

2004

Justice Jackson: A Law Clerk's Recollections A Tribute to Justice Robert H. Jackson

Phil C. Neal

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Phil C. Neal, "Justice Jackson: A Law Clerk's Recollections A Tribute to Justice Robert H. Jackson," 68 Albany Law Review 549 (2004).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

JUSTICE JACKSON: A LAW CLERK'S RECOLLECTIONS

*Phil C. Neal**

I appreciate the opportunity to take part in this event celebrating the life and work of Justice Jackson. Among other things, it gives me a chance to acknowledge publicly my own debt for one of the great experiences of my life. I especially want to commend the editors of the *Albany Law Review* for taking the initiative to do this.

Albany Law School may very well take pride in the fact that Robert Jackson's legal career began here—or almost began here. He had, in fact, begun his legal career a year before, when he clerked part-time in the Jamestown law office of his cousin, Frank Mott. He did that, incidentally, at the same time that he was taking what amounted to a postgraduate year at Jamestown High School. It was in that year that he came under the influence of Ms. Mary Willard, an English teacher who must have been a wonderful teacher and who plainly was one of the most important influences in Robert Jackson's life.

He spent only one year here at Albany Law School, but managed to complete the two-year requirements in that time, and followed that year with another year of law office apprenticeship. How much credit Albany Law School can claim for Robert Jackson's accomplishments in the law would be somewhat hard to say, but what we can say with assurance is that it did nothing to suppress his native abilities, and I believe that is no small claim.

* Prior to the founding of Neal, Gerber & Eisenberg in 1986, Mr. Neal was Dean of the University of Chicago Law School from 1963 to 1975 and a member of its faculty until 1986. Before joining the University of Chicago faculty, he practiced law in San Francisco with the firm of Pillsbury, Madison & Sutro and then taught at Stanford Law School. While Dean of the University of Chicago Law School, he served as executive secretary of the Coordinating Committee of the United States District Courts, charged with administering the massive volume of Electrical Equipment antitrust cases. He also served as chairman of the White House Task Force on the Antitrust Laws appointed by President Lyndon Johnson.

Mr. Neal received his AB degree *summa cum laude* from Harvard College in 1940 and his LLB degree *magna cum laude* in 1943 from Harvard Law School, where he was President of the *Harvard Law Review*. He was law clerk to Justice Robert H. Jackson in the 1944 and 1945 Terms of the U.S. Supreme Court. Mr. Neal was admitted to the Illinois bar in 1943 and the California bar in 1945. He has argued appeals in the U.S. Supreme Court and in the courts of appeals for the Fifth, Seventh, Eighth, Ninth and Tenth Circuits.

I first met Justice Jackson in the winter of 1943. I was still in law school and I received a letter from him inviting me to come to Washington to discuss the possibility of a clerkship. The process of selecting Supreme Court law clerks was much less elaborate in those days. Most of the Justices used some law school professor to make suggestions or relied on a particular court of appeals judge to help them select a clerk. Today, Supreme Court law clerks almost invariably come from the ranks of court of appeals clerks and the selection process has become very competitive. I am told that applicants nowadays may spend weeks preparing for an interview with a member of the Court, much like preparing for a bar exam. Happily for me, I never went through such a process. A classmate and good friend of mine was William Jackson, the Justice's son. Justice Jackson had discussed the matter with Bill. So, I went down and had a very enjoyable conversation with the Justice and, of course, accepted his offer on the spot.

Many years later, I had the opportunity to introduce Justice Jackson to an outstanding student of mine at Stanford Law School who I thought well qualified to be his clerk. I do not think the Justice hesitated very long that time either in deciding to take the student as one of his clerks for the next Term (by that time, there were two law clerks per Justice). The student, by the way, was William Rehnquist.

My impression is that Justice Jackson never agonized much over selecting a law clerk. As with so much else in his life, he acted with a sure sense of his own judgment and willingness to risk being wrong. It was also one manifestation of the self-reliance that was one of his strongest traits. Framed on his mantelpiece was a rendering of [Rudyard] Kipling's line: "He travels the fastest who travels alone."¹ The truth is that Justice Jackson did not really need a law clerk. Unlike most other Justices I have known or heard about, Jackson did not use law clerks to write drafts of opinions. He made some revisions in his drafts in response to a law clerk's comments, but nearly every word of his opinions came from his own pen. I do not think there are many Justices about whom the same may be said. The one exception was that once or twice during a clerkship, the Justice would assign the writing of an opinion to the

¹ EUGENE C. GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 48 (1958) (citation omitted).

law clerk. I think his purpose was mainly to give the clerk the experience, and to enhance the law clerk's sense of participation in the enterprise. I must say, the Justice was as deferential to the law clerk's composition as the law clerk was to his. In drafts I composed, I recall only his addition of two or three phrases, inserted to give the draft his distinctive imprint.

There were other ways in which he made his law clerk feel more like a junior partner than an employee or minion. If one were visiting in some other clerk's office there would often be the interruption of a buzzer, which meant "Come here...right now." If there was a buzzer in my office I never knew it. Justice Jackson's invariable habit was to walk from his office through his secretary's adjoining office—which was a big office—and come to my door to say: "Got a minute?" That habit was characteristic of his whole attitude toward other people in life. He had no trace of aloofness or self-importance.

I must say that such an easy person-to-person relationship with a law clerk was not universal in the Court. One of my close friends, who was a clerk to a Justice whom I need not name, once informed his Justice that he was going to be married on a forthcoming Saturday and would be grateful if he could take the Sunday off. The reply was: "Sonny, you are in the big leagues now!"

Justice Jackson's typical working procedure was to produce a more or less finished draft of an opinion and give it to his clerk with an invitation to comment. One learned to be as prompt as possible with any suggestions for revision, because once he had a draft that he was pretty well satisfied with he was anxious to get the reactions of other members of the Court. He might say: "You've got a good point, but let's get it printed and send it around to see what the others say." Then, when four concurrences came in fairly promptly, as not infrequently happened, he would be likely to say: "Let's not rock the boat with changes now."

Very different, however, was his procedure with a few major cases in which his opinions went through many drafts and became the subject of fairly numerous exchanges—written and oral—with his law clerk. The two efforts that stand out most in my mind were his opinion for the Court in the Anthony Cramer treason case,² a wonderful opinion that provides a great historical summary, and his

² See *Cramer v. United States*, 325 U.S. 1 (1945).

dissenting opinion in *Hope Natural Gas*,³ in which he advanced a novel theory for the regulation of gas rates.

The most striking aspect of Justice Jackson's work, of course, was the extraordinary attractiveness of his prose. How he came to have such a talent is a fascinating question, although surely his year of exposure to Ms. Mary Willard must account for much of his appreciation of good prose and familiarity with English literature. I suspect that he discovered early on that he had a gift for graceful and vivid expression and used every opportunity to cultivate it. Certainly, there was never anything strained or studied about his composition, and the easy flow of his prose is shown by the clean handwritten drafts he produced, in the beautiful handwriting that seems never to have changed from his early adulthood. Tom Loftus tells me it is genetic.⁴

Justice Jackson's striking analogies, aphorisms, paradoxes and antitheses were so much a part of all his writing that isolated examples cannot convey the full impact of his writing style. As one simple example, he began one opinion by saying: "We granted certiorari, and in this Court the parties changed positions as nimbly as if dancing a quadrille."⁵ Square dancing was one of his pastimes, as was horseback riding. In another opinion, he said: "Men are more often bribed by their loyalties and ambitions than by money,"⁶ a characteristic aphorism. He could be at his best when he turned his wit on himself, as in disowning a prior position: "except for any personal humiliation involved in admitting that I do not always understand the opinions of this Court, I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday."⁷ And, as that quotation shows, he was not averse to sardonic comment on the opinions of the majority. In another dissent, he said: "I do not know whether it is the view of the Court that a judge must be thick-skinned or just thickheaded, but nothing in my experience or observation confirms the idea that he is

³ Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 650-52 (1944) (Jackson, J., dissenting) (criticizing the majority opinion for failing to provide a clear test for determining whether a rate order is reasonable under the Natural Gas Act).

⁴ Mr. Loftus is Justice Jackson's grandson. See Thomas A. Loftus III, *That Baby: Justice Jackson's Writings About a Grandchild, and Vice Versa*, 68 ALB. L. REV. 37 (2004).

⁵ Orloff v. Willoughby, 345 U.S. 83, 87 (1953).

⁶ United States v. Wunderlich, 342 U.S. 98, 103 (1951) (Jackson, J., dissenting).

⁷ Massachusetts v. United States, 333 U.S. 611, 639-40 (1948) (Jackson, J., dissenting).

insensitive to publicity.”⁸ Or again: “The Court’s reasoning adds up to this: The Commission must be sustained because of its accumulated experience in solving a problem with which it had never before been confronted...I give up.”⁹

He was most eloquent, however, when his prose was put at the service of fundamental values. The inspirational power of his statements was comparable to the wartime speeches of Winston Churchill, with whom I think he had a number of other traits in common. Memorable examples are his opinion for the Court in the flag salute case¹⁰ and his dissenting opinion in *Korematsu v. United States*,¹¹ the Japanese relocation case. And, of course, his opening and closing addresses to the War Crimes Tribunal at Nuremberg, which have made available to all the essence of the massive record of the Nazi crimes that the Nuremberg trial created.¹²

I cannot attempt to summarize Justice Jackson’s judicial philosophy, but let me comment briefly on certain prominent themes that made a deep impression on me during my time with him. One was his constant concern for the practical consequences of judicial decisions. This concern was brought home to me early on by his opinion in a rather routine tax case. His experience litigating tax cases for the government had convinced him that whenever the Supreme Court tried to deal with the intricacies of tax law, it was likely to make a mess of it. He had asked my predecessor law clerk, John F. Costelloe, for a memorandum on the scope of review of Tax Court decisions. John’s memorandum concluded that the scope of review was no different from the review of any other lower court decisions. John told me that after reading the memorandum,

⁸ *Craig v. Harney*, 331 U.S. 367, 396 (1947) (Jackson, J., dissenting) (disagreeing with the majority’s finding that press coverage of a criminal trial had not created a clear and present danger to the administration of justice).

⁹ *SEC v. Chenery Corp.*, 332 U.S. 194, 213–14 (1947) (Jackson, J., dissenting).

¹⁰ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (striking down on First Amendment grounds a regulation that required school children to salute the flag and recite the pledge of allegiance).

¹¹ 323 U.S. 214, 242 (1944) (Jackson, J., dissenting) (criticizing an executive order that excluded individuals of Japanese ancestry, including American citizens, from a certain “Military Area” in California).

¹² See Opening Statement for the United States of America by Robert H. Jackson, Chief of Counsel for the United States at the Palace of Justice, Nürnberg, Germany, November 21, 1945, reprinted in ROBERT H. JACKSON, *THE NÜRNBERG CASE* 30 (1947); Closing Address, Delivered by Robert H. Jackson, Chief of Counsel for the United States, at the Palace of Justice, Nürnberg, Germany, July 26, 1946, reprinted in ROBERT H. JACKSON, *THE NÜRNBERG CASE* 120 (1947).

Justice Jackson had walked into his office with the memorandum in hand, chuckling, and said: "Well, John, that may be the law now but it won't be for long if I can help it." The opportunity came when he was assigned the opinion in a case known as *Dobson v. Commissioner*.¹³ Justice Jackson's opinion for the Court ruled, in effect, that Tax Court opinions should be reversed only for plain errors of law, much like an administrative agency.

In another case, a majority of the Court overturned a seventy-five year-old precedent to bring the insurance business within the authority of Congress to regulate interstate commerce.¹⁴ Although Justice Jackson was not averse to overruling precedents, he dissented in this instance because the decision would have widespread effects in upsetting an established regulatory system built on the old assumption that insurance was not commerce¹⁵—he thought the reform should be left to Congress, which could make the necessary adjustments.¹⁶ Actually, Congress confirmed his worries by promptly restoring to the States most of the authority the Court's decision would have taken away.¹⁷

A second trait that made a deep impression on me was the value he placed on fairness as an overriding principle. He had been a confirmed New Dealer and undoubtedly was strongly sympathetic to the New Deal's labor legislation. But his sense of fairness took over when he confronted overly zealous interpretations of those laws. In one case, the Labor Board had condemned an employer for enforcing a union shop agreement that the employer had agreed to only because the Labor Board itself had encouraged the employer to accept it. This scenario was very offensive to him. The majority opinion upholding the Labor Board conveniently omitted those facts, a circumstance that added to the indignation with which Justice Jackson dissented.¹⁸

His indignation was even greater in the famous portal-to-portal

¹³ 320 U.S. 489, 502 (1943) (holding that "[i]n deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter.").

¹⁴ *United States v. S.E. Underwriters Ass'n*, 322 U.S. 533 (1944).

¹⁵ *See Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868).

¹⁶ *S.E. Underwriters*, 322 U.S. at 593 (Jackson, J., dissenting in part) (arguing that Congress, not the judiciary, should institute federal regulation of the insurance industry).

¹⁷ 15 U.S.C. §§ 1011–15 (popularly known as the McCarran-Ferguson Act).

¹⁸ "A more complete statement of the facts than is found in the Court's opinion is necessary to disclose the reasons why...I dissent." *Wallace Corp. v. NLRB*, 323 U.S. 248, 257 (Jackson, J., dissenting).

case,¹⁹ in which a bare majority of the Court voted to accept a definition of the work week for coal miners that had been repeatedly rejected in arriving at collectively-bargained wage rates. Justice Jackson concluded his dissenting opinion with one of his most stinging rebukes, saying for four members of the Court:

“We doubt if one can find in the long line of criticized cases one in which the Court has made a more extreme exertion of power or one so little supported or explained by either the statute or the record in the case. Power should answer to reason none the less because its fiat is beyond appeal.”²⁰

A third dominant strain in Justice Jackson's work was his zeal to protect individuals from unnecessary demands of organized society, or what he thought were unnecessary demands. Well-known examples are his opinions in the flag salute case²¹ and the Japanese relocation case that I have already mentioned,²² as well as the Cramer treason case,²³ in which he adopted a view of the Treason Clause that makes prosecutions for treason very difficult.²⁴

One other example I like is his opinion in *United States v. Ballard*,²⁵ in which Justice Jackson wrote a perceptive commentary on the nature of unorthodox religious beliefs. The majority upheld a conviction for mail fraud of the promoters of a religious cult called the “I Am” movement.²⁶ Although the majority ruled that the truth or falsity of the defendants' alleged religious experiences could not be examined, it also held that the defendants were guilty of mail fraud if they themselves did not believe the things they were telling their followers.²⁷ But Justice Jackson observed that “any inquiry into intellectual honesty in religion raises profound psychological problems,”²⁸ and that it is “an impossible task for juries to separate

¹⁹ *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161 (1945).

²⁰ *Id.* at 196 (Jackson, J., dissenting).

²¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (characterizing the conflict as between the State's assertion of power to condition individual's access to public education on making a prescribed sign and profession, and the individual's right to self-determination in matters of individual opinion and personal attitude).

²² *Korematsu v. United States*, 323 U.S. 214, 242–48 (1944) (Jackson, J., dissenting) (examining the struggle between the power and scope of judicial enforcement of a military order, and the expanse of individual liberty under the Constitution).

²³ *Cramer v. United States*, 325 U.S. 1 (1945).

²⁴ *Id.* at 29–35.

²⁵ 322 U.S. 78 (1944).

²⁶ *Id.* at 79.

²⁷ *Id.* at 81–82.

²⁸ *Id.* at 93 (Jackson, J., dissenting).

fancied [religious] experiences from real ones, dreams from happenings, and hallucinations from true clairvoyance.”²⁹ He said “the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.”³⁰ And so, he concluded: “I would dismiss the indictment and have done with this business of judicially examining other people’s faiths.”³¹ This was a very characteristic expression for him, I think.

The individuality of Justice Jackson’s approach to legal problems was a hallmark of his judicial work, just as rugged independence was a hallmark of his character. As he liked to point out, he was probably the last Supreme Court Justice there would ever be who received his legal training primarily by apprenticeship rather than formal study. One cannot help wondering whether his style of thinking and writing about the law would have been different if he had been the product, instead, of intensive law review training.

Of course, it is idle to speculate, and a more useful question is how students of today might be stimulated by his example. I have sometimes thought that one of the underdeveloped uses of the case method is its potential for cultivating good taste in legal literature. What a superb addition to one’s legal education could be obtained from simply reading and analyzing scores of opinions by Judge Cardozo, Learned Hand, Henry Friendly, or Robert Jackson.

And so, in conclusion, I leave my hosts this thought—might not the Albany Law School do well to initiate such an experiment by offering a course or seminar devoted entirely to the opinions of Robert H. Jackson? It would be a fitting tribute, I believe, to use his own works to provide the kind of experience that he evidently received from that splendid teacher, Ms. Mary Willard. And I am sure it would give law students much pleasure, as I have found anew in re-reading familiar opinions in preparation for this evening. That is part of the reason why I am grateful to have had the opportunity to participate in this event. Thank you very much.

²⁹ *Id.* (Jackson, J., dissenting).

³⁰ *Id.* at 95 (Jackson, J., dissenting).

³¹ *Id.* (Jackson, J., dissenting).