

BOB JACKSON REMEMBERED

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Let no one doubt that Robert H. Jackson was a remarkable individual, with talents far beyond what might be expected in even the brightest of upstate country lawyers. Before Jackson came to Washington, while he was still relatively unknown, Judge Cardozo predicted: “You will [hear of him]—in time.”¹ Later, Justice Brandeis (who, as Chief Justice Rehnquist has commented, was “one who did not bestow compliments casually”)² said that Jackson should be the Solicitor General “for life.” Thus, when he came to the Court in October Term in 1941 his brethren already could tell that a new star was in their midst. Indeed, as Attorney General on the occasion of the Court’s 150th anniversary he had delivered, in an address to the Court, a short summary of the Court’s role in the continual emergence of the American Republic—an address that was a model of thoughtful eloquence.³

My own intersection with Jackson has no mysterious foundation. For the first two terms he sat on the Court I was the senior of the two law clerks of the newly-elevated Chief Justice Stone. This gave me some, but not much, personal access to Jackson. I had considerable awareness, however, of how he was operating and what he was producing.

Perhaps this will be more understandable if I describe briefly the working environment that then prevailed with the Justices and their law clerks. Things were smaller, and hence more intimate, than they have since become. Instead of the four law clerks who are

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¹ The episode occurred in 1930 when Jackson was being considered for membership in the American Law Institute. A Committee member asked “Who is Jackson? I have never heard of him.” Cardozo replied: “You will—in time.” EUGENE C. GERHART, *AMERICA’S ADVOCATE: ROBERT H. JACKSON* 289 (1958).

² William H. Rehnquist, Chief Justice Dedicates the Robert H. Jackson Center in Jamestown, New York (May 16, 2003), *in* 24 *SUP. CT. HIST. SOC’Y Q.* 1 (No. 4, 2003).

³ See Attorney General Robert H. Jackson, 150th Anniversary of the Supreme Court, 309 *U.S. v* (1940).

now the entitlement of a Justice, each Justice had a single clerk. The sole exception was Chief Justice Stone who, upon taking over from Hughes, had decided that the Chief really needed two law clerks, and that the senior of them should be a law clerk already familiar with the operations of the Court (I was Justice Reed's law clerk for October Term, 1940).

Justice Roberts had a permanent law clerk, not transitory like the rest of us; he was rather apart from the group and we surmised his function was somewhat different. While we were friendly with him, we did not often see or eat with him or talk about substantive matters with him. That left nine of us who led an animated collegial existence concentrating on what we and our Justices were doing. Two or more of us frequently lunched together; we were in and out of each other's offices; we had occasion from time to time to talk with other Justices, who fortunately seemed to have time to do this. Not to be overlooked, we (along with the Justices) all received our haircuts from the Court's solitary barber, a man of wisdom named Marcellus A. Gates. It is also fair to add that, though not too often, a Justice might subtly try sending a message to one of his brethren by the law clerk-to-law clerk route. Jackson's law clerk during this period was John F. Costelloe, whom I knew well from our overlapping service on the Harvard Law Review.

Jackson's work on the Court, both then and I think later, reflected three superlative qualities which conveniently complemented each other. First, he had an astonishingly quick mind; this had helped to make him the fabled advocate of his prior, as well as (at Nuremberg) his subsequent, experience. Second, he was normally affable and congenial and understood the importance, and had the knack, of dealing diplomatically with others (although on the rare occasions when he did not follow this practice the departure was not inadvertent, but deliberate).⁴ Third, and perhaps even more notably, he was gifted with writing style that placed him in the Western World's very top echelon of modern judicial stylists.

Jackson's writing gave new and enlarged meaning to the word

⁴ Thus in recusing himself in *Schneiderman v. United States*, 320 U.S. 118 (1943), Jackson recorded that upon becoming Attorney General he had "succeeded to official responsibility" for the case and "considered [this] a cause for disqualification." *Id.* at 207. This was a strong job at Justice Murphy who had been Jackson's immediate predecessor as Attorney General and who did not recuse himself, but rather became the author of the Court's majority opinion (I cheerfully assisted in Chief Justice Stone's preparation of the dissenting opinion, which I deemed completely persuasive). Later, Jackson's much-publicized outburst from Nuremberg against Justice Black also had its origin in differences in view over a non-recusal, this time by Black. See GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 224-49 (1977) (discussing the "Great Feud" between Justice Jackson and Justice Black).

“facile.” He wrote swiftly, gracefully and effectively. He could accomplish in a short paragraph, or sometimes in a single sentence, what many others might struggle to achieve in a page. He aimed to be understood not merely by his colleagues, but also by the public at large, and in this he was largely successful. He was alert to the significance of differences in style.⁵ As his friend Justice Frankfurter noted, “He appreciated a good phrase, even his own.”⁶

It may be true that on isolated occasions Jackson’s uncanny fluency led him astray in shaping an argument. It did not happen often, however, and with the benefit of further reflection, he was not beyond imposing a self-correcting device.⁷

Much of the Court’s history has been punctuated by telling aphorisms. Here also Jackson has left his mark—as when he wrote “We are not final because we are infallible, but we are infallible only because we are final.”⁸ This possibility of being wrong is a cautionary thought for his successors to bear in mind.

⁵ See Robert H. Jackson, *Mr. Justice Brandeis: “Microscope and Telescope,”* in AN AUTOBIOGRAPHY OF THE SUPREME COURT: OFF-THE-BENCH COMMENTARY BY THE JUSTICES 233 (Alan F. Westin ed., 1963) (contrasting the writing styles of Justice Holmes and Justice Brandeis).

⁶ Felix Frankfurter, *Mr. Justice Jackson*, 68 HARV. L. REV. 937, 939 (1955), *reprinted in* OF LAW AND MEN: PAPERS AND ADDRESSES OF FELIX FRANKFURTER 189, 192 (Philip Elman ed., 1956).

⁷ Thus, for example, I think Jackson’s biographer will find among the Jackson papers a proposed dissenting opinion in *Hill v. Texas*, 316 U.S. 400 (1942), where Jackson fluently developed (and circulated to his brethren) the theme that, contrary to well-established precedent, a state-court conviction based on an indictment by a grand jury from which Negroes had been systematically excluded was not unconstitutionally invalid if the conviction was by a petit jury from which no such exclusion had occurred. Ultimately, Jackson decided not to persist in his lone dissent, so that Chief Justice Stone’s opinion came down as the decision of a unanimous Court.

⁸ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).