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John Q. Barrett

### **“One Good Man”: The Jacksonian Shape of Nuremberg\***

Robert H. Jackson (1892-1954) was a Justice of the Supreme Court of the United States when President Truman asked him in April 1945 to take on, and Jackson accepted responsibility to be the chief United States prosecutor of Nazi war criminals. The International Military Tribunal proceedings that commenced seven months later in Nuremberg, Germany – the first and, in public memory, *the* Nuremberg trial – are, like Jackson himself, well-known, especially to this audience of participants, witnesses and experts.

The Nuremberg story of Justice Jackson – he who was first among Allied equals at Nuremberg; he who was its architect – is not, however, merely a story of one man in the place where he spent a year trying criminal cases of enormous, and permanent, significance. Much of Jackson’s “Nuremberg” actually occurred elsewhere, in Jackson’s fifty-three years of living before Lord Geoffrey Lawrence gavelled the IMT trial proceedings to order on Tuesday, November 20, 1945.

#### **I. Jackson’s Preparation for Nuremberg**

The key component of Robert Jackson’s preparation for his role at Nuremberg was his deep reverence toward, and his expertise in, law itself. As a very young man, Jackson came to the law in 1910 primarily through training as an apprentice. A lawyer by 1913, when he was only twenty-one years old, he then worked for 20 years in his native New York State in private practice. Jackson’s legal experiences during those decades were full and diverse, including civil and criminal trial and appellate litigation, client counseling, sophisticated business matters, government regulation, municipal lawyering, regional and national professional organizing, political party service, and involvements in state government. In all of this, Jackson interacted with many, but he ran primarily his own shop, doing most of his investigating, writing, negotiating and advocacy. In a quick span of years, Jackson rose to prominence across his state and even nationally, becoming a member of the American Law Institute and a leader in the American Bar Association.

Attorney Robert H. Jackson of western New York State was not merely an American domestic figure, however. Jackson’s early years and prosperity soon brought international travel that greatly expanded his range of contacts, and experiences. In 1924, he was part of an American Bar Association trip to England. During this trip, Jackson began an acquaintance with former Supreme Court Justice, near president, Secretary of State and future Chief Justice Charles Evans Hughes. This trip also took Jackson for the first time to Middle Temple in London, in which one of his ancestors, who later immigrated to the United States, had been born. This trip to England also gave Jackson an initial exposure to Lord Chancellor Richard Haldane, who in many ways became a Jackson role model and influence in later years.

As Jackson developed this deep intellectual, personal, practical and expansive engagement with law, he also pursued a formative political path. He had an acquaintance with Franklin D. Roosevelt beginning in Albany in 1911, when Jackson was a law student and Roosevelt was a freshman state senator. Over the next two decades, that acquaintance developed as Roosevelt rose in the Wilson administration, to the New York governor’s mansion and ultimately to the White House, becoming a series of deepening political, policy and law involvements and a friendship.<sup>1</sup> After being deeply involved in FDR’s 1932 presidential campaign, Jackson paused a year before committing to join the New Deal in Washington. Ultimately, in early 1934, he was appointed by President Roosevelt,

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<sup>1</sup> See generally ROBERT H. JACKSON, THAT MAN: AN INSIDER’S PORTRAIT OF FRANKLIN D. ROOSEVELT (John Q. Barrett, ed., 2003).

confirmed by the Senate and joined the Treasury Department's Bureau of Revenue as assistant general counsel.

In federal government work, Jackson quickly rose to his own great successes. In spring 1935, he was the U.S. government's lead prosecutor in an American, domestic, civil law version of a "trial of the century": the tax evasion case against Andrew W. Mellon, the former Secretary of the Treasury and Ambassador to the Court of St. James's in London under Presidents Harding, Coolidge and Hoover. Although Mellon was defended aggressively by his attorney, the American Bar leader Frank Hogan, Jackson's cross-examination of the defendant and the sizeable judgment he won, garnered him nationwide press and name recognition.

Later in 1935, Jackson led the U.S. government's investigation regarding the finances and affairs of the recently-deceased "Match King" Ivar Kreuger. His International Match Company had collapsed spectacularly (it was the Enron of its day), leaving financial mysteries, creditors and business wreckage in the United States and abroad. Roosevelt sent Jackson to Europe that fall to investigate Kreuger's and the corporation's actual financial circumstances. This investigation took Jackson to Sweden, France ... and into Germany. Jackson's first visit to Germany occurred, in other words, in Hitler's third year in power. Jackson met there with the United States ambassador and many senior officials and got to observe National Socialism in its early governmental form.

From Treasury, Jackson moved on to the Department of Justice. Over the next few years, Roosevelt appointed him first as an Assistant Attorney General heading the Tax Division, then Assistant Attorney General heading the Antitrust Division, then Solicitor General of the United States, then finally Attorney General. In each of these positions, Jackson had enormous responsibilities and was the Roosevelt Administration representative on the pressing issues, and in the leading legal and political battles, of the day. Jackson came to be known even more widely as a great talent and a personal favorite of President Roosevelt. Jackson was, by late 1937, one whom Roosevelt contemplated succeeding him in the White House when he retired to Hyde Park, New York in 1941 after two terms.

Events in Roosevelt's career, of course, took different turns, as did Jackson's own career. In 1941, Roosevelt appointed Jackson to the Supreme Court as an Associate Justice. During the next four Terms, Jackson wrote landmark opinions in civil liberties and other notable cases. Through his beautifully written opinions, Jackson demonstrated legal expertise and range and a level of personal independence that distinguished him from some of his colleagues on the Court. It became generally known that Roosevelt's intention was to appoint Jackson to serve as chief justice of the United States whenever Chief Justice Harlan Fiske Stone decided to step down. Thus Jackson was visibly, by spring 1945, in legal circles and beyond, in the United States and internationally, much more than "just" a Supreme Court justice. When new President Truman officially appointed Jackson on May 2, 1945, to prosecute Nazi war criminals, Jackson's stature and qualities themselves demonstrated the seriousness of the president's commitment to a path of law.

## **II. The Intellectual Seeds of Jackson's Nuremberg**

What Jackson did at Nuremberg has many intellectual origins, but three are particularly noteworthy:

First, Jackson's personal background was philosophically anti-war. During World War I, when Jackson was merely a young attorney based in western New York State, he was involved in regional politics and spoke regularly on many public issues. He advocated President Wilson's reelection in 1916 because "he kept us out of war." Jackson was deeply skeptical and critical in the first months of 1917, when the president's perspective on the European war changed. Unlike many of his contemporaries, Jackson did not enlist after war was declared in April 1917. He spoke loyally in support but kept his distance from actual war efforts. Two decades later, Jackson was deeply involved in President Roosevelt's reelection campaign. In August 1936, when FDR delivered his famous "I Hate War" speech at Chautauqua Institution in Jackson's adult home region of Chautauqua County, New York, Jackson was present at the president's side, mouthing along with him that famous punch line -- which was, in its particular, a Roosevelt commitment to non-involvement in the new civil war in Spain.

Second, as a Roosevelt administration executive branch official in the late 1930s until summer 1941, Jackson was deeply involved in numerous projects that were important responses to, and legal condemnations of, Germany’s aggressive war making. In summer 1940, Jackson as attorney general provided to President Roosevelt the ultimate legal justification that undergirded and justified his deal with Prime Minister Churchill that provided 50 over-aged United States destroyers in exchange for naval base leases on various Atlantic territories. From this Destroyer Deal came the larger Lend-Lease arrangements, again built on policy and legal work by Jackson, with Great Britain and with the U.S.S.R. In 1941, Jackson wrote and prepared to deliver in Havana, Cuba, a speech to the Inter-American Bar Association that attacked Germany’s aggressive and illegal war making.<sup>2</sup> This speech, which Jackson finalized after discussing it privately with President Roosevelt on his yacht off the coast of Florida, in fact was not delivered by Jackson – rough waters and bad weather made it impossible for the seaplane that would have taken Jackson to Cuba to land near the yacht, but the speech made it there without Jackson and was delivered in his name by a prominent U.S. diplomat. This widely-reported speech formed an intellectual framework for Roosevelt Administration policy through the rest of that year and then, as war came to the United States, during later planning for prosecuting the perpetrators of such aggression.

Third, Jackson’s work and career involved regular and committed engagement with issues that we today would call human rights questions. In the Department of Justice, he was deeply involved in civil liberties policy determinations. On the Supreme Court, he penned the *West Virginia State Board of Education v. Barnette* opinion that invalidated compelled flag salutes in public schools, protecting Jehovah’s Witness schoolchildren in their freedom of belief and conscience.<sup>3</sup> Jackson also stood away from the majority of the Court, for human rights in clashes with executive power, military imperatives and his own president and friend. The most notable of these moments is Jackson’s dissenting opinion in *Korematsu v. United States*, where he branded as unconstitutional the military orders of 1942 that had excluded Japanese Americans, including tens of thousands of U.S.-born citizens, from the west coast regions where they lived and worked.<sup>4</sup>

### III. Jackson’s Nuremberg Assignment: The Law/Trial Path

When Japan attacked the United States on Sunday, December 7, 1941, Jackson had been a justice of the Supreme Court and thus out of the executive branch for only six months. He felt immediately that the legal work of the Court had become much less important than the military work of the nation and its allies. Jackson’s feelings of discontent crystallized in the very first week after Pearl Harbor when he and the other justices heard oral arguments in the now long-forgotten *Winchester Country Club* and *Merion Cricket Club* cases.<sup>5</sup> The weighty issue they raised was whether country club members’ annual payments constituted “dues and membership fees” and were therefore subject to federal taxation. Jackson railed in the justices’ private conference about the stupidity of giving a moment’s thought, at that juncture, to such a pedestrian issue – which led Chief Justice Stone to assign responsibility for writing those Court opinions to Jackson. In this context, Jackson volunteered to President Roosevelt, early and often, that he would leave the Court and return to the executive branch in any capacity where he could be useful.

Roosevelt appreciated Jackson’s offer and conversed with him occasionally and informally about various war-related matters, but the president recognized, and he told Jackson, that Court-work had permanent importance. FDR also told Jackson to stay put because of the president’s intention eventually to elevate Jackson to chief justice. Thus, Jackson stayed put on the Court, although his reading and thinking did gravitate toward international topics and matters as time permitted. In part, this may have

<sup>2</sup> See Robert H. Jackson, *International Order*, 35 AM. J. INT’L L. 348 (1941) & 27 A.B.A. J. 275 (1941).

<sup>3</sup> 319 U.S. 624.

<sup>4</sup> See 323 U.S. 214, 242-48 (1944) (Jackson, J., dissenting); see generally John Q. Barrett, *A Commander’s Power, A Civilian’s Reason: Justice Jackson’s Korematsu Dissent*, 68 L. & CONTEMP. PROBS. 57 (2005).

<sup>5</sup> *White v. Winchester Country Club*, 315 U.S. 32 (1942); *Merion Cricket Club v. United States*, 315 U.S. 42 (1942).

reflected Jackson's understanding of Roosevelt's vague references to tasks he would want Jackson to perform after the war was won.<sup>6</sup> Without in any way meaning to compare Andrew Mellon or other large domestic legal challenges to the criminality of Hitler and the waging of aggressive world war, Roosevelt and his other close advisers knew and valued Jackson as an excellent lawyer of great stature – he would be their counsel of choice for any challenging legal project. Thus even very early on, Roosevelt contemplated Jackson performing a task on the order of what ultimately became his Nuremberg assignment.

During the War, President Roosevelt made general, public commitments that the German perpetrators of this criminal calamity would, following their military defeat, be tried and punished through legal processes rather than summarily executed. This decision emerged from a battle within the Roosevelt administration, pitting principally Secretary of War Henry L. Stimson advocating legal prosecution against Secretary of the Treasury, Henry Morgenthau Jr., advocating summary punishment. FDR first committed generally to prosecution but then endorsed Morgenthau's proposal for extreme and extralegal measures, only to be persuaded by Stimson to rescind that decision and return to the law path. In February 1945, Roosevelt, Stalin and Churchill at Yalta reiterated their general commitment to war crime prosecution. They discussed the topic in no detail, however, referring it instead to foreign ministers for further negotiation and implementation. That work, including detailed negotiations that Roosevelt's White House counsel Samuel I. Rosenman was having with counterparts in London, was ongoing when Roosevelt died on April 12, 1945.

Although Jackson in that early April was barely aware of these diplomatic processes, he was by that time organizing and advancing his own thinking about post-war prosecutions of war criminals. On April 13, 1945, literally the night after Roosevelt's sudden death in Warm Springs, Georgia, Jackson delivered the principal speech at the annual meeting of the American Society of International Law.<sup>7</sup> Jackson addressed the topic of war criminals and starkly delineated the choice between executive disposition and trial. Jackson declared that he would not presume to say which option should be chosen – that was, in his view, an executive decision that a new president now would have to make. When Jackson mentioned President Roosevelt, he departed from his prepared text and noted tearfully that events now would be proceeding on a course that he had not anticipated even a day earlier, meaning a new president. But as to the trial option, Jackson declared that a decision to pursue trials should mean committing the United States to conducting real trials, by which he meant American due process standards of public proceedings, specified charges, defense counsel, discovery of evidence, a burden of proof beyond a reasonable doubt on prosecutors, and an independent judicial decision-maker.

In the days following Jackson's ASIL speech, Judge Rosenman returned to Washington, first for the Roosevelt funeral and then to brief President Truman on pending matters. One topic of their discussion was Rosenman's negotiations with the British regarding the fate of captured German leaders following their imminent defeat. Based on discussions with Rosenman, Truman quickly decided to pursue the law path – the Stimson, rather than the Morgenthau, path – just as Roosevelt had. This meant that the project would require more than armed force. Through Rosenman, Stimson and his deputy John J. McCloy, the recommendation reached Truman that Justice Jackson, among other possibilities, was a person of the stature and ability to do this job for the United States. Truman, who knew Jackson quite well and held him in very high regard, agreed to give this project this leader. He dispatched Rosenman to the Supreme Court, where he opened discussions and on the president's behalf ultimately offered the job to Jackson. In direct discussions over a matter of a few days, Jackson and Truman reached a detailed understanding on their shared vision of real prosecution in real trials of Nazi war criminals. On May 2, 1945, Truman announced publicly Jackson's appointment to serve as United States Chief of Counsel.

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<sup>6</sup> See ROBERT H. JACKSON, *supra* note 1, at 107: "He [FDR] said that it was quite possible ... that when the peace came and the time for settlement arrived, there would be important things that I was particularly qualified to do. What it was he did not say, and of course I did not ask. The matter dropped at that."

<sup>7</sup> See Robert H. Jackson, *The Rule of Law Among Nations*, 39 AM. SOC'Y INT'L L. PROC. 10 (1945), 31 A.B.A. J. 290 (1945), 19 TEMP. L.Q. 135 (1946) & 39 AM. J. INT'L L. 533 (1945) (excerpt).

#### IV. Jackson’s Getting to Nuremberg

When Jackson publicly accepted President Truman’s appointment, he believed that he was accepting a summer job that he could complete before the next Supreme Court Term would begin on the first Monday in October. The job, as Jackson understood it at the start, involved preparation and prosecution of the principal war criminals. He would, in other words, take ready-to-go cases based on overwhelming evidence, master them quickly and try them swiftly to verdicts. Given the assurances of the War Department and the obvious criminality of the Nazi defendants, Jackson believed that such trials were plausible, and that they were destined to be successful.

What Jackson learned in his first weeks on the job, performed while also juggling his end-of-term work on the Supreme Court, was that he had been sold a bill of goods. There were no cases ready to be tried. In fact, there was very little evidence that had been collected. Most shocking for the objective of international prosecution was the absence of any diplomatic agreement among the Allies of how to proceed – Jackson quickly learned that significant diplomatic work needed to be done before any prosecution could take place. He therefore arranged formally to be assigned the task of negotiating the diplomatic agreement. Within weeks, all negotiations, including those that had occurred at the United Nations conference in San Francisco, were consolidated as Jackson’s responsibility. On June 18, 1945, he embarked for Europe to negotiate with his British, Soviet and French counterparts.

What Jackson accomplished first, and personally, in this enormous, unexpected task was the public definition of an intellectual framework for prosecuting Nazi war criminals. Jackson’s vision is embodied in the June 6, 1945-report that he delivered to President Truman following an initial organizational trip to the European continent.<sup>8</sup> As Jackson’s report makes clear, an overriding concern of the prosecution project was to prevent resurgent Nazism in Germany. The legal framework for addressing this concern was a charge that the Nazi planning and perpetration of aggressive war and related crimes was itself criminal – in other words, it was conspiracy in the nature of that crime in United States law. Jackson also articulated a theory of bringing charges against specified organizations that had been key components of the Nazi governmental system. Jackson asserted that these organizations were central entities in the conspiracy, and that obtaining guilty verdicts against organizations in an initial trial would permit more efficient later prosecutions of their most culpable members. The Jackson model, in other words, envisioned the trial of an organization such as the Gestapo and, once its criminal guilt was adjudged, prosecutions of individual Gestapo members limited to their roles in that now-established criminal organization. Jackson’s vision at this very early moment also included a preferred mode of trial evidence: the Nazi individuals and organizations would be prosecuted based not on the fallible and suspect testimony of cooperating individuals, but rather on authenticated, enormously detailed captured Nazi documents – in other words, on proof from the defendants’ own offices and fountain pens.

Following his report to Truman and the completion of the Supreme Court’s term, Jackson decamped to London to do the actual negotiating with his Allied counterparts. He went there with the full authority of the United States, which President Truman had communicated anew in June when he received and embraced Jackson’s initial report. Over the ensuing seven weeks, Jackson accomplished for the United States and its Allies a diplomatic feat that is, in the recollections of “Nuremberg” as a trial in Germany, appreciated far too little. Meeting over many, many hours in Church House at Westminster Abbey, Jackson and the Allies negotiated the details and agreed on the legal framework that became the IMT trial at Nuremberg.<sup>9</sup> Their starting-point was four significantly differing legal systems and at least two divergent views – the American-British view versus the Soviet perspective – of what a war criminal trial actually would be. In the western view (and on this the British quite quickly deferred to the American lead), the trial would be of the type that Jackson had described three months earlier to the

<sup>8</sup> Report to the President by Mr. Justice Jackson, June 6, 1945, *reprinted in* U.S. DEPARTMENT OF STATE, INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON, 1945, at 42-54 (Publication 3080, released Feb. 1949).

<sup>9</sup> The full London Conference proceedings and other related documents were published as U.S. DEPARTMENT OF STATE, INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON, 1945 (Publication 3080, released Feb. 1949).

American Society of International Law: it would be a real trial, not a show-trial, with prosecutors carrying a significant burden of proof at trial against defendants, who had adequate and independent defense resources, in a proceeding before an independent adjudicator, all of which meant that acquittal was a real prospect for each defendant. In the Soviet view, by contrast, these trials were to be conducted against persons whom the Allies had already declared to be guilty, which meant a view of the trial function as revealing crimes as a step preliminary to imposing foreordained punishments.

Jackson's authority to insist on the international framework he envisioned or, failing to persuade allies of his course, to abort the international effort and instead to go it alone in U.S.-only prosecutions, was reconfirmed near the end of the London negotiations. In late July 1945, Jackson flew to Berlin and traveled to Potsdam, where President Truman was meeting with his counterparts Stalin and Churchill (and then, after the British election and the Conservative Party's defeat, with new Prime Minister Clement Attlee). Each of the new "Big Three" was accompanied in Potsdam and assisted by his foreign minister and a large supporting contingent. Jackson met with the new U.S. Secretary of State, James F. Byrnes, who had been Jackson's Supreme Court colleague during his first year on the Court and was a peer and a friend. Byrnes at Potsdam reconfirmed Jackson's full authority to conclude the London negotiations for the United States in any fashion he saw fit.

Back in London and within days, Jackson used this authority – his ultimate ability to walk away from the international effort – to win Soviet agreement to Jackson's trial model. On August 8, 1945, Jackson and his Allied counterparts signed the London Agreement and Charter.<sup>10</sup> It defined the crimes that would be prosecuted by the Allies and created the International Military Tribunal that would adjudicate cases against Nazi defendants. (Within days, of course, Japan surrendered following the U.S. atomic bombings of Hiroshima and Nagasaki, and this unexpectedly early Allied victory in the Pacific and full conclusion of World War II explains why the London Agreement did not, even in its time, attract the global notice it deserved.)

### V. Jackson at Nuremberg

On November 21, 1945, Justice Jackson went to the podium in courtroom 600 at the Palace of Justice in Nuremberg and delivered his opening statement on behalf of the United States. Jackson was the first of the four prosecutors to speak, and his presentation took more than half the day. In eloquent terms, demonstrating his writing prowess and the drafting and redrafting that produced it, he canvassed in one speech the full span of Nazi criminality. He reviewed in detail the evidence against the individuals who sat in the dock and located them within the system of culpability and accountability that ran upwards to the would-be defendants who were not present, including Hitler, Himmler and Goebbels. Jackson also located the individual crimes within the overall conspiracy to engage in aggressive war, the supreme crime, explaining a theory of that crime as the taproot that made the further war crimes and crimes against humanity possible. For Jackson and the Allies generally, this framework of conspiracy to breach the peace as the principal crime connected the individual defendants to the culpable Nazi organizations, and it addressed this culpability in a public venue that would, it was hoped, help to thwart any resurgent Nazism among the German people.

After the American conspiracy case was completed in late 1945, Jackson turned personally to the completion of two additional tasks during the many remaining months of trial. He first presented the detailed argument defending the criminal charges against the Nazi organizations, ultimately persuading the Tribunal to proceed with their trial and, in the end, to return guilty verdicts against some of the organizations.

Jackson also participated actively during the 1946 trial months in cross-examining selected defendants and principal defense witnesses. Most famous, and controversial, was his cross-examination of Hermann Göring, the *de facto* lead defendant. The general public impression of this examination is

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<sup>10</sup> See *id.* at 420-28.

that Jackson was less than successful, and indeed that Göring got the better of Jackson in their verbal exchanges.

Although the trial record, films and audiotapes demonstrate that this impression is accurate to a point, the belief that Göring bested Jackson reflects, I believe, an over-emphasis on a few reporters' partial, if harshly judgmental, accounts, their unrealistic expectations for the examination, their disproportionate focus on Jackson's rough patches and, at the bottom line, their overlooking the decisive admissions that Göring made. In other words, while there is no question that Jackson's cross-examination of Göring got off to a bumpy start, that some questions were compound or just loose, that Jackson wasted time arguing to the Tribunal objections that to us seem trivial, and that Jackson in spots got flustered, negative reportage and impressions fail to notice what the examination achieved: Göring's many admissions and his authentications of damning documentary evidence. As the United States judges Francis Biddle – Jackson's longtime friend and colleague and then, at Nuremberg, his judicial antagonist to a degree – and John Parker put it privately to Jackson shortly after he completed this cross-examination, the prosecution was getting on better than they had thought possible.

Negative reporter accounts of Jackson's cross-examination of Göring seem to reflect particularly unrealistic, but experience-based, expectations that Jackson would knock this witness out of the ring. Before Göring took the stand, his lawyer Dr. Otto Stahmer had opened his defense case by calling two principal defense witnesses, German Air Force General Karl Bodenschatz and General Field Marshal Erhard Milch, to testify. In each instance, Jackson handled the cross-examination and was extremely effective. Indeed, Jackson's cross-examination elicited from Bodenschatz and Milch such strong evidence against Göring that Dr. Stahmer, almost in a panic, decided to dispense with further witnesses and instead to rush Göring himself onto the stand unexpectedly. Reporters, witnessing all of that, probably expected more of the same from Jackson, overlooking Göring's brilliance, his restored health since jailers had weaned him from drugs and his attitude of fatalistic confidence without remorse. They also did not anticipate the Tribunal's decision, surely a fair one, to let a defendant explain, even quite discursively, his answers to a prosecutor's questions.

In the later months of trial, Jackson personally handled cross-examinations of other defendants and witnesses. Two of these – Hjalmar Schacht, former head of the Reichsbank, and Albert Speer, former Hitler confidant, architect and armaments minister – were notably challenging. Although each examination is a complex and mixed story, Jackson believed that he succeeded each time in establishing the defendant's guilt beyond a reasonable doubt. The Tribunal agreed as to Speer, but Schacht was acquitted.

Jackson's final trial contribution at Nuremberg trial was his July 26, 1946, closing address. In this speech, again written, edited, rehearsed and perfected by Jackson himself, he canvassed the overwhelming evidence that he and his Allied counterparts had presented. Interestingly, although he argued vehemently for verdicts of guilty, Jackson advocated no particular punishment for any of the defendants. Some combination of his own disdain for execution and respect for judicial independence seems to have reinforced Jackson's determination to be only, in this moment, a prosecutor, summarizing the evidence presented and arguing for the verdicts he believed it justified legally.

## VI. Jackson's Nuremberg Successes

In the complex story of Nuremberg, Jackson's achievements are at least four-fold:

First, Jackson's accomplishment was the legal task completed. He demonstrated, even to skeptical audiences at home and abroad, that this trial had indeed lived up to high standards of fairness and due process. One example of this developing reaction was the move that Judge Charles Wyzanski, one of Jackson's friends and former colleagues and one of his most thoughtful early critics, made during the course of the Nuremberg trial year. Judge Wyzanski, with whom Jackson had argued and won the Social Security cases in the Supreme Court in the late 1930s<sup>11</sup> and who in 1941 had been appointed a

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<sup>11</sup> See *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).



Federal District Judge in Boston, spoke privately and then wrote publicly, near the start of the Nuremberg trial, about his deep misgivings about its legality.<sup>12</sup> Months later, after evaluating the record of what actually had transpired in the Palace of Justice, Wyzanski, with private grace and public courage, reassessed and to a large degree recanted his earlier criticism by publishing these words in late 1946:

“...[T]he outstanding accomplishment of the trial, which could never have been achieved by any more summary executive action, is that it has crystallized the concept that there already is inherent in the international community a machinery both of the expression of international criminal law and for its enforcement. ...

No doubt such an *ad hoc* method is not so satisfactory as a covenant made by all the powers in advance of wrongful conduct.... But until the world is prepared to follow the more satisfactory method, it has every reason to be profoundly grateful to Mr. Justice Jackson and his associates, who, in the face of enormous practical difficulties and widespread theoretical criticisms, persisted until they demonstrated the justice of the *ad hoc* method adopted at Nuremberg.”<sup>13</sup>

Jackson himself summarized the legal task well completed, including its procedures, evidence, judgments and relative speed, in his October 7, 1946, final report to President Truman.<sup>14</sup>

The second success Jackson had at Nuremberg is the building of the historical record that is embodied in the forty-two volume Nuremberg trial transcript and millions of pages of supporting documents. As Jackson had envisioned from the beginning, this documentary record, largely captured from the Nazis and authenticated by them during interrogations and at trial, demonstrates without ambiguity the scope, complexity, and personal perpetration of myriad crimes. It took subsequent decades for people to understand from this record the enormity of the crimes perpetrated by the Nazis, including the magnitude and details of the Holocaust. This comprehension might not have been possible, and “Holocaust denial” might be more than a crackpot venture today, had Jackson not led the Allies on the path of gathering and using documentary evidence to prove the guilt of the individual and organizational defendants.

Another Jackson success at Nuremberg is what he recognized even then as its durability as a challenge. In the remaining eight years of his life, Jackson wrote, spoke and thought constantly about Nuremberg while also handling his sizeable work as a Supreme Court Justice. He regarded his time at Nuremberg as the most important work of his life, and he viewed it as work that was undone in the sense of having a meaning that would continue to be worked out over the course of many years. In Jackson’s phrase, the meaning of Nuremberg would start to become clear in the “century run,” and it would turn on the uses and building and commitment that future generations brought to what he started.

A final Jackson success was the one that connects him personally to the bottom line of the project: He got the world, quite literally, to Nuremberg, and to all that that achievement has come to mean in six decades since his day. Another leading lawyer might have been able to do something similar, laudable and lasting, of course. But that doing of Nuremberg would have required, in that hypothetical alternative to Jackson, the uncommon qualities that made him, by 1945, such a special fit for this enormous, personal task.

And yet that may overstate the need. President Truman instead may have had it exactly right when he offered a much simpler description in late summer 1945 of what Jackson was, in his performance of this task, which made him the right man to pursue all the challenges that became the achievements of Nuremberg. On Wednesday, September 5, 1945, Justice Jackson met with the president in the White House. The London Agreement had been reached and the project of prosecuting leading Nazi war

<sup>12</sup> See Charles E. Wyzanski, Jr., *Nuremberg – A Fair Trial?*, ATLANTIC MONTHLY, Apr. 1946, reprinted in CHARLES E. WYZANSKI, JR., WHEREAS – A JUDGE’S PREMISES 164 (1965). Judge Wyzanski’s article originated in his December 15, 1945, lecture to the American Academy of Arts and Sciences.

<sup>13</sup> Charles E. Wyzanski, Jr., *Nuremberg in Retrospect*, ATLANTIC MONTHLY, Dec. 1946, reprinted in CHARLES E. WYZANSKI, JR., WHEREAS – A JUDGE’S PREMISES 180 (1965).

<sup>14</sup> Report to the President by Mr. Justice Jackson, Oct. 7, 1946, reprinted in U.S. DEPARTMENT OF STATE, INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON, 1945, *supra* note 9, at 432-40.

criminals was then in transition to Germany, where individuals and organizations would be indicted and then the international trial would commence. Jackson, in this meeting, described for the president the kinds and quality of evidence that the Allies had gathered for use at trial, including some that Jackson personally had just obtained from the Vatican following his personal meeting with Pope Pius XII. President Truman told Jackson of his inclination to appoint Francis Biddle, recently fired as Attorney General of the United States and before that the Solicitor General, who had served under Attorney General Jackson, as the chief American judge at Nuremberg. Truman gave Jackson an opportunity to object, and thus to veto, the Biddle appointment, but Jackson did not.

And then, after the meeting was done, President Truman jotted a few words on his daily appointment page alongside the entry noting this scheduled meeting. Jackson had, Truman wrote, already “[m]ade a great contribution to International Law.” And then the President summarized what Jackson was – which is all that the world will ever need to accomplish something like Nuremberg – by writing three more words: “One good man.”<sup>15</sup>

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<sup>15</sup> President Truman’s handwritten note on his Appointment Sheet, Sept. 5, 1945, in PSF Box 82, Harry S. Truman Library, Independence, MO, *quoted in* OFF THE RECORD: THE PRIVATE PAPERS OF HARRY S. TRUMAN 64 (Robert H. Ferrell, ed., 1980).