area that had been lawless. That was a challenge. Another thing was that I had always loved advocacy and trial work, and this was about the most important trial that could be imagined. To represent the government in an international trial, the first of its kind in history, was a challenge that no man who loved advocacy would pass up willingly. I suppose that I could say that I had a sense of duty to respond to the President's request, but . . . that was secondary.

"If internal matters at the Court had been pleasant and agreeable, and if I had not already considered leaving the Court, I probably would not have undertaken it. All things considered, I didn't know but what it might prove to be a good exit from the Court, and I wasn't at all sure that . . . I would ever return to the Court."

In a sense, however, Jackson was misled into accepting the assignment. For it was represented as a short-term venture, because of the erroneous beliefs that essential agreement among the four allied powers already existed and that the preparations for trial had been all but completed. When Truman and Jackson first discussed the trials, they both expected that Jackson could be back on the bench by the opening of the next term of the Supreme Court, the following October. The facts turned out to be that Jackson's first major obligation was to go to London to negotiate the agreement on which the trials were based. His second was to marshal the evidence. His third, and perhaps least important, was the presentation of the evidence to the tribunal. But it was only the last, the advocate's job, that was originally tendered. "The proposition of President Truman was this. He wanted me to become the head of American counsel in presenting the evidence and personally to conduct the case."

Jackson was sympathetic to the presidential proposal for two other reasons. "The trial of these persons for alleged precipitation of the war would also be entirely in keeping with the philosophy of lend-lease, . . . with the destroyer exchange, and the aid to Britain." Here then was a chance to justify his actions as legal adviser to Roosevelt in these matters. Moreover, less than two weeks before he was approached by Rosenman, he had addressed himself to the problem in a speech to the American Society of International Law. "There was a good deal of sentiment for a phony trial of the Nazi leaders. . . . I didn't think that the question as to a political decision [to] punish them was necessarily for me to discuss. If they were punished as a frank act of war or

act of state, that would not reflect on the integrity of the judicial process. But the suggestion that there be a phony trial without the essence of fairness did disturb me."

Jackson took to London with him a position that was pretty well fixed. His mission essentially was to sell the American notions to the allies, each of whom was somewhat more bloodthirsty than the Americans in this regard. "The plan of the United States was that a military court . . . be set up and that it proceed to try in two phases the question of war guilt. The first phase would be to establish the existence of a general conspiracy to which the Nazi party, the Gestapo, and other organizations were parties. The object of the conspiracy was to obtain by illegal means, by violation of treaties, and by wholesale brutality, control of Europe and the world. When this plan should be proved, the second phase would be entered upon which would consist of the identification of individuals who were parties to the general conspiracy.

"Where this plan would depart from ordinary common-law trials would be that the individual would not be permitted to try on his own behalf the general issue of the guilt of the organizations, but would be limited to showing the facts relating to his participation in the plan, or that his participation was not with knowledge, or was not voluntary. The finding of the illegality of the organizations would be conclusive against the individual members."

Although, to begin with, "the officials of Great Britain wanted to dispose of the six or seven Nazis without a trial," and were quite concerned lest "an open trial . . . provide a sounding board for Nazi propaganda," by the time of the London meeting, the British were strong and willing adherents to the American scheme. The French were a bit more reticent, largely as one French representative put it, because the "Americans want to prove that a war of aggression is illegal. We just want to prove that the Nazis were bandits." The essential conflict came with the Russians, who had an entirely different notion of the role of political trials.

"The Soviet delegation early indicated a belief that the court was merely to appraise the differences in degrees of guilt between various individuals and fix their penalties, but that the findings of guilt against all and sundry had already been made by Churchill, Roosevelt, and Stalin in their statements accusing the Germans. Of course, that was contrary to the idea of all the rest of us. . . . The Soviets eventually accepted, at least on the surface, our view of it."

The second major Soviet-American issue involved the problem of aggression. "It was their persistent position that we were only to declare the Nazi aggressions illegal, while it was our own position that were declaring any aggression illegal." The Russians conceded on this point, too, but the conference was never successful in agreeing upon a definition of "aggressive war," a problem that remains unsolved to this day despite continued efforts by the United Nations. On issues of reconciling constitutional and Anglo-American criminal

procedure, the London conference evolved a scheme which, in effect, added some of the civil law and Russian protections for the defendants to those that inhered in the common law. Jackson returned from London with an agreed basis for the trials much in keeping with the American intentions from the start.

Nuremberg was chosen as the site, not for its ideological significance, as many suspected, but because it was the best site available in the American zone of Germany. The best was none too good. "It appeared to all of them that the courthouse could be made adaptable, that billeting could be had, that while the town was in terrible shape, there being no telephone communications, the streets full of rubble, with some twenty thousand dead bodies reported to be still in it and the smell of death hovering over it, no public transportation of any kind, no shops, no commerce, no lights, the water system in bad shape—despite all these things—it seemed a place that the army could make habitable for our purposes." The trial was to take place under the most difficult of circumstances, for essentially it was a military trial and the problems created by military organization all descended on the trial staff, civilian as well as military.

Jackson turned to the preparation of the case for trial. "We came early to the unhappy conclusion . . . that we were going to have . . . to build our own case from the ground up. . . . [D]espite the large talk there had been little done to dig out the evidence. The task was a much more difficult one that I had anticipated. . . ." Jackson's primary conflict on trial strategy came within his staff. The Nazis had conveniently provided enormous documentation of their enormous villanies. Jackson became "convinced that the case should be a documentary one, that we should put on no witness that we could reasonably avoid, and that we should prove everything we could by documentation. . . . We could have made a more sensational trial by use of witnesses." Jackson was interested in conclusive proof rather than newspaper headlines. It did make for a dull proceeding, except when the films of the concentration camps were shown. These were devastating in their effect.

The high points of Jackson's participation at the trial itself came in his opening statement and his closing argument. Some have looked askance at his cross-examination of Goering, but it must be said that the court imposed strange hardship in this regard by refusing to restrict the answers to the questions that were put. And an examination of Goering's testimony in response to the examination reveals that Goering provided enough evidence to hang himself which, after all, is one test of good cross-examination.

The trials were brought to a successful conclusion, a year after the date first anticipated. It had been a grueling year, physically and emotionally. The price, in personal terms, was high. The return, in personal terms, was only the satisfaction afforded by a job well done. Virtue was its own reward. That Jackson thought the game worth the candle, however, cannot be doubted. The accomplishments were great. "In the first place, the agreement negotiated at London for the first time made explicit and unambiguous provisions that

to prepare, incite, or wage a war of aggression was a crime against international society. The agreement won the adherence of nineteen additional nations and constitutes a basic act with which international law must always deal. . . . We proved a workable procedure for the trial of crimes could be adopted that would reconcile the conflicts between Anglo-American, French, and Soviet procedure. . . . [W]e documented, beyond any question, the causes of the war and the method by which the Nazis rose to power. These documents are available. Their authority . . . can't be questioned now because the men who were most interested of all living men to question their authenticity had a chance to impeach them. Instead of questioning them, they verified them." Jackson lived in no fool's paradise, however. "Of course, there is nothing to prevent the misuse of the Nuremberg precedent." But there was a lesson to be learned from them. "It may be that the lesson is not being learned, but it's there." Jackson had made his contribution to the future peace of the world. He knew that it might not be enough, but it was all he had.

Before he left for Nuremberg, Jackson was finding the life on the Court distasteful, in no small measure because of the personal feuds that had developed among the Justices, to which he was no stranger. His two or more offers of resignation to Truman were not mere gestures. While he was away, things got worse not better. There was a petty conflict among the Justices over the content of the usual letter to be sent to Roberts by his brethren on his retirement. And the Black-Jackson feud hit the headlines when, with the death of Chief Justice Stone, two Justices of the Court were reported to have threatened their resignations if Jackson were to be appointed Chief Justice. The Black position was expressed through agents, Lister Hill at the White House, and Drew Pearson, among others, in the press. Jackson wrote a blistering letter to the President, which he proceeded to have published in the press.

Jackson denied that he felt deprived of the Chief Justiceship. "Unless one knows the inner workings of the Court, he probably can't realize that one is really better off as an Associate Justice . . . in everything except kudos." The center chair would have been the capstone to his career that he would not have rejected. "But I had never in my life gone seeking a job, and I wasn't going to seek this one.

"When I came back to the Court, Vinson of course was Chief Justice. From that day to this [1952], Justice Black has treated me with respect as one gentleman to another. We've never exchanged a harsh word. Relations were never as harmonious between us as they have been since [my return]."

Jackson's papers do not contain an evaluation of his work as a Justice. Paul Freund's judgment is, for this purpose, probably even better. Speaking of "the pattern of Mr. Justice Jackson's view of individual and commonwealth," Professor Freund wrote: "What must be cherished and secured above all—what the Constitution means to be secured—is human personality. Its cultivation is both a civic necessity and a spiritual duty. The right to be oneself, to

differ in thought and word, to express one's nonconformity in peaceable persuasion, to be treated by one's fellows wielding public power as a rational subject and not a mere object, to be treated evenhandedly—these claims as ancient as religious sensibilities, formulated with modest British insularity as the immemorial rights of Englishmen, and retransformed in eighteenth-century America into rights of man, remain the central concern of a civilization torn between the angel and the dynamo.

"In this recognition, Mr. Justice Jackson's understanding coalesced with his temperament. Convivial he was, and joyful in companionship, but he did not wear his heart upon his sleeve or expose the deepest recesses of the spirit to the outside gaze. Fresh and unconventional ideas were welcome to him as they can only be to a lover of irony and paradox. But his mind recoiled from organized pressures, as it did from the seduction of opportunism.

"If this portrait leaves some features blurred, it is not disturbing. What is disturbing is the risk of the opposite distortion, an excessive tidiness in the portrayal of a complex and altogether unmechanical individual. The intellectual portrait of a judge resembles a treatise on a legal subjet. Anyone who has lived through a complicated and lively case is appalled to find it embodied in a treatise as a citation for an abstract proposition. It is all a good deal like trimming a great oak to make it neat as a hedge, or devising categories for Latin ablatives when the language is no longer living. The risk is especially great in the case of Mr. Justic Jackson, for one of the most tragic aspects of his death is that he had never ceased to rethink and redefine his premises. His philosophy was, in the figure applied to the common law, working itself pure. In that process, incomplete though it was, he struck off what Emerson called 'blazing iniquities,' which will kindle many a heart in the ceaseless struggle for the lift of the spirit." (Freund, *On Law and Justice* 180–82 [1968])

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The quoted materials in the previous article are all taken from Mr. Justice Jackson's transcript of taped interviews prepared for the Oral History Project of Columbia University and are published with the permission of William Eldred Jackson, Esq. Mr. Justice Jackson retained relatively few of his personal papers. These have not yet been allocated to a library or opened to the public.

Jackson's extra-judicial writings were extensive. For the most part they were fugitive pieces prepared for special occasions in the forms of speeches and articles. Some were patently political, others were concerned with the proper functioning of the bar—a primary concern of the Justice, a few were serious studies of legal or historical problems. Certainly the most important of his publications was *The Struggle for Judicial Supremacy,* published in 1941

by Alfred Knopf and since republished in paperback form. His 1945 Cardozo Lecture published by the Association of the Bar of the City of New York: *Full Faith and Credit: The Lawyer's Clause of the Constitution* and his Godkin Lectures at Harvard, *The Supreme Court in the American System of Government*, published posthumously by the Harvard University Press in 1955, are also worthy of note. His best writing, of course, is to be found in his opinions in volumes 314 through 346 of the United States Reports.

Of the writings about Jackson, it must be said that no one has yet provided an authoritative biography. There is a biography by Eugene Gerhart, *America's Advocate: Robert H. Jackson*, published in 1958. It suffers from two major faults. First, it is the approach of one who was so obviously an admirer that he felt called upon to omit the warts from the portrait. Second, it is totally devoid of an evaluation of Jackson's role on the Supreme Court and does not adequately place his non-judicial activities in the context of their times. There are several good law review articles on Jackson, however, among them: Charles Fairman's "Robert H. Jackson: 1892–1954—Associate Justice of the Supreme Court," 55 *Columbia Law Review* 445 (1955); Felix Frankfurter's "Mr. Justice Jackson," 88 *Harvard Law Review* 937 (1955); Paul Freund's "Individual and Commonwealth in the Thought of Mr. Justice Jackson," 8 *Stanford Law Review* 9 (1955); Warner Gardner's "Robert H. Jackson, 1892–1954—Government Attorney," 55 *Columbia Law Review* 438 (1955); and Louis Jaffe's "Mr. Justice Jackson," 68 *Harvard Law Review* 940 (1955).