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No College, No Prior Clerkship: How Jim Marsh Became Justice Jackson's Law Clerk

John Q. Barrett

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OF COURTIERS & KINGS



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CONSTITUTIONALISM AND DEMOCRACY

Gregg Ivers and Kevin T. McGuire, Editors



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OF *More Stories of Supreme Court
Law Clerks and Their Justices*
COURTIERS
& KINGS

Edited by Todd C. Peppers and Clare Cushman

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JOHN Q. BARRETT

No College, No Prior Clerkship

How Jim Marsh Became Justice Jackson's Law Clerk

In his first four years on the Supreme Court, Justice Robert H. Jackson employed, in sequence, three young attorneys as his law clerks. The first, John F. Costelloe, was a Harvard Law School graduate and former *Harvard Law Review* editor who until summer 1941 was, like then attorney general Jackson, working at the U.S. Department of Justice. Costelloe became Justice Jackson's first law clerk shortly after his July 1941 appointment to the Court and stayed for a little over two years. Jackson's next law clerk, Phil C. Neal, came to Jackson in 1943 after graduating from Harvard Law School, where he had served as president of the *Harvard Law Review*. Jackson's third law clerk, Murray Gartner, arrived in spring 1945, also having graduated from Harvard Law School and serving as *Harvard Law Review* president.

At one level, the Harvard, Harvard, Harvard, star, star, star pattern of Justice Jackson's early law clerk hiring is no surprise. Supreme Court clerkships were then, as they are now, demanding jobs for very bright, very well trained, very skillful young lawyers. Costelloe, Neal, and Gartner were all of that, both naturally and thanks to the Harvard Law School. They also came to Jackson highly recommended by his son William E. Jackson, who himself became a Harvard Law School student in fall 1941, just a few weeks before his father first sat on the Supreme Court bench. During the next two years, Bill Jackson served with Phil Neal and Murray Gartner on the *Harvard Law Review* and was influential at recommending that his father hire them as law clerks.

At another level, Justice Jackson's early law clerk hiring pattern is surprising. Jackson was no snob, and, more to the point, he was no Harvard man. Robert Jackson graduated from public schools in western New York State and never attended college. Indeed, he barely attended law school—he attended Albany Law School in 1911–12 for only the “senior” year of its two-year program. Jackson studied to become a lawyer, albeit an excellent and in time a prominent one, mostly by serving as an apprentice to two lawyers in Jamestown, New York. Thirty years later, Jackson had risen through private practice and notable public service, including as solicitor general of the United States and then as



attorney general of the United States, to become a Supreme Court justice who hired as his law clerks some of the top graduates of Harvard Law School. He was happy with their work and fond of them personally.

In 1947, Justice Jackson tried something different. Following the three Harvard Law School men, Jackson hired a Temple Law School graduate to be his next law clerk. This man had been a successful law student, but in a non-elite law school and, indeed, in its night school division. His name was James Milton Marsh, and this is the story of how he became, improbably, a Supreme Court law clerk.

Justice Jackson in the World Spotlight

In spring 1945, while that year's Supreme Court term was still ongoing, Justice Jackson lost his law clerk, Phil Neal. This "loss" was consensual. It began when State Department official Alger Hiss, acting on the recommendation of Justice Felix Frankfurter, a great networker and talent scout, contacted Jackson's second-year law clerk, Phil Neal, about joining the State Department staff at the San Francisco conference that would produce the United Nations. Neal was interested and discussed this opportunity with Jackson, who was supportive and authorized Neal's departure. This did not, however, leave Jackson clerkless. Neal arranged for his good friend Murray Gartner, who had graduated earlier that winter from Harvard Law School and had already been hired to begin clerking for Jackson in summer 1945 (when Neal originally was planning to depart), to start "early," upon Neal's departure.

Shortly after Murray Gartner's arrival at the Supreme Court, still prior to the justices concluding their 1944 term and beginning their summer recess, Justice Jackson himself embarked on something similar to Neal—albeit at a higher level: he left the Court to serve in the executive branch. In late April 1945, President Harry S. Truman recruited Jackson to serve as U.S. representative and chief of counsel to prepare and prosecute before an international tribunal the European Axis leaders and others who had committed atrocities and war crimes.

President Truman announced Jackson's appointment on May 2, 1945, attracting significant attention and press coverage in the United States and internationally. Jackson continued, but with much more prominence and at an accelerating pace, to perform the war crimes prosecutor work he had been doing privately since Truman had recruited him a few weeks earlier. Jackson built his staff. He began to master new legal and factual material. He worked with officials across the U.S. government and with other relevant parties. He also juggled, and he somewhat neglected, Supreme Court work in the final weeks of its term.

On May 8, Nazi Germany surrendered unconditionally to the Allies. Ger-



many thus ceased to exist. The Allies, still fighting Japan in the Pacific Theater, assumed the European Theater responsibilities of victory and military occupation. They began to deal with the devastated continent, which was covered with myriad survivors, displaced persons, defeated soldiers, and prisoners. The Allies increasingly discovered and struggled to comprehend evidence of enormous Nazi atrocities. The Allies, especially Justice Jackson, began to implement their leaders' clear but undeveloped wartime commitments to, after defeating the Nazis militarily, prosecute them as international criminals.

In mid-May, Justice Jackson made his initial trip to Europe, to consult military and civilian leaders and to survey the situation. Due to the trip, Jackson missed some Supreme Court sessions late in the term, and of course he was not present to work with his new law clerk, Murray Gartner.

On June 6, Jackson delivered to President Truman a formal report on his early progress and his plans. The president immediately released the report to the public, resulting in its widespread publication and its extensive discussion in the press and among the public.¹ Jackson's report stated, in detail and with eloquence, his commitments to law, fairness, expedition, and accountability in prosecuting leading Nazis.

The Supreme Court began its summer recess on June 18. Justice Jackson and his core staff left Washington for Europe that same afternoon. After a summer working in London and on the European continent, Jackson returned briefly to Washington that September to consult with President Truman and others. Later that month, Jackson relocated to Nuremberg in the U.S. zone of occupation in the former Nazi Germany. In November, Jackson began trial work there as U.S. chief prosecutor. The Nuremberg trial ran from November 1945 until October 1, 1946. Jackson's service there caused him to miss the full 1945–46 term of the Supreme Court.

James M. Marsh, Jackson-Watcher and Prospective Publisher

Among the millions who read or heard of Justice Jackson's May appointment to prosecute Nazi war criminals and his June report to President Truman was James M. Marsh, a thirty-one-year-old chief warrant officer in the U.S. Army Signal Corps. Since late 1944, he had been serving in Italy on the staff of U.S. Army brigadier general George Irving Back, chief signal officer of the Mediterranean Theater. Marsh's tasks there included working on office reorganization, preparing reports, selling fixed wire communication facilities that were located around the Mediterranean, appraising army signal facilities in Italy and France, and, following the surrender of Axis forces, transferring those facilities to the postwar Italian and French governments.

"Jim" Marsh had many accomplishments and a range of work experiences



that predated his military experience. He was born and raised in Brookville, a county seat city in western Pennsylvania. (Brookville is located, coincidentally, about seventy miles south of Spring Creek, Pennsylvania, where Justice Jackson was born, twenty-one years before Marsh, on his family's farm.) In 1931, Marsh graduated from Brookville's high school. He then went to work as clerk and stenographer to a local attorney (who also was a relative).

In early 1934, Marsh became his county's manager of the Home Owners Loan Corporation (HOLC), a program that helped people in economic distress during the Great Depression to refinance their home mortgages. After a year, Marsh was promoted to the HOLC district office in Johnstown, Pennsylvania, where he worked as an administrative assistant in the accounting and legal departments.

In 1936, Marsh returned to Brookville. He worked for the next three-plus years selling cars and managing a local Oldsmobile dealership. In January 1940, he moved to Bradford, Pennsylvania, where he worked for the *Bradford News* as an office manager, handling wholesale distribution of the newspaper and other publications.

Nine months later, following the fall of France to Nazi Germany and the start of its blitz against Great Britain, Marsh enlisted in the army.

In early 1941, the army, which had trained Marsh for infantry service, assigned him to work in Pennsylvania at a major troop induction center. He handled property accounting and supervised office and warehouse personnel.

In June 1942, the army assigned Marsh to the Signal Corps in Philadelphia. His work there included designing and maintaining procurement records, setting office procedures, supervising personnel, and reviewing and analyzing contractor financial statements and accountants' reports.

In spring 1943, Marsh became, de facto, an army lawyer. He became assistant officer in charge of the legal division at the Signal Corps' Philadelphia Field Office. In that position, Marsh conducted legal research and wrote legal opinions on procurement and pricing matters. He also served as his commanding officer's executive officer, editing and approving legal opinions drafted by civilian staff, and as that chief's administrative officer, supervising a staff of thirty people.

In June of that year, Chief Warrant Officer Marsh also became a law student. At the urging of his commander, who recognized his aptitude for legal work, Marsh began to attend the Temple University School of Law. It was located on the ninth floor of Gimbel's Department Store on Ninth Street, just south of Market Street, in downtown Philadelphia.

Because Marsh had only a high school diploma and no college degree—indeed, he had no college experience at all, although he did take, at some point, a correspondence course in accounting—Pennsylvania rules decreed that he



could not become a law student. Marsh was determined to get a law school education, and, working in tandem with Temple and state authorities, he obtained an exemption from the college degree requirement. He first persuaded Temple to admit him on the condition that the state grant him an exemption from the college-degree requirement. He then petitioned the Pennsylvania State Board of Law Examiners to exempt him based on his employment and military experiences and letters of recommendation. The State Board granted Marsh's petition, and soon he was a student in Temple law school's evening program. He continued to work as a Signal Corps officer on active duty by day and attended his law classes at night.

Marsh took a leave from law school to serve in Italy. By fall 1945, he was back in Philadelphia, still in the Signal Corps and again attending Temple Law School as an evening student. Marsh earned strong grades and, in time, a position on the staff of the *Temple Law Quarterly*, the school's law review.

By his "junior" (third) year, Marsh was the *Temple Law Quarterly's* legislation editor. In that capacity, he decided—no doubt with agreement and support from his colleagues on the *Quarterly*—that Justice Jackson's prosecutorial assignment was so significant and so underreported in legal periodicals that they should, in effect, cover it.²

The First Publication

Marsh's immediate objective was to republish Justice Jackson's April 13, 1945, speech at the American Society of International Law (ASIL) annual meeting dinner. Jackson delivered this speech the day after the death of President Franklin D. Roosevelt, on the Friday evening that began the weekend of his funeral and burial. Jackson's speech thus received little notice at that time. Indeed, the speech was unknown to President Truman and his aides when they, two weeks later, recruited Jackson to serve as U.S. chief of counsel to prosecute Nazi leaders as international criminals. But Jackson's ASIL speech belatedly drew prominent notice in the general press.³ Marsh had read about Justice Jackson's assignment from President Truman and knew of Jackson's early pronouncements about how he was pursuing his task. In Marsh's view, Jackson's ASIL speech and all of his early work toward international prosecutions of Nazis for specific crimes, while covered well in the general press, were being insufficiently publicized and explicated for more sophisticated legal audiences.

So Marsh, in September or October 1945, telephoned Justice Jackson's Supreme Court chambers. By that time, Jackson was working in Europe, but Marsh succeeded in speaking to Jackson's law clerk, Murray Gartner. (Jackson left Gartner working in Washington, justice-less, for all of the 1945–46 Supreme Court term that Jackson missed while he was prosecuting in Nuremberg. Jack-



son made this up to Gartner by keeping him on as law clerk for an additional year—they worked together at the Court during the 1946–47 term.)

In their initial telephone conversation, Marsh asked Gartner if the *Temple Law Quarterly* could publish Justice Jackson's ASIL speech. Gartner, who himself recently had been a law student publishing a law review at Harvard, said that Jackson would have no objection to that—indeed, he would be pleased.⁴ Gartner told Marsh that he would mail Marsh a copy of the speech.⁵ A few weeks later, after Marsh had not received it, he wrote to Gartner to remind him to send it.⁶ On October 29, Gartner sent the speech to Marsh.⁷

While Marsh was waiting to receive the speech, Jackson and his allied prosecutor counterparts signed and filed the Nuremberg indictment on October 18, 1945. On November 20, the International Military Tribunal (IMT) commenced trial proceedings in Nuremberg. The next day, Justice Jackson, chief prosecutor for the United States, delivered his opening statement to the tribunal.

Law student Marsh, following these developments, expanded the scope of his project. In its January 1946 issue, the *Temple Law Quarterly* published—as no other law review had or did—seven major documents. It captioned this collection “The Legal Basis for Trial of War Criminals.” Its contents: Justice Jackson's April 13 speech to the ASIL,⁸ his June 6 public report to President Truman,⁹ a Walter Lippmann column regarding that historic Jackson report,¹⁰ the August 8 London Agreement creating the IMT,¹¹ the IMT Charter that accompanied the London Agreement,¹² Jackson's statement on the signing of the London Agreement and IMT Charter,¹³ and the October 18 indictment of the accused Nazi international criminals.¹⁴

At the end of February 1946, Chief Warrant Officer and *Temple Law Quarterly* legislation editor James Marsh sent a copy of the issue to Justice Jackson in Nuremberg. The trial there had just reached the end of the prosecution cases. Marsh, in a thorough cover letter written on “Army Service Forces, Office of Chief Signal Officer, Philadelphia Field Office of the Legal Division” stationery, apologized for printing difficulties that had delayed publication a bit. Looking ahead to the trial's conclusion, he asked Jackson to send the prosecutors' summations and the IMT's decision for publication. Marsh also expressed interest in publishing any article that Jackson might write about the trial after its conclusion. And Marsh noted, in closing, that Jackson's

various treatises outlining the legal and moral necessity for the Nuremberg trial, and particularly your opening address, have been most inspiring to me as a law student and . . . , from discussions with many people, it has been made clear to me that they have a widespread salutary effect upon American thought.¹⁵



Marsh's letter reached Justice Jackson. After reading it, he wrote a note on it to his son, a young lawyer and U.S. Navy officer who was serving at Nuremberg as his father's executive assistant: "Bill please answer[.] I cant give them an article but we can give them stuff ie organization arguments now for example[.]"¹⁶

The Second Publication

Bill Jackson, following his father's instruction, wrote back to Marsh in March 1946. Jackson enclosed a copy of the justice's February 28 Nuremberg trial argument regarding the criminality of the Nazi organizations that the Allies were prosecuting, along with twenty-one individual defendants, "for whatever use you wish to make of it. . . . The problem of these organizations as well as what the prosecution proposes to do about them has generally been misunderstood and perhaps the Justice's statement may help in dispelling the confusion."¹⁷

In April, Marsh, now editor in chief of the *Temple Law Quarterly*, wrote to thank Bill Jackson.¹⁸ Marsh later informed him that the *Quarterly* would be publishing, in its April 1946 issue, Justice Jackson's "organizations" argument almost in its entirety.¹⁹

In May, Bill Jackson advised Marsh that because Justice Jackson would not be returning to the United States "for a month or so," Marsh should send the April issue of the *Quarterly* to Jackson's Nuremberg office.²⁰ In June, Marsh did so.²¹ The issue contains, as its second piece, a nearly complete text of Justice Jackson's February 28, 1946, Nuremberg courtroom argument on the criminality of Nazi organizations.²²

The Third Publication

In late July 1946, while Justice Jackson was completing his prosecuting work at Nuremberg, Marsh obtained from Jackson's Pentagon office the text of his July 26 closing argument. On July 31, Marsh wrote to Jackson at the Supreme Court (to which he returned to work on August 3, for an interim period before he returned to Nuremberg to hear the international court there render its judgment). Marsh reported that he had arranged, despite the impending next issue of the *Temple Law Quarterly* already being at the printer, to publish in that issue a somewhat condensed version of Jackson's Nuremberg closing.²³ It soon appeared in the July 1946 (cover date) issue.²⁴

The First Meeting

On November 1, 1946, Jim Marsh finally met Justice Jackson in person. Following the advice of his former army chief, Philadelphia attorney J. Harry LaBrum,



Marsh had told Jackson's office that he (Marsh) had plans to be in Washington soon and would like to stop at the Supreme Court to say hello to the justice. This was untrue—and the gambit worked. As LaBrum had predicted, Marsh was invited to Jackson's chambers on that Friday afternoon.

Marsh, accompanied by fellow Temple law student William Heefner, met with Justice Jackson for about an hour.²⁵ They discussed many topics, including the late president Franklin Roosevelt and the New Deal (in which both Jackson and Marsh had served, albeit in positions at somewhat differing levels). They discussed Jackson's recently completed prosecutorial work at Nuremberg. Jackson was, throughout their discussion, very careful. Marsh told Jackson that the *Temple Law Quarterly* planned to publish the full text of the Nuremberg tribunal's judgment and Jackson's final report to President Truman. Marsh asked Jackson to write a foreword to that issue, and he agreed to do so. (Following this midday Friday meeting, Jackson promptly dictated and edited into final form a four-paragraph essay, which his secretary typed up, marked with Jackson's final edits, and mailed to Marsh on the following Monday.²⁶)

As their meeting was winding down, Marsh followed advice that he had received from his wife and from LaBrum. Confessing that he had come to the meeting with an "ulterior motive," Marsh asked Jackson to consider hiring him as his law clerk.²⁷ Knowing that Supreme Court law clerks generally held college degrees and he had none, Marsh told Jackson of his (Marsh's) special admission to Temple Law School following the Pennsylvania State Board of Law Examiners' decision to grant Marsh's petition for permission despite lacking a college degree.

Jackson replied that he would think about it. He told Marsh that he (Jackson) had already talked to some people about possibly becoming his next law clerk. Indeed, he said he had made "a tentative commitment to one of the present Circuit Court clerks." But he advised Marsh "to file an application and letters of recommendation, on the chance that a vacancy might materialize with him or with one of the other Justices."²⁸

Following this Washington meeting, Marsh returned to Philadelphia. Although he was a final semester law student, he spent a significant amount of time during the next two months working on matters relating to Justice Jackson.

During the week following their Washington meeting, Marsh wrote to Jackson. Marsh thanked the justice for his "courtesy" and "kindness" during Marsh's visit. He reported the sequence in which the *Temple Law Quarterly* would publish, beneath Jackson's foreword, final Nuremberg-related documents. Marsh stated his plan to prepare and publish an index to those and all Jackson and Nuremberg material published in the *Quarterly*. Marsh also promised that he and his law school dean would not give the printer who produced the *Quarterly* "any rest until this issue is in the mails."²⁹



Marsh also wrote, simultaneously, to Jackson's secretary, Mrs. Elsie L. Douglas. He thanked her for sending Jackson's foreword, noting that he "was pleasantly surprised to receive it so promptly." He added, for himself and Heefner, that her "friendly hospitality was certainly a big factor in our enjoyment of the visit."³⁰

Applying for the Clerkship

In the final weeks of 1946, Marsh avidly commenced his campaign to persuade Jackson to hire him as a law clerk. Marsh identified and wrote to at least ten attorneys whom he knew to some degree, telling them of his possible clerkship opportunity with Justice Jackson and asking them to write letters of recommendation to him. They included four of his former Signal Corps supervising officers (including one, Boston lawyer Leonard ["Andy"] Wheeler Jr., who had gone on to work for Jackson at Nuremberg during fall 1945), five friends or former employers from western Pennsylvania, and a Temple Law School dean.

Then, in early January 1947, Marsh wrote to Justice Jackson. Marsh reiterated his "hope," first voiced in their meeting two months earlier, to "be[] considered for a clerkship."³¹ In his cover letter, carefully composed and thorough but confined to one page, Marsh summarized his "short on formal education and long on practical experience" background, including a year working in the Signal Corps Legal Division. He attached a comprehensive two-page summary of his life, education, and work experiences, reminding Jackson that the Pennsylvania State Board of Law Examiners had acted on this record plus letters of recommendation when they had granted Marsh's petition to attend law school despite not having a college degree. At the end of this summary, Marsh listed—not alphabetically; he listed Wheeler first—ten men who would be writing to Jackson on Marsh's behalf.³²

Days later, Justice Jackson began to receive recommendation letters regarding Marsh. (As they arrived, Jackson had Elsie Douglas write Marsh to acknowledge receipt of his letter of application, and to inform Marsh that Jackson would keep it "on file until a later date when he will make his appointment."³³) Jackson received two strong, succinct recommendation letters from Brookville, Pennsylvania, Marsh's hometown. Raymond Brown, an attorney, wrote that he had known Marsh from his childhood, that his reputation was excellent, and that he and another had been the first men in the county to volunteer for military service "at the [1940] outbreak of the late hostilities."³⁴ The presiding judge of Pennsylvania's Fifty-Fourth Judicial District, sitting in Brookville, wrote that he had known Marsh well for fifteen years, and that he was "able, affable, careful, fair, honest and reliable. He has demonstrated that



hard work pays and everything accomplished by him to date has been through his own efforts while acting in the most painstaking manner.”³⁵

Justice Jackson also received a longer, also glowing, letter from attorney Leonard Wheeler, formerly a prosecutor on Jackson's Nuremberg staff. Wheeler reported his perspective as one of Marsh's former senior officers:

Although Marsh served abroad during the time I was Officer in Charge of the Signal Corps Legal Office in Philadelphia, I had an opportunity to see a good deal of him, and of his work, when I was Executive Officer and Assistant to the Legal Director in Washington. He [Marsh] is a man of great energy and ability, with a very quick and discerning mind and excellent judgment. When I first became associated with him I was frankly surprised to learn he was not already a member of the Bar, but was still studying law, as his work bore all the earmarks of a good lawyer. He was very quick to get at the heart of a problem, and very resourceful in its solution. He occupied a somewhat delicate position as assistant and close friend of my predecessor as Officer in Charge, but in spite of not being a member of the Bar, and in spite of his somewhat anomalous rank of Warrant Officer, he was able to keep the staff pulling together, to resolve disagreements soundly and tactfully, and to carry a great deal of the load of his chief. He is persistent and fearless, but he makes friends easily, and keeps them, and should go a long way in his profession.³⁶

Jackson next received a letter from the predecessor whom Wheeler had referenced, Philadelphia lawyer and former Signal Corps lieutenant colonel J. Harry LaBrum. He described supervising Marsh in the army as he performed administrative duties; making him, “although he was junior in rank to many other officers under my command,” LaBrum's administrative officer; bringing Marsh along when LaBrum took charge of the Signal Corps' Field Division Legal Office (where Marsh supervised ten full-time lawyers, “did research and wrote legal opinions, and his work in all instances compared favorably with that done by our top lawyers”); and having Marsh as his (LaBrum's) executive officer during a tour in Italy. LaBrum also wrote of Marsh's successes in law school and described him as, overall, “a young man of sound judgment, tact, and good common sense. . . . My belief in his diligence, integrity and ability have [*sic*] been born of my long association with him, and substantiated by his accomplishments in spite of numerous obstacles.”³⁷

The onslaught continued. By the end of January, Jackson had also received four more letters: from Temple Law School's administrative dean;³⁸ from a Philadelphia attorney who had, as Home Owners Loan Corporation (HOLC) district counsel in Johnstown, Pennsylvania, during 1935–36, supervised Marsh's



work there;³⁹ from a western Pennsylvania attorney who did HOLC legal work with Marsh in his home county in 1933–35;⁴⁰ and from Marsh's former commanding officer, Brigadier General Back.⁴¹ In varying words and based on differing experiences, each described Marsh's excellence and urged Jackson to hire him.

The Fourth Publication

Marsh himself added to what had become, in effect, a pile of material supporting his clerkship application. In its December 1946 issue, the *Temple Law Quarterly* published, beneath Jackson's foreword,⁴² the IMT's (the Nuremberg international criminal court) final judgment,⁴³ the dissenting opinion of its Soviet member,⁴⁴ and Jackson's final report to President Truman.⁴⁵ The *Temple Law Quarterly* had indeed, and uniquely, under Marsh's leadership, brought fundamental Nuremberg trial and related documents to the attention of the U.S. legal academy and legal profession.

Jackson Interviews Marsh

Justice Jackson reacted positively to Marsh's publication efforts, to meeting him, to his clerkship application, and to the letters recommending his hiring. During the winter, Jackson invited Marsh, who that February received his Temple law degree, to come back to Washington, this time for a formal clerkship interview.

On the morning of March 4, 1947, they met in Justice Jackson's chambers at the Court. At some point during this meeting, Marsh asked Jackson to inscribe for Temple Law School's dean and its administrator two issues of the December 1946 *Temple Law Quarterly*, and Jackson did so graciously.

The core of this meeting, however, was a simple challenge from Jackson to Marsh. As Marsh recalled it, Jackson said the following:

You give me a problem. I have no doubt that you can handle the job. But if I hire you as my law clerk we will be operating these chambers without even one college degree. I do not have a degree; my secretary [Elsie Douglas] does not have a degree; and you do not have a degree. I have always felt that my writing has suffered because of my lack of formal education. So I would be compounding a weakness. What do you have to say about that?⁴⁶

Marsh also recalled his quick response:

Mr. Justice, every lawyer and every judge in the country knows that you are the best writer on this Court, college degree or not. And if there is



anything that I can do well, it is write, rewrite and edit. I am sure you can find lots of lawyers who know more about the law than I do, but I don't think any of them could do the writing and critiquing part of the job as well as I can. So if you want someone with that kind of talent, and a flair for ideas and people and politics, who would be fiercely loyal to you, I'm your man.⁴⁷

After the interview, Marsh returned to Philadelphia. The next day, he wrote to Elsie Douglas that Jackson's inscriptions in the copies of the December issue of the *Temple Law Quarterly* had created a "tremendous stir" at the school, and that his "exulta[nt]" fellow law students were each "most anxious to receive an inscribed copy." Marsh enclosed the names of ten students he said were "equally deserving," explained that he had arranged for ten additional copies of the December issue to be sent to her, and said that he would "be most grateful if [Justice Jackson] could take the time to inscribe copies to those students."⁴⁸

These books soon arrived, and Douglas presented them, with Marsh's letter, to Justice Jackson. He inscribed them as Marsh had requested—on the letter, Jackson noted "Done" and wrote his initials.⁴⁹

Jackson's Hiring Decision

In March 1947, Justice Jackson reached the point of deciding which of five prospects who had come to his attention in varying ways—Stafford R. Grady, D. Bret Carlson, Arlin M. Adams, Robert B. von Mehren, and James M. Marsh—would become his next law clerk. To focus his thinking, Jackson drew by hand, on a page of yellow legal paper turned sideways, a simple chart comparing the qualifications of each candidate. The categories of comparison were "Prior [Law Clerk] Service," "College [and/or law school]," "Relig[ion] etc," "Experience," and an unlabeled column for other relevant information.

Jackson noted, in this order, some of the qualifications and characteristics of each candidate. Stafford Grady was clerking for Jackson's friend Justice Harold M. Stephens of the D.C. Court of Appeals, had earned his law degree at the George Washington University, was a product of Catholic schools, and had administrative work experience.⁵⁰ Bret Carlson had not yet served as a law clerk, but he was from Jackson's adult hometown of Jamestown, had served in the U.S. Navy during World War II, and was about to graduate from Harvard Law School, where he was a "high scholar." Arlin Adams also had navy service and was about to graduate from the University of Pennsylvania Law School, where he ranked second in his class and was editor in chief of the *Pennsylvania Law Review*. Robert von Mehren was clerking for Judge Learned Hand on the U.S. Court of Appeals for the Second Circuit, had attended Harvard Law School (where he had been president of the *Harvard Law Review*), and was of German



descent. Jim Marsh had no prior clerkship and nothing else that Jackson noted as relevant personal background or experience. Indeed, Jackson's only note regarding Marsh was his college: "None."

Justice Jackson then noted his decisions, in a series of circled numbers. Bret Carlson was his third choice. Robert von Mehren was his second. James Marsh was his first.⁵¹

Offer and Acceptance

On April 9, Jackson wrote to Marsh, at the Temple Law School office of the *Temple Law Quarterly*, to offer him a one-year clerkship starting July 1 at an annual salary of \$4,288.68. (Jackson later requested, and the chief justice approved, paying Marsh the senior law clerk salary, \$5,116.32 per year, based on Marsh's military service and work experiences.⁵²) Jackson's letter covered numerous job details. Marsh's clerkship actually could begin, Jackson explained, with a couple of vacation weeks. Then Marsh's first task would be to deal with petitions for writs of certiorari, jurisdictional statements and briefs that would accumulate during the summer. Jackson explained that he would want Marsh to prepare and type up, for each of these, memoranda stating case history, facts, issues, and his recommendation. Jackson here indicated some of what had impressed him in Marsh's background: "There is in this work a good deal of typing of cert notes and memoranda, but I gather you are well qualified to run a typewriter. There is also research—no novelty to you."⁵³

Jackson also explained that, later in the term, the clerkship would involve work on opinions. "I usually prepare a draft opinion. You will prepare and type a memo of criticisms, suggestions and substitutions. These we will discuss and work out together. I want from a clerk the most severe criticism of both form and substance." Jackson, again alluding to Marsh's work experiences, noted that "there is proofreading and editing of opinions for printing. That, too, is not new to you." With commendable candor, Jackson also described what many law clerks have experienced (and treasured): "Of course, a score of chores and incidentals are thrown in just to keep you out of mischief."

Justice Jackson, perhaps thinking that Marsh would come to the clerkship with less elite legal education than would his clerk peers, also included some reading recommendations for his "spare time." Jackson recommended articles that then Harvard Law School professor Felix Frankfurter had published in the *Harvard Law Review* "on the work of the Court from year to year, and also his book on the Federal Courts. . . . Also, of course, any reading on constitutional subjects, particularly the Commerce Clause and Due Process Clause, will prove useful."

Jackson closed by acknowledging that Marsh would probably find it difficult



to find satisfactory housing for his family in overcrowded postwar Washington. "There is not much that one can do to assist another in this," Jackson wrote, "but if there is anything I will be glad to be of help."⁵⁴

Nothing in Jackson's letter caused Marsh to have second thoughts about clerking. He received the offer letter on April 10 and immediately wrote back his grateful acceptance.⁵⁵ In a subsequent letter to Jackson's secretary, Elsie Douglas, who was trying to help the Marshes—they had been married since 1942 and had two young daughters—find an acceptable apartment, he added that his clerkship "appointment was most gratifying to the Law School as well as to me."⁵⁶

Clerkship, Success, Gratitude

In Philadelphia, Chief Justice George W. Maxey, of the Pennsylvania Supreme Court, administered the oath of office to Marsh as a new law clerk to Justice Robert H. Jackson on June 30, 1947.⁵⁷

Thereafter, Marsh moved with his family to Washington. Justice Jackson sent his messenger, Harry Parker, to pick them up when they arrived by train at Union Station.

Marsh soon reported to work. He was Jackson's sole law clerk during the Court's October term 1947. That winter, Jackson asked Marsh to stay on for a second year, and he accepted. He thus clerked for Jackson from summer 1947 until summer 1949.

Justice Jackson regarded Jim Marsh as one of his finest law clerks and remained close to him and his family, who returned to Philadelphia following Jim's clerkship, for the rest of Jackson's life. They exchanged letters, telephone calls, and gifts; saw each other regularly when Marsh visited Washington; and saw each other on occasion when Jackson visited Philadelphia (including the Marshes' home). Justice Jackson liked everything about Jim Marsh, and that warm feeling was entirely reciprocated—Marsh, for all of his long life, was filled with admiring memories of Jackson and deep gratitude for the life-shaping clerkship opportunity he gave to Marsh.⁵⁸

That Justice Jackson turned out to be right—entirely right—about Jim Marsh does not, however, explain why Jackson made the unorthodox decision in 1947 to hire Marsh. That had many parts. One part was Jackson's open mind—he was receptive, as few other justices were then (or since), to a clerkship applicant who was not the usual. Marsh and Jackson also had a Nuremberg link, which mattered deeply to Jackson—Marsh's *Temple Law Quarterly* Nuremberg publications impressed Jackson and gave Marsh a connection to what Jackson regarded as the most important work of his life. Marsh's work history, military service, and work ethic also impressed Jackson very much.



Obviously Jackson liked Marsh when they met. Elsie Douglas liked him too—as Marsh came to learn, she urged Jackson to hire Marsh, and that mattered. And Marsh’s letters of recommendation, in their quantity, coming from many impressive quarters, each filled with detail and enthusiasm, helped his cause.

Another factor, maybe the central one, was the matter of pure resemblance. When he looked at Jim Marsh—western Pennsylvania; little higher education; New Deal service; war-related service; ambition; writing skill; love of language; call to the law; earning his rise by succeeding again and again ahead of his peers, precociously; attracting admirers, believers, and mentors at each step—Robert Jackson saw a version of himself.

Notes

I thank Judge Arlin M. Adams, the late D. Bret Carlson, Jeffrey M. Flannery and his Library of Congress Manuscript Division colleagues, the late Murray Gartner, the late Stafford R. Grady, Dr. Stafford R. Grady Jr., the late William F. Heefner, the late Judge Cornelia G. Kennedy, the late Antoinette M. (Ferraro) Marsh, the late James M. Marsh, Phil C. Neal, Gregory L. Peterson, Janis Carlson Ruslink, Arthur R. Seder, Justice John Paul Stevens, and Robert B. von Mehren for their generous assistance; former St. John’s law students Lecia M. Grieppe and Andrew G. Lipton for excellent research; and Todd Peppers and Clare Cushman for their friendship, scholarship, and invitation to write this essay.

Jim Marsh, age ninety-two, died on June 25, 2006. Toni Marsh, his hometown sweetheart who became his wife and partner of sixty-four years, died that December. I had the great fortune to become their friend. I dedicate this essay to their dear memories and thank their children for their friendship and assistance.

1. See, for example, Robert C. Nixon (International News Service), “Jackson Urges Trial of All German Nazis,” *Baltimore News-Post*, June 7, 1945, 1; Lewis Wood, “Punishing of War Criminals by U.S. Pledged by Jackson,” *New York Times*, June 8, 1945, 1, 5; “The Text of Justice Jackson’s Report to the President on Trials for War Criminals,” *New York Times*, June 8, 1945, 4; George Connery, “No Hampering in War Trials, Jackson Says,” *Washington Post*, June 8, 1945, 1, 2.

2. See James M. Marsh ‘47, “Law Quarterly Printed Nazi War Crimes Proceedings,” *Temple Esquire* (Spring 1989): 2.

3. See, for example, Arthur Krock, “Justice Jackson’s ‘Honorable’ Substitute for War,” *New York Times*, April 27, 1945, 18 (summarizing Jackson’s April 13 ASIL speech); “World Law,” *Washington Post*, May 4, 1945, 6 (editorial summarizing and praising the speech).

4. Gartner might have checked, at least after the fact, that his permission to Marsh had Justice Jackson’s approval. See William E. Jackson note, October 2, 1945 (“Marsh”) (written in London) (in author’s possession).

5. Murray Gartner to Mr. James M. Marsh, October 29, 1945, Box 43, Robert H. Jack-



son Papers, Manuscript Division, Library of Congress, Washington, D.C. (hereafter cited as RHJL).

6. James M. Marsh to Murray Gartner, Esq., October 22, 1945, RHJL, Box 43.
7. Murray Gartner to James M. Marsh, October 29, 1945, RHJL, Box 43.
8. Honorable Robert H. Jackson, "The Rule of Law Among Nations," *Temple Law Quarterly* 19 (1946): 135–43.
9. Honorable Robert H. Jackson, "Justice Jackson's Report to President Truman on the Legal Basis for Trial of War Criminals," *Temple Law Quarterly* 19 (1946): 144–56.
10. Walter Lippmann, "An Historic State Paper," *Temple Law Quarterly* 19 (1946): 157–59 (reprinting a June 1945 Lippmann newspaper column).
11. "Agreement for the Establishment of an International Military Tribunal," *Temple Law Quarterly* 19 (1946): 160–61.
12. "Charter of the International Military Tribunal," *Temple Law Quarterly* 19 (1946): 162–68.
13. Honorable Robert H. Jackson, "Statement of Chief U.S. Counsel Upon Signing of the Agreement," *Temple Law Quarterly* 19 (1946): 169–71.
14. "Indictment against Major Nazi War Criminals," *Temple Law Quarterly* 19 (1946): 172–235. The *Quarterly* also published, in the back half of this issue, collected materials concerning the new International Court of Justice (ICJ). The U.S. Senate had, on July 28, 1945, ratified the Charter of the United Nations (UN) and, annexed thereto, the statute of the ICJ. This court, known informally as the World Court, supplanted the Permanent Court of International Justice (PCIJ) that had existed under the League of Nations to resolve disputes among member states in accordance with international law. The Temple journal published, as an assembled set of ICJ materials, a background report by Judge Manley O. Hudson, U.S. representative to the PCIJ and instrumental supporter of the World Court, plus the UN Charter, the ICJ statute, and a Hudson essay on the World Court's future. See Hon. Manley O. Hudson, "Report of the Honorable Manley O. Hudson," *Temple Law Quarterly* 18 (1946): 236–46; "Charter of The United Nations," *ibid.*, 247–75; "Statute of the International Court of Justice," *ibid.*, 275–89; Hon. Manley O. Hudson, "World Court—The Next Step," *ibid.*, 290–95.
15. James M. Marsh to Honorable Robert H. Jackson, February 28, 1946, 1–2, RHJL, Box 108.
16. Note from Robert H. Jackson to William E. Jackson, on letter from James M. Marsh to Honorable Robert H. Jackson, February 28, 1946, *ibid.*, 1. Bill Jackson added on this letter his note that Marsh's letter should be filed in Justice Jackson's office files under "Misc[ellaneous]. Corresp[ondence]. M.," and presumably it was. Bill Jackson also, until his death in 1999, kept the January 1946 issue of the *Temple Law Quarterly* in his personal papers regarding Nuremberg.
17. Lieutenant (jg) William E. Jackson to James M. Marsh, March 21, 1946, RHJL, Box 108.
18. James M. Marsh to Lieutenant (jg) William E. Jackson, April 11, 1946, RHJL, Box 108.
19. James M. Marsh to Lieutenant (jg) William E. Jackson, April 26, 1946, RHJL, Box 108.



20. Lieutenant (jg) William E. Jackson to Mr. James M. Marsh, May 13, 1946, RHJL, Box 108.

21. James M. Marsh to Honorable Robert H. Jackson, June 20, 1946, RHJL, Box 108.

22. See Robert H. Jackson, "The Law Under Which Nazi Organizations Are Accused of Being Criminal," *Temple Law Quarterly* 19 (1946): 371–89. The opening article in the issue is William O. Douglas, "The Lasting Influence of Justice Brandeis," 361–70.

23. James M. Marsh to Honorable Robert H. Jackson, July 31, 1946, RHJL, Box 108.

24. See Robert H. Jackson, "Closing Arguments for Conviction of Nazi War Criminals," *Temple Law Quarterly* 20 (1946): 85–107.

25. William F. Heefner, telephone interview with author, August 29, 2006. Much of my account of this meeting is based on Heefner's recollection.

26. See Elsie L. Douglas to Mr. James M. Marsh, November 4, 1946 (with typed and marked foreword), RHJL, Box 108. Jackson's foreword, as published as the opening page of the *Quarterly's* December 1946 issue, is dated November 5, 1946. See Robert H. Jackson, "Foreword: The Nürnberg Trial Becomes an Historic Precedent," *Temple Law Quarterly* 20 (1946): 167.

27. James M. Marsh and Antoinette M. Marsh, interview by Gregory L. Peterson and John Q. Barrett, Chautauqua Institution, Chautauqua, New York, October 24, 2003. Antoinette Marsh believed, with an understandable Depression mentality, that one should not hesitate to ask another, more powerful person for a job, because a job is "your first line of defense" in life. *Ibid.*

28. James M. Marsh to Dr. Elden S. Magaw, January 10, 1947. Jackson was referring to Stafford R. Grady, law clerk to Justice Harold M. Stephens of the District of Columbia Court of Appeals. See note 51.

29. James M. Marsh to Honorable Robert H. Jackson, November 7, 1946, RHJL, Box 108. In this letter, Marsh proposed a title for Jackson's foreword. Elsie Douglas promptly wrote back, relaying Jackson's answer "that he will rely on your good judgment to choose an appropriate title for the foreword." Elsie L. Douglas to Mr. James M. Marsh, November 9, 1946, RHJL, Box 108. As the opening page of its December 1946 issue, the *Quarterly* published Jackson's foreword with the title that Marsh had proposed. See note 26.

30. James M. Marsh to Mrs. Elsie L. Douglas, November 7, 1946, RHJL, Box 108. A few weeks later, Marsh wrote again to Douglas, "to let [her] and Justice Jackson know that the material for the special issue is now being worked on by the printer and he has promised to have it out by late December without fail." James M. Marsh to Mrs. Elsie L. Douglas, November 24, 1946, RHJL, Box 108.

31. James M. Marsh to Honorable Robert H. Jackson, January 7, 1947, RHJL, Box 135, Folder 12.

32. Jackson's office files, as archived at the Library of Congress, seem to contain letters from only nine of the ten.

33. Elsie L. Douglas to Mr. James M. Marsh, January 15, 1947, RHJL, Box 135, Folder 12.

34. Raymond E. Brown to Honorable Robert H. Jackson, January 14, 1947, RHJL, Box 135, Folder 12.



35. Jesse C. Long to Honorable Robert H. Jackson, January 14, 1947, RHJL, Box 135, Folder 12.
36. Leonard Wheeler Jr. to Mr. Justice Robert H. Jackson, January 14, 1947, at 1, RHJL, Box 135, Folder 12.
37. Letter from J. Harry LaBrum to Hon. Robert H. Jackson, January 15, 1947, at 1–2, RHJL, Box 135, Folder 12.
38. Elden S. Magaw to Honorable Robert H. Jackson, January 20, 1947, RHJL, Box 135, Folder 12.
39. J. Charles Short to Mr. Justice Jackson, January 21, 1947, RHJL, Box 135, Folder 12.
40. Merritt H. Davis to Honorable Robert H. Jackson, January 27, 1947, RHJL, Box 135, Folder 12.
41. George I. Back to Honorable Robert H. Jackson, February 3, 1947, RHJL, Box 135, Folder 12.
42. Jackson, “Foreword,” 167.
43. “Judgment of the International Military Tribunal against Major Nazi War Criminals and Criminal Organizations,” *Temple Law Quarterly* 20 (1946): 168–317.
44. I. T. Nikitchenko, “Dissenting Opinion of the Soviet Member of the International Military Tribunal,” *Temple Law Quarterly* 20 (1946): 318–37.
45. Robert H. Jackson, “Justice Jackson’s Final Report to the President Concerning the Nürnberg War Crimes Trial,” *Temple Law Quarterly* 20 (1946): 338–44.
46. James M. Marsh, “Supreme Court Justice without a College Degree,” *Supreme Court Historical Society Quarterly* 21 (2000): 19.
47. *Ibid.*
48. James M. Marsh to Mrs. Elsie L. Douglas, March 5, 1947, RHJL, Box 108.
49. Note by Robert H. Jackson on letter from James M. Marsh to Mrs. Elsie L. Douglas, March 5, 1947, *ibid.* Jackson also received belatedly, after he had interviewed Marsh on March 4, one more letter from a Marsh recommender. Brigadier General Conrad Snow, who during the war had served as counsel and legal division director under the army’s chief signal officer, wrote that Marsh’s service in the Philadelphia Field Office had been “of the highest efficiency.” General Snow noted that Marsh had borne “a very large share of the administrative burden of the office,” described him as “assiduous, intelligent and cooperative to a high degree,” and gave him a “heartly recommendation.” General Snow also reminded Jackson that they had known each other when they served together in the American Bar Association’s House of Delegates, probably in the late 1920s or early 1930s. And General Snow noted, in closing, that it was his legal office that had sent then colonel Leonard Wheeler from Washington to join Jackson’s staff at Nuremberg. See Brigadier General Conrad E. Snow to Mr. Justice Jackson, March 6, 1947, RHJL, Box 135, Folder 12.
50. Stafford Grady served as a deputy clerk of court at the U.S. District Court for the District of Columbia for his final twenty months as a student at the George Washington Law School. He then, in July 1945, began to clerk for Justice Stephens at the D.C. Court of Appeals. In that approximate time period, Justice Jackson interviewed Grady and offered him a clerkship for the following Supreme Court term, 1946–47. Jackson later pushed that offer back because, after his year away at Nuremberg, he be-



lieved that he owed Murray Gartner a full clerkship year and kept him on instead. In November 1946, Jackson believed that he still had a tentative commitment to employ Grady during the following Supreme Court term, 1947–48. See note 28 and accompanying text. In the end, that changed. Jackson hired Marsh to clerk during 1947–48, and Grady, after clerking for Justice Stephens until November 1947, became an assistant U.S. attorney in the District of Columbia. See generally Justice Harold M. Stephens to Stafford Grady, September 9, 1946, at 1 (“I assume you have heard nothing from Mr. Justice Jackson, otherwise you would have mentioned it.”), in Box 15, Papers of Harold M. Stephens, Manuscript Division, Library of Congress, Washington, D.C.; “Stafford Grady Takes Oath,” *Washington Times-Herald*, November 11, 1947, 5; Stafford R. Grady, telephone interview by author, September 6, 2006.

51. Jackson’s chart ranking the candidates is in RHJL, Box 135, Folder 12. Although the chart is undated, it seems that Jackson decided in March 1947, probably very shortly after their March 4 meeting, to hire Marsh as his next law clerk. See Robert H. Jackson to Dr. Charles T. McCormick, March 31, 1947, 1 (“I have made a commitment as to a law clerk for the coming year so that it will not [be] possible to consider a University of Texas man this time.”), RHJL, Box 135, Folder 12.

52. See Robert H. Jackson to The Chief Justice [Fred M. Vinson], June 18, 1947, RHJL, Box 135, Folder 12.

53. Robert H. Jackson to Mr. James M. Marsh, April 9, 1947, 1, RHJL, Box 135, Folder 12.

54. *Ibid.*, 1–2.

55. See James M. Marsh to Honorable Robert H. Jackson, April 10, 1947, RHJL, Box 135, Folder 12.

56. James M. Marsh to Mrs. Elsie L. Douglas, April 12, 1947, RHJL, Box 135, Folder 12.

57. See “Oath,” *Philadelphia Inquirer*, July 1, 1947, 16 (publishing a photograph of the event).

58. See generally James M. Marsh, “The Genial Justice: Robert H. Jackson,” *American Bar Association Journal* 60 (1974): 306–9, reprinted in *Albany Law Review* 68 (2005): 41–49; James M. Marsh, “Affirm, If Possible,” *Supreme Court Historical Society Quarterly* 18 (1997): 4–5.

