

THE GENIAL JUSTICE: ROBERT H. JACKSON*

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Robert H. Jackson was a distinguished Supreme Court justice, but he also possessed an irreverent wit and contagious charm. These human and personal attributes inspired fond and enduring respect among those who had the good fortune to know him or to work for him as a law clerk.

“The best thing about these Washington parties is that you see, for a few minutes, a lot of people with whom a few minutes is enough!” The speaker was Justice Robert H. Jackson, and the occasion was the last judicial ball held in the White House before reconstruction undertaken in 1948. His remark was typical of the humor which the justice produced spontaneously and most willingly. Years later Sidney Alderman was to recall in the memorial resolution he presented to the Court that Justice Jackson’s “charms of personality, his engaging humor, his conversational and anecdotal gifts, and his frank and forthright manner of expression endeared him to all.”

Justice Jackson was well known as a skillful trial lawyer, an outstanding appellate advocate, a compelling writer, a star exponent of the New Deal, a lawyer’s judge, a dedicated prosecutor of war crimes—and he was all of these. Many excellent articles have discussed these accomplishments, but none has really captured the twinkle in his eye, the warm smile, the quick wit, or the common touch—his most personal and personable characteristics. Almost twenty-five years ago I was Justice Jackson’s law clerk, and I still recall not only his humor but his ability to share it. Some of the best examples of his wit cannot be used, and there may be better anecdotes known to others. But these are mine, and at least, after all these years, I have gotten them down on paper.

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** Clerk to Justice Robert H. Jackson from 1947–49. Special thanks to Charlene Peterson at the Robert H. Jackson Center for transcribing this article.

The idea for this article was probably born during the last days of my clerkship. To mark the occasion of my departure, Justice Jackson had a small cocktail party for the other law clerks and secretaries. Bruce Griswold, then law clerk to Justice Burton and now a Cleveland lawyer, remarked to the justice that he had never heard of any similar affair before and inquired just why he was having the party. Quickly the Justice replied, "Bruce, if you had worked with the fellow every day for two years and then he finally decided to go back to Philadelphia, don't you think that you would have some sort of celebration, too?"

I had my first real glimpse of the justice's sense of humor the very first day I reported for work at the Court, and the joke was on him. He was explaining to me that the filing system he and his secretary, Elsie Douglas, had developed would make it certain that all of us would always know where each current case file was at all times. Having made this point, he turned to Mrs. Douglas and said, "Elsie, by the way, what's wrong with this filing system anyway?" Mrs. Douglas replied, with a straight face, "In a word, Mr. Justice—you!" I later learned the accuracy of Elsie's appraisal and the impossibility of imposing sanctions.

WASHINGTON LIFE WAS SUBJECT OF JACKSON'S BARBS

Nothing in Washington escaped his attention, including the White House remodeling project much in the news in the late forties and early fifties. In 1953 the Alfalfa Club selected Justice Jackson as its "presidential nominee," a candidate whose only function was to address the society's "national convention." On that occasion he said that General Edgerton, a former Alfalfa candidate who supervised the reconstruction job, was the only Alfalfa nominee who actually got into the White House, and that once he got in he began selling the White House brick by brick (which was precisely what the official souvenir selling project involved). After all, the justice said, "that is more democratic than to sell it in one parcel." Finally, he said, Edgerton was "the only occupant of 1600 Pennsylvania Avenue in our memory to leave the White House in better condition than he found it."

The White House and the presidency were not the only aspects of Washington life to receive Justice Jackson's barbs. One of his most often quoted remarks—"I do not always understand the opinions of this Court"—struck a responsive note with countless lawyers and lower court judges.

Similarly, in an opening address to the American Law Institute he remarked that it was appropriate for a member of the Supreme Court to address the A.L.I. since it represented the legal profession's great undertaking to restate the law, and then he added, "I am sure it has not escaped your attention that the institution of which I am a member is actively engaged in the same enterprise."

On another occasion he noted that for a justice of the Supreme Court to help Stanford Law School dedicate its new home was only a reflection of the comity one educational institution owes another. He said that the Court's academic body, consisting of the legal profession, looks to the Court's Monday lectures "by which they are instituted as to what the law is—when they are not mystified."

The bar was also a favorite subject and one on which the justice could speak with great authority. Once when the Court had handed down a five-to-four decision of dubious validity, counsel came in with a petition for rehearing which lacked the fire and vigor usually characteristic of these documents. After reviewing the petition, I sent it to the justice with a note saying, "I don't know why counsel thought this petition would move the Court when your dissent didn't." To which he replied, "My boy, with some lawyers it is not a question of what will move the Court, but what will move the fee."

RURAL LIFE SPARKED LEVITY

Anything relating to rural life was likely to spark a bit of levity. For example, when another justice's bright young law clerk from Harvard stated in drafting an opinion involving the agricultural exemption to the Fair Labor Standards Act that "the compost heap is no more," the justice noted on the margin (to me), "Not so; on the fields, fertilizer; on paper, jurisprudence." Congress amended the statute to disclaim the majority view and adopt the justice's dissent.

Of course, Justice Jackson frequently poked humor at himself. At a hearing in chambers, a lawyer for a labor organization sought to enjoin enforcement of some Taft-Hartley Act provisions but soon realized that he had lost and would get no stay. He remarked to the justice, whom he had known personally for many years, "My only problem now is, what can I tell my client?" The justice replied, "Tell him what we always did in the old days, Dave—that you got before some damn dumb judge who didn't know what it was all about."

The bar received attention of another kind when disbarment proceedings against a Washington lawyer, whose misconduct seemed to be widespread, never quite succeeded. When I asked

why, the justice answered, "The trouble is this fellow is apparently an all-around s.o.b.—and to be disbarred you have to be a specific s.o.b."

Justice Jackson didn't always take himself seriously either. After producing the prevailing opinion in the *Tidewater Oil* case, which upheld the statute making the District of Columbia a state for diversity jurisdiction purposes, the justice noted that one ground supporting the statute's validity had been rejected by a vote of six to three, another by seven to two. Still there were five votes in favor of validity, so that, he said, "the statute is valid but no one can tell you why."

Although most of the humor for which I remember the justice was his own; he had some wonderful stories about life in rural upstate New York. Indeed, they seemed so typical that I often wondered if he originated them. He loved to tell about the judge who, in the circuit-riding days, made his annual visit to clear the docket in a remote New York county. After hearing evidence all day in the case of a man accused of murdering his wife's lover, the judge went for a walk through the countryside in the early evening and was surprised to encounter the defendant running an errand for the sheriff. The judge decided to accompany the defendant and walk him back to the courthouse, where the defendant returned to jail and the judge returned to his chambers.

When the judge chastised the sheriff the following morning for permitting a first-degree murder defendant to run free, the sheriff replied: "Judge, we all know this fellow, and he ain't going any place. Of course, I'll keep him locked up if it will make you feel better, but, as you know, we ain't going to convict him anyhow."

Once in a while the political establishment also came in for ribbing. One election year the justice observed, "The American people's problem is how to throw the Democrats out without throwing the Republicans in"—a problem which has not yet been solved.

Of course, Justice Jackson always disclaimed being a politician and said that he was, rather, a lawyer in politics. During the course of the Mellon tax evasion prosecution, Frank Hogan, famous counsel for Andrew Mellon, accused Jackson of having selected that particular case for prosecution "on a political basis." In reply, Jackson quipped that cases had to be selected on some basis, and politics seemed better than any. The result, of course, suggested that Mr. Hogan was right on all points.

LEARNED HAND “WAS RIGHTER THAN HE KNEW”

At times the justice would suggest, in speaking of Learned Hand, that “the old man was righter than he knew.” At least one opinion that Justice Jackson filed in my time indicated that the same was true of him. The matter involved the validity of some federal regulation based on the “war power.” The justice noted that, as of that time (1948–49), the United States had “made no peace with our allies, much less our enemies.” It can scarcely be disputed that this situation prevailed for many years, and in some respects still prevails today.

Probably because of his experience as a practicing lawyer, Justice Jackson was aware of the frustrations of both individuals and businessmen in dealing with the federal government. In one case involving a farmer he noted that while it had been well said that people dealing with the government “must turn square corners,” there was no reason why those square corners should “constitute a one-way street.” The farmer lost that case because of his lack of familiarity with crop insurance regulations published, unknown to him, in the Federal Register. Recently Bruce Griswold reminded me that when he announced his dissent from the bench on decision day, the justice said that “no farmer worth his salt would waste any time reading a dreary publication like the Federal Register.”

Some of the justice’s humor and his work habits seemed to stem from his constitutional aversion for any complicated business or social whirl, even in the relatively quiet forties. He loved to tell people of the old-time New York lawyer who, in the 1920s, would not visit the “modern” law offices in Buffalo, with their typewriters and dictating equipment, because he “didn’t want to get caught up in the machinery.” The justice himself never used the buzzer or the telephone to summon a law clerk. I can see him yet, appearing in the door of my office, asking “Got a minute?”

That always struck me as a significant reflection of the man’s character and his attitude towards people. He never lost the common touch. When he went fishing in Virginia, it was usually with his caretaker or with one of the younger lawyers or clerks employed in either the library or the clerk’s office. At Christmastime he would invite the three or four printers from the Court’s printshop and their janitor up to his chambers for a drink.

Because of the interest both he and Mrs. Jackson took in people and their problems, I am probably the only law clerk in history whose family was met at the train by a justice’s family chauffeur.

Mrs. Jackson was most kind to us. We have never forgotten how charming and gracious she was, especially when the Jacksons first came to dinner. This is an event all law clerks and their wives face with considerable trepidation. But in our case it was unnecessary. The alleged cook who helped my wife was an unmitigated fraud, her biscuits an unyielding disaster. But Mrs. Jackson's manner almost convinced us that we just did not appreciate Virginia baking. And long after my clerkship ended, Justice Jackson continued his interest in my family.

JACKSON KNEW PRESIDENT ROOSEVELT WELL

One common bond we had, of course, was admiration for President Roosevelt, mine from afar, Justice Jackson's close at hand. He knew F.D.R. well, and he had not only admiration but also a great understanding of the limitations under which he (and any president) had to operate. The president had frequently told him that he would name him chief justice at the first opportunity. Nevertheless, when Chief Justice Hughes retired in 1941 and F.D.R. had the opportunity to name his replacement, Justice Jackson understood that Roosevelt had to appoint Justice Stone. So when the president brought up the subject, there was no friction. Indeed, Justice Jackson asked for the honor of advising Stone of his forthcoming elevation. This is confirmed in Alpheus Mason's biography of Chief Justice Stone.

At another stage President Roosevelt mentioned that he would appoint Justice Jackson secretary of state when the opportunity arose. When the justice demurred on the grounds that, although he had traveled a great deal abroad and was a serious student of history, he really did not have any experience in foreign relations, the president said, "Hell, neither did Cordell Hull – until I gave him the job."

Needless to say, humor did not monopolize his views on law. The justice held in high regard the obligations of lawyers and judges. He himself worked constantly and continually. His draft opinion returned to him with my suggestions at five o'clock in the evening would be back on my desk the following morning with his answers and further improvements.

His credo was that a lawyer should give his best efforts to every professional assignment. First of all, every client is entitled to a first-class effort, and second, whatever you do, "Somebody is watching, and you will attract clients, even from the other side,

because you do a better job.” He completely believed it when he commented, “There are no unimportant cases.” He had great affection and respect for Chief Justice Hughes, whom he first met in bar association activities in New York State. He almost revered Hughes as a lawyer, judge, and public servant. William T. Gossett’s excellent article in the December, 1973, issue of this *Journal* (page 1413) brought home to me that Justice Jackson’s work habits indeed were patterned after those of Chief Justice Hughes.

The justice’s writing was incisive and effective. He did not employ purple prose or picturesque language. His strength was in his ability to utilize clear, expressive, distinctive language appropriate to the particular occasion. And although he seemed to write easily, he worked and reworked every opinion. He was not frustrated by the pursuit of perfection, and he never held a case too long. He always said, “The best is the enemy of the good,” and let it go.

Nevertheless, Justice Jackson often told the story of three stonemasons who were asked what they were doing. The first said, “Earning my living”; the second, “I am shaping this stone to this pattern”; and the third lifted his eyes and said, “I am building a cathedral.” Justice Jackson commented, “It lifts up the heart of a judge to listen to an advocate who obviously knows that he is building a cathedral.”

But even when he was serious, the justice could bring a point home humorously. When he invoked “all the known reasons” for justifying a changing position, he added, “I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday.”

He was one appellate judge who recognized that all appellate courts in correcting errors frequently make their own. “We’re too far from the facts,” he often said. He was especially reluctant to reverse an excellent court of appeals, such as the then Second Circuit. And his reluctance was magnified when the panel below included Learned Hand—“L.H.,” as he was affectionately called. “If I could just sit down and talk to the old man,” the justice would say.

One “old man” he never forgot was Justice McReynolds, a man dissimilar to Justice Jackson in many respects. He loved to tell about the blunder he made when, as solicitor general, he was arguing a “contemplation of death” estate tax case before the Supreme Court. McReynolds listened carefully to Jackson’s argument, which emphasized the advanced age of the testator, and interjected, “Mr. Solicitor General, didn’t you note that the testator

was a hardy Scotsman?" Jackson replied, "Yes, Your Honor, and that's another reason why we feel he would never have made such a large gift except in contemplation of death!" Pointing out that McReynolds too was a hardy Scotsman, Justice Jackson cautioned me to remember that an advocate can be too sharp and quick for his own good. But he won the case, and McReynold's vote as well.

Feeling as he did that the Supreme Court was too far from the facts, the justice was acutely aware of incongruous results produced by some of the Court's decisions. In one divorce case he wrote in all seriousness, "If there is one thing that people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom." In another divorce case he noted that the Court's decision "permits him to have a wife who can not become his widow and to leave a widow who was no longer his wife."

TRIAL LAWYERING WAS HIS FIRST PROFESSIONAL LOVE

Justice Jackson's first love in his professional life was trial lawyering. He thought trial lawyers could have more fun than other lawyers. For example, he said, the last rite of an appellate advocate is to file a scurrilous petition for rehearing, whereas the last rite of a trial lawyer is to take the client and retire to the local tavern to damn the judge—"and I have presided at many."

My wife, Antoinette, and the justice were kindred spirits, and they agreed on just about everything, frequently at my expense. I shall never forget one incident that occurred around the middle of my first term. Elsie Douglas and I had learned that Mrs. Jackson had to be out of town on her husband's birthday. We discussed this matter with Harry Parker, the justice's messenger and chef, and Harry agreed to do the honors for a party. As we sat down to dinner, the justice noted the sumptuous nature of the repast, tucked his napkin under his chin with a flourish, and made some remark about being ready for anything. He had gained a little weight at the time, and the napkin's flowing out over his chest made that fact quite noticeable. My wife turned to him and said, "Mr. Justice, if I didn't know you better, I would say you are pregnant." I almost died on the spot, but the justice roared with laughter, and my second year's clerkship was assured.

Justice Jackson had demanding standards for lawyers and judges, and I shall never forget them. He deeply believed that courts are not the only branch of the government responsible for preserving

individual liberty. His own vigor in upholding rights under the First, Fourth, Fifth, and Fourteenth Amendments; the commerce clause; the antitrust laws; and the Court's obligation to protect every individual from oppression by government—were all attributes of his I shall always respect and remember. But the never-to-be forgotten characteristics of Justice Jackson were his unfailing good humor, his ready wit, and that human touch that marks a really great man.