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D. P. Marshall Jr.

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# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

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### ADVICE FROM JUSTICE JACKSON

Country lawyer. Solicitor General. Attorney General. Chief Prosecutor at the Nuremberg Trials. Associate Justice of the Supreme Court. Having neither attended college nor graduated from law school, Robert H. Jackson lived greatly in the law nonetheless.

He spent the first twenty years of his professional life practicing law in the small town where he grew up. Describing later what he called the “county seat lawyer,” Jackson might have been describing himself:

He “read law” in the *Commentaries* of Blackstone and Kent and not by the case system. He resolved problems by what he called “first principles.” He did not specialize, nor did he pick and choose clients. He rarely declined service to worthy ones because of inability to pay.<sup>1</sup>

Jackson was that kind of country lawyer until President Roosevelt called him to Washington in 1934 to be the general counsel for the IRS. Thus began his two decades of public lawyering.

Today Jackson’s name often calls to mind his judicial opinions. We read him speaking for the majority in the second flag-salute case:

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1. Robert H. Jackson, *Tribute to Country Lawyers: A Review*, 30 ABA J. 136, 139 (1944) (reviewing Arthur Gray Powell, *I Can Go Home Again* (U.N.C. Press 1943)).

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.<sup>2</sup>

And we read him speaking for himself in one of the Japanese-internment cases:

Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by residence. No claim is made that he is not loyal to this country . . . Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable.<sup>3</sup>

Jackson's powerful words still carry us with him to his conclusions. Back of his judicial writing, however, is the advocate's craft, and Jackson was rightly admired as one of the greatest appellate advocates of his generation.

Consider the roughly two years he spent as Solicitor General. As Jackson's last law clerk put it, "if ever a job sought out the man and the man found his proper niche, it was so with the Solicitor Generalship and Robert Jackson."<sup>4</sup> He once argued seven cases in our highest court in ten working days. And don't forget, those were the days when each side received an hour to argue the case. Adding in the handful of arguments he made as Attorney General, Jackson lost six cases at the Supreme Court and won forty-four.<sup>5</sup> So able was his advocacy there, Justice Brandeis remarked that Jackson should be made Solicitor General for life.<sup>6</sup> That was not to be, of course, and our law is the richer for Jackson's having taken the bench.

After he had served a decade on the Supreme Court, Jackson was invited to give the Morrison Lecture to the California State Bar. He chose "a workaday subject on which

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2. *W. Va. St. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

3. *Korematsu v. U.S.*, 323 U.S. 214, 242-43 (1944).

4. E. Barrett Prettyman Jr., *Robert H. Jackson: Solicitor General for Life*, 1992 J. S. Ct. History 75, 76.

5. *Id.* at 83, 85 n. 69

6. *Id.* at 75.

[he] had some experience” and the result was *Advocacy Before The United States Supreme Court*.<sup>7</sup>

Like his judicial opinions, Jackson’s lecture sparkles. He begins with a humorous bow to John W. Davis’s classic address about oral argument. Then he asks and answers nine questions, covering everything from the importance of oral argument—“the Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations”—to whether reserving time for rebuttal is prudent—“Cases have been lost that, before counsel undertook a long rebuttal, appeared to be won.” Along the way, we get the full Jackson treatment: colorful stories, punchy sentences, vivid phrases, and practical conclusions.

Jackson’s advice endures because he speaks as a fine appellate judge who was once an able appellate lawyer. “Many lessons that I pass on to you,” he tells us, “were learned the hard way in the years when I was intensively occupied with the presentation of government litigations to the Court.” One of those lessons is what I think the best description in print of the lawyer’s situation before, during, and after oral argument:

I used to say that, as Solicitor General, I made three arguments of every case. First, came the one that I planned—as I thought, logical, coherent, complete. Second was the one actually presented—interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.

A decade after leaving his rural practice for government service in Washington, Jackson wrote that the “vanishing country lawyer left his mark on his times, and he was worth knowing.”<sup>8</sup> We might add that his advice about oral advocacy is worth remembering.

DPM  
Jonesboro  
May 5, 2003

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7. The Cornell Law Quarterly first published Jackson’s talk at 37 Cornell L.Q. 1 (1951), and The Journal gratefully acknowledges permission from the Quarterly’s descendent, the Cornell Law Review, to reprint it here.

8. Jackson, *supra* n. 1, at 139.

