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From Justice Jackson to Thomas J. Dodd to Nuremberg

*By John Q. Barrett**

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I am delighted to be part of this occasion that brings the Supreme Court Historical Society, the Robert H. Jackson Center and all of you together in this very special place for this very special, and timely, program.¹

My role is to provide an introductory framework for Senator Dodd's lecture on his father's work as a prosecutor at Nuremberg.² I thus will discuss a few pieces of the "before" phase of the 1945-46 Nuremberg international trial of Nazi war criminals and touch on one aspect of the "after" phase that followed that project, but I will leave details of the central events of the Nuremberg trial itself for Senator Dodd to address.

My particular focus will be the two principals among the United States prosecutors at Nuremberg: Supreme Court Justice Robert H. Jackson, the United States Chief of Counsel, and his Executive Trial Counsel—and his trusted colleague and deeply respected friend and peer—Thomas J. Dodd, Jr.

The "Nuremberg" idea has many beginnings. As the rule of law, it has roots, in a general sense, in the United States Constitution, in our Declaration of Independence, and in English law and history, including the Magna Carta. As a specific undertaking of the World War II Allies,

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¹ The program, which was held on February 15, 2005, in the courtroom of the Supreme Court of the United States in Washington, D.C., included introductions by E. Barrett Prettyman, Jr., vice president of the Supreme Court Historical Society, and Gregory L. Peterson, president of the Robert H. Jackson Center, Inc.; my remarks based on this text; and Senator Christopher J. Dodd's lecture, "Prosecuting the Peace of the World: The Experiences of Thomas J. Dodd at the International Military Tribunal, Nuremberg, Germany, 1945-46."

² Senator Dodd's lecture is available at www.senate.gov/~dodd/press/Speeches/109_05/0215.htm.

“Nuremberg” began during the wartime meetings and in the public statements of Roosevelt, Churchill and Stalin. As a commitment to justice, “Nuremberg” has all of those origins plus more fundamental roots in human belief and morality.

Regarding those most fundamental roots of Nuremberg, it seems appropriate here, in the presence of Senators Dodd and Lieberman, and as we remember Senator Thomas Dodd, to invoke another United States Senator from Connecticut. In May 1945, just two weeks into his assignment to prosecute Nazi war criminals, Justice Jackson attended a private dinner here in Washington with a group that included eight U.S. Senators. They of course discussed Jackson’s new, very high profile presidential appointment. One of those luminaries, Senator J. William Fulbright of Arkansas, argued very persistently that evening that there is no law on which to try Nazi war criminals—and so we should just execute them forthwith. A Connecticut voice, that of the dinner’s host, was less legally troubled: “I am satisfied,” said Senator Brien McMahon, “to rest on the Ten Commandments.”

The Nuremberg assignment—Robert Jackson’s Nuremberg assignment—came from President Truman, but the idea that Jackson should be the one to prosecute war criminals was President Franklin Roosevelt’s. FDR had come to know, over seven plus years of close contact with Jackson before appointing him to the Supreme Court in 1941, that Jackson was an effective prosecutor, government advocate and legal thinker, as a general matter and specifically on the war-related and international issues that had defined his time as Attorney General during 1940 and 1941. (The criminal who was foremost in FDR’s mind during the War, and the person he envisioned his trusted assistant Jackson prosecuting after the War, was Adolf Hitler.)

Following his Yalta meetings sixty years ago this month, President Roosevelt dispatched his counsel and trusted adviser Judge Samuel I. Rosenman to London. He was working there with senior British counterparts in March and early April 1945 on the specific plan for post-War prosecution when the news came of FDR’s death. Rosenman rushed back to the U.S. for the funeral, and then he stayed here to advise the new President.

Through Rosenman, Jackson’s Nuremberg assignment actually began in this Supreme Court building. At 5:00 p.m. on Thursday, April 26, 1945, Sam Rosenman came from a White House meeting with President

Truman to meet with his friend Bob Jackson in his Court chambers. Rosenman told Jackson that the U.S. plan to prosecute Nazi war criminals was still on, and that the lead job was still his if he wanted it. A series of Jackson-Rosenman conversations rolled into a series of Jackson-Truman meetings, and on May 2, 1945, the President announced publicly—surprising at least some of Jackson’s fellow Justices—that he would be the U.S. Chief of Counsel.

During the next two months, Jackson juggled his end-of-the-Term Supreme Court work with this new assignment. As he began to work with a preexisting War Department/Army Judge Advocate General team, Jackson learned that he had been sold quite a bill of goods. No cases against war criminals were ready to go to trial. In fact, very little evidence against individuals had been gathered and assembled. And notwithstanding the “Big Three” talks, Rosenman’s work in London, and the United Nations preparatory conference process that was underway at Dumbarton Oaks and continued in San Francisco, there was no Allied agreement on how to proceed to try war criminals. This would not be, as Jackson had hoped and maybe even briefly believed, a summer task from which he would return to the Court well before Monday, October 1, 1945.

Jackson immediately added to his inherited team a few senior lawyers, his Supreme Court secretaries, a close former colleague from his Department of Justice days, and his own son as his executive assistant. In June 1945, they decamped to London. Over the next two months, Jackson negotiated hard and reached agreement with our British, Soviet and French allies on a charter—the London Agreement and Charter of August 8, 1945—that defined the legal process, out of four varied legal traditions, by which military trials of war criminals could go forward. The London Agreement created an International Military Tribunal independent of the prosecution, defined that court’s jurisdiction over specified crimes (aggressive war, war crimes, crimes against humanity, and conspiracy to commit each of those crimes), and provided rules for public trial, for autonomous and funded defense counsel, for liberal discovery, for a presumption of defendant innocence, and for the burden on prosecutors of proof beyond a reasonable doubt, among many other core concepts that we know well, and revere, as “due process of law.”

Alongside this tremendous diplomatic task and law-making achievement, Justice Jackson also was beginning to conduct the work of a prosecutor. Remnants of U.S. Army and Office of Strategic Services (OSS)

operations, and also Allied military forces that now occupied Europe, were capturing prospective defendants, gathering enormous amounts of potential evidence, including voluminous, remorselessly precise Nazi records, and beginning to conduct interrogations.

Jackson had, on his day-one staff, literally one experienced criminal prosecutor. He needed, in that area particularly, additional personnel, and a tremendous infusion of talent.

* * *

Thomas Joseph Dodd, Jr., born in Norwich, Connecticut in 1907, graduated from Providence College in 1930 and then, in 1933, from Yale Law School. He became a FBI Special Agent and cut his investigative teeth on such matters as John Dillinger, his gangster physician “Doc” May, and “Baby Face” Nelson. In 1935, Dodd joined the New Deal—he became Connecticut State Director of the National Youth Administration. From there, in 1938, he was recruited to Washington to become special assistant to U.S. Attorney General Homer S. Cummings—he of Connecticut, and Yale, and a mentor who had encouraged Dodd’s FBI and NYA stints. Over the next seven years, Tom Dodd was a special assistant to five Attorneys General: Cummings, then Frank Murphy (who later became Justice Murphy), later Francis Biddle and finally Tom Clark (who later became Justice Clark)—and in the middle of that run, to Attorney General Robert H. Jackson.

“Special assistant” can be a most misleading title. In Dodd’s day it meant, and he was, a real, trial-level federal prosecutor. Dodd worked first in the Criminal Division under the previously-mentioned Brien McMahon of Connecticut, who was the Division’s assistant attorney general from 1935 until 1939. Dodd became part of the Criminal Division’s new civil liberties unit. He prosecuted cases involving conspiracies to violate the National Labor Relations Act by thwarting labor unionization, including the famous cases against Harlan County, Kentucky coal companies, executives and law enforcement officials. Dodd also prosecuted, in the 1930s and in the South, civil rights cases against Ku Klux Klan members and others.

In early 1942, in the first months after Congress’s declaration that the United States was at war with Japan and Germany, Main Justice sent Tom Dodd to Hartford to prosecute a major spy ring case. Five defendants were accused of violating the Espionage Act of 1917 by conspiring

throughout 1941 to gather and deliver to Germany or Japan information about the U.S. Army, Navy and defense industries. Four of five defendants—Otto Willumeit, head of the German-American Bund division in Chicago; Anastase A. Vonsiastsky, world leader of the anti-Soviet White Russian party; Dr. Wolfgang Ebell, a Texas physician; and Gerhard Wilhelm Kunze, the U.S.-born national leader of the German-American Bund (the *Bundesfehrer*)—decided, one at a time, to plead guilty. Dodd and his team then tried and won the conviction of the fifth defendant, the Reverend Kurt Emil Bruno Molzahn, pastor of Philadelphia’s Old Zion Lutheran Church.³ At later points in the War years, Dodd handled other major federal prosecutions, including the Anaconda Wire Company “million dollar war fraud” case,⁴ alien enemy cases, selective service cases⁵ and sabotage cases, in addition to more routine cases.⁶ By summer 1945, Tom Dodd had been the government’s lead trial counsel in 285 cases in various parts of the country.

Robert Jackson knew directly that Thomas Dodd was an excellent prosecutor and “skilled courtroom lawyer.” So did many of the colleagues and friends they shared, including Homer Cummings, Brien McMahon, Tom Clark and FBI director J. Edgar Hoover. In July 1945, Jackson’s war crimes prosecution staff situation improved considerably when Tom Dodd was recruited to join the team.

* * *

I will now bridge, in summary form, over Nuremberg itself. Tom Dodd was briefly in London, but he soon went to the European continent and began to interrogate prisoners and build potential cases.

In September 1945, the prosecution relocated from London to Nuremberg. In October, Jackson named Dodd to his senior Trial Board,

³ See *United States v. Molzahn*, 135 F.2d 92 (2d Cir.) (affirming judgment of conviction), *cert. denied*, 319 U.S. 774 (1943).

⁴ See *United States ex rel. Sherr v. Anaconda Wire & Cable Co.*, 57 F. Supp. 106, 107 (S.D.N.Y. 1944) (describing, in this private relator’s *qui tam* action, the concurrent federal criminal investigations), *aff’d*, 149 F.2d 680 (2d Cir.) (*per curiam*), *cert. denied*, 326 U.S. 762 (1945).

⁵ See, e.g., *United States v. Flakowicz*, 146 F.2d 874 (2d Cir.) (*per curiam*), *cert. denied*, 325 U.S. 851 (1945).

⁶ See, e.g., *United States v. Hall*, 52 F. Supp. 796 & 52 F. Supp. 798 (D. Conn. 1943).

where he was at the center of drafting the indictments against 22 individuals and selected Nazi organizations.

The trial began in late November with Jackson's historic, masterful opening statement. U.S. prosecutors then began to present evidence. Dodd personally presented evidence on the Nazi economic preparations for aggressive war, evidence on the slave labor program, and evidence, including horrific captured films, on the concentration camps.

In January 1946, Jackson named Tom Dodd his Executive Trial Counsel. That made Dodd his number two, which involved him in all aspects—including prosecutor and evidence supervision, planning to respond to defense cases, meeting with Allied counterparts, personal daily presence in court, and administrative responsibilities—of the massive job that was, at the point position, Jackson's.

Dodd also continued personally to prosecute. During spring 1946, he cross-examined defendants Wilhelm Keitel, who had been Field Marshal of the German Army; Alfred Rosenberg, the former Nazi minister for the eastern occupied territories; Hans Frank, the former governor general of occupied Poland; Walter Funk, who had been president of the Reichsbank; Baldur von Schirach, who had led the Hitler Youth and later was governor of Vienna; Ernst Sauckel, the former head of Germany's conscript labor organization; and Arthur Seyss-Inquart, who had been Nazi commissioner of occupied Holland.

On August 2, 1946, following his summation and the close of the cases against individual defendants, Justice Jackson returned to Washington. Before leaving Nuremberg, he had appointed Tom Dodd acting Chief of Counsel. During the next month, Dodd supervised presentation of the cases against the indicted Nazi organizations. This final trial phase concluded with Dodd's own summation of the evidence.

In late September, both Jackson and Dodd were present when the Tribunal returned its judgments. Many were convicted, but the acquittals of three individual defendants may be the most powerful proof of the fairness, the real justice, of the Nuremberg that Jackson and Dodd, and many others, created.

In October 1946, Robert Jackson and Thomas Dodd each returned to the U.S. and his distinguished future. In addition to the Nuremberg trial

model and international law precedent, what they left to history in the trial record, comprised largely of captured, admitted documents, is the irrefutable record of Nazi criminality, including the Holocaust.

* * *

And now the “after.” Jackson had, in Nuremberg in July 1946, awarded Dodd through military auspices the Medal of Freedom. Back in the U.S. later that fall, Jackson nominated Dodd for, and President Truman awarded to Thomas Dodd, the Certificate of Merit for his Nuremberg work.

On a Friday night in September 1947, Justice Jackson traveled to Hartford, Connecticut to award that Certificate personally to Tom Dodd at a large dinner event at the Hotel Bond. Jackson’s efforts to present this award personally demonstrate his appreciation for Dodd’s work, of course, and also his deep personal affection for this colleague.

But even more interesting is what they did the next morning. Dodd, with others, picked Jackson up at the Hotel Bond in Hartford and drove him west to Litchfield, Connecticut. Jackson was interested in that colonial town because he was, the Senators may be pleased to know, himself a Connecticut descendant—Jackson’s great-grandfather Elijah Jackson had been born in Litchfield in 1772, and his father Uri Jackson had served in the Connecticut militia during the Revolutionary War.

And so Jackson and Dodd together viewed that interesting landscape. They also spent part of that morning visiting Litchfield’s distinction in United States law: the Tapping Reeve House and Law School, the first law school in the United States.⁷

As they viewed that birthplace of law and legal learning in a land that was once wilderness, I am sure that Bob Jackson and Tom Dodd thought back, modestly, to the night before, and to their work during the previous two years. There was, in that pioneer law school in Litchfield, a real parallel to what Jackson and Dodd had accomplished as principal architects of Nuremberg. They had brought law to a place—to the world, and to the wilderness, wreckage and criminality of war—that needed it, and still needs it, so deeply.

⁷ See www.litchfieldhistoricalsociety.org/lawschool.html.