

ROBERT H. JACKSON: HEAD OF STATE?

*E. Barrett Prettyman, Jr.**

Robert H. Jackson would have made an interesting President.¹ Some might disagree—principally because of his disposition to work alone on many matters²—but F.D.R. himself had a secretive side to him, and it did not hinder his effectiveness. Jackson would have been a strong head of state because his affable personality would have made him the type of leader that subordinates would have been eager to emulate and because he was a thoroughly practical man. He would have understood all the nuances of the problems he faced and the solutions that would or would not have worked to solve them.

How many of our Presidents have had the prior experience of working as a small-town lawyer and then at every level of the Federal Government, from the I.R.S. and the Antitrust Division up through the Solicitor General's office and on to the Attorney Generalship—as well as the enormous responsibility of being lead prosecutor at the Nuremberg trials? There was nothing speculative or theoretical about this background.

One example near the very end of Jackson's life demonstrates his practical nature. While the Supreme Court Justices were still at odds with one another over how to solve the conundrum presented by *Brown v. Board of Education*, and before the new Chief Justice, Earl Warren, had drafted what would become a unanimous opinion for the Court, Jackson began writing his own concurring opinion. I am not suggesting here that what he wrote should have become the

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¹ This thought occurred to someone else as well. See ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT 31–38 (John Q. Barrett ed., 2003).

² See E. Barrett Prettyman, Jr., *Robert H. Jackson: Solicitor General for Life*, J. SUP. CT. HIST. 75, 75–77, 81 (1992).

majority opinion—far from it³—but I do believe that what Jackson was worrying about in that opinion demonstrates how practical and tough-minded he was. Among his concerns: 1) What kind of a decree could the Court write that would not leave the front-line trial judges—particularly in the deep South—with little or no guidance, and thus at the mercy of their disapproving neighbors? 2) In light of Congress's many responsibilities under the Constitution, why was it playing no role in this weighty, nation-wide problem? 3) Whom would the Court seek to blame for the segregation that had built up over so long a period—the lower courts, school boards, the South—when it had been the Supreme Court itself that had approved the defining principle of separate but allegedly equal educational facilities? 4) In light of the Framers' clear intent not to do away with school segregation, what rule of law, apart from pure judicial fiat,⁴ was the Court to rely upon in overruling *Plessy v. Ferguson* and striking down segregation in the schools? 5) If the Court were to rely upon the Equal Protection Clause of the Fourteenth Amendment as the basis for its decision, how would it deal with the case involving the District of Columbia, where the Fourteenth Amendment did not apply?

These and others were realistic concerns, but they did not prevent the pragmatic Jackson from joining Warren's opinion, not every aspect of which he agreed with. He understood all too well the public interest in a united judicial front, which was far more important than the relatively minor differences that he and other Justices might have had with the Warren draft.

Jackson has been underestimated as a Justice, ironically, because he was such a fine stylist as a writer of opinions. Just as we fail to take persons seriously who are at the top of their game as comedians, so too do commentators denigrate the depth of a man who writes with vigor, wit and style. But make no mistake—Jackson was not only one of the finest writers in the history of the Court, but also a realistic, sensible man with strong executive talents.

When proven wrong, he could change his mind and admit the

³ See E. Barrett Prettyman, Jr., Thoughts on Justice Jackson's Unpublished Opinion in *Brown v. Board of Education*, Address to the Robert H. Jackson Center, Athenaeum Hotel, Chautauqua, New York (Oct. 8, 2003) (transcript available at http://www.roberthjackson.org/Speeches_About_Jackson_BrownvBoard.asp).

⁴ What Justice Reed called *krytocracy*. See John D. Fassett, *A Plea for the Demise of a Stubborn Myth*, in *BLACK, WHITE, AND BROWN: THE LANDMARK SCHOOL DESEGREGATION CASE IN RETROSPECT* 132, 141, 142 (Clare Cushman & Melvin I. Urofsky eds., 2004).

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error of his ways.⁵ When compelled to rule in a way that failed to punish those who had acted improperly, he could conjure up alternative ways to see that justice was done.⁶ Just as in his opening and closing arguments at Nuremberg, he could speak in the most compelling, magisterial and persuasive way on behalf of both Americans and other citizens of the world. As demonstrated by Harry Truman, a largely self-educated man who is very bright, fearless, keenly aware of history and practical in every respect can become a strong and effective leader, ready for combat at home and abroad.

This country could have done a lot worse than Robert Jackson as its head of state.

⁵ See *McGrath v. Kristensen*, 340 U.S. 162, 176–78 (1950) (Jackson, J., concurring).

⁶ See *Irvine v. California*, 347 U.S. 128, 137–38 (1954).