

REMEMBERING ROBERT H. JACKSON AT NUREMBERG
DECADES AGO

*Brady O. Bryson**

After World War II ended in 1945, the organizers of the upcoming Nuremberg trials had an elusive vacancy on their personnel list. They needed a young military officer who (1) was already taught never to say no, (2) was short some six months of additional service before becoming eligible to resume civilian life, (3) possessed a good working grasp of the Russian language, and (4) had a solid record of experience and achievement in the legal profession. What a combo! Believe it or not, yours truly was found to have all such qualifications and was solicited to join the American legal team at Nuremberg.

In early September 1945, (at age 30) he set out from Washington with travel orders entitling him to transportation in Army planes (although a sailor) anywhere in the world except the United States! There were no commercial flights to Europe in those days. Not much later, after an excusable rest stop in Paris, he arrived at Nuremberg and was given a position as an attorney on Chief Counsel Robert H. Jackson's trial staff. He had an informal understanding that this responsibility would end in six months. His first assignment was as a liaison officer between the American and Russian lawyers engaged in the major trials. The liaison responsibility proved less than overwhelming and he soon became involved in a variety of other legal functions. These responsibilities included chairmanship of a group of highly qualified and committed young lawyers tasked to summarize and organize the information on hand, for the record, on the persecution of the Jews. This work was well received. That explains how I got to Nuremberg, so now I'll turn my attention to Chief Counsel Jackson.

First, none of my interactions with Justice Jackson were

* Mr. Bryson, a 1938 graduate of Columbia University Law School, served from September, 1945 to March, 1946 as a trial attorney on Justice Jackson's legal staff at the Major War Crimes Trials in Nuremberg.

particularly intimate. He was the busiest figure on the scene—completely dedicated to a huge responsibility. I cannot say whether he took cream in his coffee. We did not breakfast together. From a distance though, it slowly dawned on me that Justice Jackson was fully engaged in the design and construction, as well as the enforcement, of an unprecedented legal machine. He was definitely up to the task. It seemed indubitable that the intellectual and procedural challenge of sitting on the United States Supreme Court must have been mild in comparison. The systemic demands of Nuremberg were almost beyond belief. But he seemed always organized, always busy, always working, always confident, always in charge and inspirational. After all, the spoken language, legal structures, trial practices, criminal cultures and political systems of at least five highly differing countries were intimately involved—the United States, Britain, France, U.S.S.R. and Germany. All official words spoken in the courtroom were at once restated in multiple tongues.

In the dock, some twenty-five major defendants were being tried, in large part simultaneously. Lawyers and press from everywhere abounded. What legal practices should govern? What, for example, about criminal protections, such as the principle of *ex post facto*? Unsurprisingly, the London Charter reflected the inventions of the system, but left much to the tribunal which was making as well as enforcing the rules as the case moved on. The London Charter was churned out by the four victorious nations (the United States, England, France and U.S.S.R.) and ratified by approximately twenty others.

All this is familiar history, at least to followers of such events at the time. Recalling it, however, is relevant whenever we consider what Justice Jackson undertook and how he managed his part. All of us participating as lawyers at Nuremberg were graphically aware of the challenges and dimensions he faced.

In time, disputed concepts arose that the Justice was determined to support, while some others, including some Americans, disagreed; one such concept was the crime of aggression. It was embodied in the Nazi's aggressive use of armed forces to invade and overrun other countries, such as Poland, U.S.S.R. and France. It was also embodied in the violation of human rights and the persecution of the Jews, at home as well as abroad. This persecution was not always a military action, but at the very least was supported by the police. These war crimes relied heavily on the

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misuse of extreme violence. Some defendants, however, were not part of either the military or police and avoided direct participation in such violence. As civilians, they supported the Nazis, thus contributing in various indirect ways to such reckless vicious violence.

Justice Jackson, an idealist, believed such figures were as guilty as the man who carried the gun. He sought to establish this as a legal principle at Nuremberg. The lead defendant of this kind may have been Dr. Schacht, the financial wizard who raised much of the German government's money, thus underwriting the Nazi military and other instruments of force. Justice Jackson wanted to see emerge, as an achievement at Nuremberg, a greater emphasis on such indirect guilt. He found it difficult to rally all participants in this direction, but firmly pushed ahead. He planned to open the case against Dr. Schacht in order to disclose, with great force, his conception of the moral reach of Nuremberg.

The tribunal, of course, controlled its own schedule and, perhaps innocently, listed the case at a time impossible for Justice Jackson to be there. In any event, the message came to me that he had directed that I take it on, with an understanding that it would be handed back to him after the opening phase, scheduled for early January 1946. I was astonished, and of course flattered, but took it as an order. Fortunately, I was in full agreement with his philosophy, but did not know whether he realized this.

The case was called on the morning of January 8. I was ready and answered the call, appearing for the United States of America. There followed one of my most memorable experiences in a long life. Never had I been handed an undertaking of such breadth and depth. I summarized, in full detail, the United States' position for the tribunal as I understood it. In addition, I introduced seventy-five documents into evidence showing Dr. Schacht's lengthy connection with and support of the evolution of Nazism. I felt I had lived up to Justice Jackson's expectations. When I saw him in person several years later in Washington, he earnestly thanked me for what I had done.

Meanwhile, I had received many congratulations and had immediately arranged my departure from Nuremberg, returning home as had been expected. In Washington, the U.S. Navy released me to civilian life with a special commendation for duty abroad. I could not conveniently follow the remainder of the proceeding against Dr. Schacht in any detail, but did run through the findings

and opinions of the tribunal later in the year. It split evenly, 2 to 2, with the judges from the United States and U.S.S.R. voting for conviction and those of England and France voting against it. Dr. Schacht was then turned over for possible further indictment at the so-called "lesser trials" in Germany. After another two years of confinement, he was released to his family. I felt he was guilty of willingly supporting Nazism until he concluded that Hitler would ultimately lose the game. This was due, in large part, because he (Schacht) could not match the American purse, particularly in the building of air power. He was removed from office and finally wound up in a concentration camp. At that point he may well have repented what he had done for the Nazis (he had been an official member). In most legal systems, however, repentance may be encouraged and even mitigate punishment. Repentance, however, hardly expunges the crime. In his later years, Dr. Schacht paid dearly for what he had done.

The basic problem the tribunal faced with conviction was whether it was time, before a military court at Nuremberg, to extend the war crimes concept to include non-military defendants who, in a tyrannical country, had failed to attack evil as it emerged. After all, a large number of business leaders in England, Europe, and even in the United States had conducted business with Nazi Germany. Indeed, at one point, Dr. Schacht visited the United States and was graciously received at the White House. Just when should have Dr. Schacht rebelled, at the risk of his life? Should all such citizens be classified as wrongdoers?

The Russian member on the tribunal had little trouble with this and filed a forceful dissent. Russia had lost millions of people in the chaos generated by Hitler. The American member also voted for conviction, agreeing with Justice Jackson's view of the case. Those from France and England doubtless felt that the time had not come to go so far. Therefore, for the present at least, a line had to be drawn. So be it.

P.S. This comment on Justice Jackson at Nuremberg is drawn entirely from memory of happenings many years ago. The reader is asked to forgive any possible error in formal fact. It's the substance that counts!