Albany Law Review

Volume 44 April 1980 Number 3

ROBERT H. JACKSON: A PERSPECTIVE TWENTY-FIVE YEARS LATER*

*The Honorable William H. Rehnquist***

I am indeed honored to be chosen to give the Jackson Lecture this year, since I had the privilege of being one of his two law clerks when he was an Associate Justice of the Supreme Court of the United States in the early 1950s. Those who have established this forum have very sensibly not confined the speaker to comments about Justice Jackson's career, but I would somehow feel uneasy with my own conscience if I did not devote myself on this occasion to the enduring significance which I think that career has had, not only for those associated with the Supreme Court of the United States, or for those associated with Albany Law School, but for all who are or aspire to be members of the legal profession.

I freely concede that I begin with a handicap in making this attempt. With rare exceptions, law clerks do not become intimate personal friends with the judge for whom they work. Differences in age, in responsibility, and in the stage of life through which one is passing at the time of the association largely preclude this, and my relationship with Justice Jackson was no exception. I greatly admired him; I hope that I served him satisfactorily as a law clerk; I enjoyed the chance almost every law clerk gets to be on hand when the judge is in a reminiscing mood to hear some of the anecdotes of his contemporaries or of his earlier life. Like most of his other law clerks, I worked closely with him on several opinions which he wrote, but it would be as inappropriate now as it would have been twenty-five years ago to reveal any confidences which passed between us in the course of such efforts.

On the other hand, were I to undertake in my allotted time a thumbnail biographical sketch of Justice Jackson's career based on materials written by others, I would be attempting a task both uselessly duplicative of the efforts of those others and quite inappropriate to this occasion. For those of you who have an interest in the details of some of the more important aspects of Justice Jackson's public career, a number of people who knew him far better than I did or who knew much more about the details of his career have al-

* This paper was presented on September 14, 1979 as part of the Justice Jackson Lecture program at the Albany Law School.

** Associate Justice of the United States Supreme Court.

ready published accounts of this knowledge. His fellow New York practitioner, Eugene Gerhart, has written a full-length biography of him.[1] The Association of the Bar of the City of New York sponsored four memorial lectures in his honor on the Fifteenth Anniversary of his death in 1969.[2] The roster of distinguished contributors to those lectures gives you some idea of the importance which was attached to this occasion: my colleague Potter Stewart, Whitney North Seymour, two distinguished chief judges of the New York Court of Appeals: Charles S. Desmond and Charles D. Breitel, Professor Paul Freund, Lord Shawcross, and John Lord O'Brian (another product of Western New York). A reading of the four lectures and the comments of those who introduced the lectures gives more insight into Justice Jackson's career and position in the history of the United States in the twentieth century than I could possibly aspire to do.

Yet notwithstanding these admitted handicaps, I shall nonetheless proceed with my own effort to interpret Justice Jackson's career. I think that this is an appropriate occasion for even such a worm's eye view as I may be capable of providing, and I also think that the passage of time may by the perspective it gives make some of the events in a person's lifetime seem more important as a part of his total career than they did at the time of his death, and others less so. In view of his rural beginnings and lack of family connections, it would be both easy and superficially plausible to portray the dominating theme of Robert Jackson's life as a sort of modern day Dick Whittington — the story of an ambitious and talented youngster who aspired to positions which seemed impossible for him to reach, but who nonetheless did reach them. All of this is true of Justice Jackson, but he was surely more than the judicial counterpart of the youngster in the childhood fable who was "thrice Lord Mayor of London".

What lawyers might call the "black letter" account of Justice Jackson's rise to national prominence can be stated briefly. He was born in Northwestern Pennsylvania, and at the age of five years moved across the state line to the small town of Frewsburg, New York, where he is now buried in the family plot. His lifelong devotion to his place of birth, to Frewsburg, and to Jamestown where he later moved, is convincingly demonstrated by an article which he authored for the University of Pennsylvania Law Review in December, 1952 — after eleven years on the Supreme Court of the United States, six years after the Nuremberg Trial, six months after his separate concurrence in the *Steel Seizure Cases*.[3] It is entitled: *Falstaff's Descendants in Pennsylvania Courts*.[4] He begins the article by saying:

> Old lawyers' tales united education with entertainment for students and young lawyers in days when they made their way to the bar through apprenticeship in law offices . . . . One such tale that I think is worth recording concerns litiga-

---

[1] E. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON (1958).

[2] C. DESMOND, P. FREUND, P. STEWART & SHAWCROSS, MR. JUSTICE JACKSON: FOUR LECTURES IN HIS HONOR (1969) [hereinafter cited as FOUR LECTURES].

[3] Youngstown Sheet & Tube Co. v. Sawyer *together with* Sawyer v. Youngstown Sheet & Tube Co., 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

[4] 101 U. PA. L. REV. 313 (1952).

> tion that descended through generations of a most uncommon family, and for over half a century occupied the legal profession in my native Warren County in northwestern Pennsylvania. It has the quality, by no means indispensable to an old lawyer's story, of being supported by the record.[5]

His formal academic career ended with high school and his year here at Albany Law School. After "reading law" he was admitted to the New York bar in 1913. He practiced in Jamestown, New York, the county seat of Chautauqua County, for twenty years, and in 1934 he became General Counsel of the Bureau of Internal Revenue in the Treasury Department under the administration of President Franklin Roosevelt. Within the next seven years, he served successively as Assistant Attorney General in charge of the Tax Division, then of the Antitrust Division, then as Solicitor General of the United States, then as Attorney General of the United States, and finally, from 1941 until his death in 1954, as Associate Justice of the Supreme Court of the United States.

But I do not think that this remarkable track record in Washington is what Justice Jackson will be primarily remembered for, or would want to be remembered for. I recall that shortly after I had been appointed to the Court upon which he served, my late father, who was not himself a lawyer and had no great interest in the law, reminded me about Justice Jackson's comments about the city of Washington. I must have looked surprised, because for a moment I could not remember Justice Jackson ever discussing Washington with me, say nothing of with my father, who was born and lived his entire life in Milwaukee, Wisconsin. But then my father, who had an extraordinary memory, reminded me that when he and my mother had visited me in Washington during the period of my clerkship, Justice Jackson had very generously invited the three of us to have lunch with him in his chambers. And my father went on to say that Jackson had commented in the course of the luncheon that "Washington is a bad city for a public official to live in. It takes everything from you, and gives nothing back." Stimulated by my father's recollection, I, too, remembered the Justice's comments, and at this point in my life would have to say that there is more than a little truth to them.

On the international stage Justice Jackson's participation as the United States prosecutor in the Nuremberg trials represented an accomplishment which none of his colleagues could match. It thus has a ready made uniqueness, but I have some doubt that he will be remembered primarily for that, either. Too much of his career was devoted to the practicing of law, the administration of the law in the executive branch of the United States government, and the judging of cases as a member of the Supreme Court, all here in the United States.

I would suggest, rather, that somewhat more generalized attributes of this man's career in our profession will remain with us for a longer period of time, or will have in the long run a more enduring consequence, than his rapid rise on the Washington scene or his participation in the Nuremberg trials.

---

[5] *Id.*

The first of these larger, albeit more amorphous, attributes which I would like to suggest is Robert Jackson's remarkable similarity to Abraham Lincoln in many respects. Obviously, there was only one Lincoln, and Robert Jackson did not lead the Union victoriously through a Civil War which resulted in the abolition of slavery. But I am speaking now not of historical accomplishments but of character traits. It seems to me that Jackson possessed much of Lincoln's rare ability to profit from experience, to accommodate his views when that experience seemed to require accommodation, and yet to maintain throughout his life a sturdy independence of view which took nothing on someone else's say-so. Chief Judge Desmond, who I am sure through long friendship knew much more about Justice Jackson than I do, seems to me to have captured this idea in his one of the four memorial lectures when he said: "But always in Jackson there was a lot of Frewsburg. . . ."[6]

The second point which I would like to make about Justice Jackson's career, and I think it is one closely related to the first, is that his life as a lawyer and judge is a living testament to the fact that the legal profession is indeed a career open to the talents. Here was a man without a background that would assure a career which would include at least a couple of important sounding titles, but who nonetheless on the basis of sheer ability rose to a number of the most distinguished legal positions which the profession offers. When I say "ability," I do not mean simply analytical ability, although I think he possessed that in great degree. I do not mean ability to charm an audience or to add zest to an otherwise dull opinion by a pithy phrase, although I think he possessed these characteristics to a degree unmatched by his contemporaries or successors. There is, in addition to all of these, an element of doggedness — the doggedness which it took to be a member of the Democratic Party in Jamestown, New York, during the 1920s and 1930s — but also the doggedness which insisted that no matter how overwhelming the weight of authority behind a doctrine, or how prestigious the signatories on a petition were, both doctrine and petition would be weighed, in part at least, with a measure of Frewsburg commonsense and with a view to the value of the Western New York environs where he spent the first forty years of his life. Robert Jackson never forgot that there was, indeed, life west of the Applachian Mountains.

While he was Solicitor General and Attorney General of the United States, Jackson authored a book entitled *The Struggle for Judicial Supremacy*.[7] It was an account of the various clashes which had occurred between the Supreme Court of the United States, on the one hand, and Congress and the President, on the other during the 1930s. I think my colleague Potter Stewart hit the nail on the head in his memorial lecture in 1969 when he said: "Although the book tells of events that took place hardly thirty years ago, it seems today to speak of 'old, unhappy, far off things, and battles long ago.' In short, it is, superficially a curiously dated book."[8]

---

[6] FOUR LECTURES, *supra* note 2, at 23.

[7] R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941).

[8] FOUR LECTURES, *supra* note 2, at 65.

But I think that Justice Jackson, at least by the time that I was his law clerk, would have been the first to admit that the book was "curiously dated" in many respects. He did give me an inscribed copy of it for Christmas, but I suspect this was a traditional gift to law clerks so long as the copies supplied by the publisher lasted. He did not boast about it, comment frequently about it, or, so far as I am aware, make repeated references to it in his later writings. It was very much the product of his Washington experience between 1934 and 1941. Just as it probably neither could nor would have been written by a lawyer who had simply practiced in Jamestown, New York, for several decades, it likewise neither could nor would have been regarded as gospel by the man who, as an Associate Justice of the Supreme Court in 1952, wrote one of the concurring opinions in the famous *Steel Seizure Cases.*[9]

Although these latter cases may seem to you of the present generation of law students as "curiously dated" as Jackson's book *The Struggle for Judicial Supremacy* seemed to Justice Stewart, I can assure you that they do not seem "curiously dated" to me. Just as the Supreme Court decisions involving the Pentagon Papers[10] or the Nixon Tapes[11] may seem almost a part of current history as well as of constitutional law to your generation, the *Steel Seizure Cases* seemed exactly that to me. I had finished law school in midterm, and came to work for Justice Jackson as a law clerk around the first of February, 1952. Two months later, the United Steelworkers of America gave notice of a nationwide strike at most of the nation's steel mills to begin five days later. A few hours before the strike was to begin, President Truman by Executive Order directed the Secretary of Commerce to take possession of most of the steel mills and to keep them running.

Obeying the Secretary's orders under protest, the companies sued the Secretary of Commerce in the United States District Court for the District of Columbia seeking to enjoin him from carrying out the terms of the President's Executive Order on the grounds that it was in excess of the President's constitutional authority.[12] It was obvious that a judicial Donnybrook was in the making.

At this time, in the prevailing constitutional climate, governmental authority was near its apex when invoked against individual or property rights. I think part of the reason for the then prevailing constitutional climate was a carryover from the struggles of the New Deal with the Supreme Court of the 1930s related in Jackson's *The Struggle for Judicial Supremacy.*[13] I think another reason for it was the relatively recent end of the Second World War and the existence at that very time of the undeclared war in Korea, facts of life which here as in so many other areas have an influence on the law. In

---

[9] Youngstown Sheet & Tube Co. v. Sawyer *together with* Sawyer v. Youngstown Sheet & Tube Co., 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

[10] New.York Times Co. v. United States *together with* United States v. Washington Post Co., 403 U.S. 713 (1971).

[11] United States v. Nixon *together with* Nixon v. United States, 418 U.S. 683 (1974).

[12] 103 F. Supp. 569 (D.D.C. 1952).

[13] R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941).

this area the influence is aptly expressed in the Latin phrase "*silent Leges inter arma*" — in time of war, the laws are silent and the guns speak. Put in a more jurisprudential and restrained fashion, it is the not unfounded belief that in times of military crisis other branches of the government must uphold the action of the executive if it is reasonably possible to do so. That, at any rate, had been the attitude of the Supreme Court in most of the cases decided in the late forties and early fifties.

Unfortunately for the government, the Justice Department apparently put to work on the case in its initial stages one or two very bright and logical recent law graduates who had the misfortune of lacking the commonsense of Western New York which Justice Jackson never forgot. To put it in contemporary metaphor, they came up with a theory in the District Court to justify the seizure without taking account of "how it would play in Peoria".

That theory was quite simply stated: Article II of the United States Constitution granted to the President of the United States all of the powers which had been possessed by King George III at the time of the revolution unless those powers were expressly limited or denied by some other provision or Article of the Constitution. I have never had occasion, as Justice Jackson's law clerk or since, to research this theory in order to see whether there actually was any precedent to support it. When argued to the District Judge who was hearing the case, it outraged him, and when stated by the press, it outraged the press and the public. Those in charge of the government's litigation were sufficiently schooled in experience as well as in precedent to quickly abandon this theory in the face of public denunciation from most quarters of the country. Three weeks after the President's order seizing the mills, the District Court issued a preliminary injunction in favor of the mill owners restraining the Secretary of Commerce from carrying out the order of seizure.[14] Four days later, on May 3rd, 1952, the Supreme Court of the United States granted certiorari and set the cases for argument on May 12th.[15] By the time of argument in the Supreme Court the government had substantially toned down its view of the President's inherent authority. But that peerless oral advocate, John W. Davis, transplanted from West Virginia to New York City by way of the Solicitor General's Office, who argued the case for the steel companies, refused to let the government off the hook that easily. While he responded to the arguments which the government made in its briefs and orally in the Supreme Court, his peroration was a denunciation of the government's original theory of the President's authority.

Although I was one of Justice Jackson's law clerks at the time the Supreme Court handed down its decision in these cases on June 2, 1952, my participation was largely that of a spectator. Although the Justice gave both my fellow clerk and me courtesy opportunities to suggest changes and modifications in his concurring opinion, each of us had the good sense to decline the opportunity insofar as any but the most minor changes were concerned. The case was deemed of sufficient importance by the Court so that six separate opinions, including a three-Justice dissent, were written in the course of

[14] 103 F. Supp. 569 (D.D.C. 1952).
[15] 343 U.S. 937 (1952).

deciding it. But I think that many scholars would agree with me when I say that of all the opinions, Justice Jackson's comes the closest to being a "state paper" of the same order as the best of the Federalist Papers, or of John Marshall's opinions for the Court in the early part of the nineteenth century. His grouping of Presidential powers into three classes — the first in which the President acts pursuant to an express or implied authorization of Congress, where his authority is at its maximum; the second where the President acts in the absence of either a congressional grant or denial of authority; and the third in which the President acts in a manner incompatible with the expressed or implied will of Congress,[16] has yet to be surpassed in its statesmanlike and lawyerlike analysis of the executive branch of the federal government.

Justice Jackson would never have written *The Struggle for Judicial Supremacy* had he remained in Jamestown. I do not believe he would have written his concurring opinion in the *Steel Seizure Cases* had not he been exposed in the eleven years between 1941 and 1952 to this country's participation in a World War, to the experiences which he underwent as the prosecutor for the United States at the Nuremberg trials, and to the beginnings of the "Cold War" in the late forties and early fifties of this century.

So here was a man truly capable of profiting by and learning from experience. Yet, insofar as I could tell, his own ego or view of his own capacities was never unduly elevated by any of the successes which he achieved. It is easier than one might imagine to become isolated in Washington, and easiest of all to become thus isolated in high public office. But Justice Jackson never succumbed to that temptation, and time and again vigoriously reasserted his independence of judgment even though it might conflict with currently fashionable modes of thought. There was indeed always "a good deal of Frewsburg" in him. He did not have to read the views of some particular columnist, commentator, or editorial writer in order to know what he thought about a particular factual situation.

Personally, he was as ideal an employer as a law clerk could have. My interview with him for that position took place when he came to Stanford in the summer of 1951 to dedicate the then new Law School, at which I was a student. I had expected some sort of grilling on one or another fine point of constitutional law; but although we did briefly discuss this subject, when he learned that I was of Swedish ancestry, he put me completely at ease by recounting several humorous dealings he had had with Scandinavian clients in Jamestown. When I reported to him for work as a law clerk many months later, I expected a brief handshake and a list of assignments which he wished me to begin work upon immediately. The handshake was there, but his first comment was "Well, I guess the best thing we can do for you right now is to make sure that you are put on the payroll as of today." And, I hasten to add, he could not have been more right.

I have tried to point out that just as Jackson's book *The Struggle for Judicial Supremacy* was peculiarly the product of his seven years in the executive branch of the federal government from 1934 to 1941, that experience

[16] 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

deepened and ripened into what seems to me a much more enduring statement — his concurring opinion in the *Steel Seizure Cases* — as a result of the eleven years of experience and reflection which he underwent from 1941 to 1952. But I would be quite amiss if I left you with the impression that he addressed himself only to then-current issues or cases which arose in the course of his duties as an Associate Justice of the Supreme Court of the United States. In the posthumously published Godkin Lectures,[17] which he had substantially completed before his sudden death in October, 1954, he had distilled from his life experience and reflection not merely observations about past or contemporary political or judicial doctrinal struggles, but took occasion to look into the future as well.

I would like to relate that portion of the Godkin Lectures which my colleague, Potter Stewart, quoted near the end of his memorial lecture in honor of Justice Jackson. My colleague there adverted to Jackson's criticism of a "cult of libertarian judicial activities" who, in the words of Jackson's Godkin Lectures

> believe that the [Supreme] Court can find in a 4,000 word eighteenth-century document or its nineteenth-century Amendments, or can plausibly supply, some clear bulwark against all dangers and evils that today beset us internally. This assumes that the Court will be the dominant factor in shaping the constitutional practice of the future and can and will maintain, not only equality with the elective branches, but a large measure of supremacy and control over them. I may be biased against this attitude because it is so contrary to the doctrines of the critics of the Court, of whom I was one, at the time of the Roosevelt proposal to reorganize the judiciary. But it seems to me a doctrine wholly incompatible with faith in democracy, and in so far as it encourages a belief that the judges may be left to correct the result of public indifference to issues of liberty in choosing Presidents, Senators, and Representatives, it is a vicious teaching.[18]

And who among us can say that these posthumously published observations do not have a large measure of truth in them?

I have mentioned earlier that a good deal more can be drawn from Justice Jackson's career than the styling of him as sort of a judicial counterpart to Dick Whittington, thrice Lord Mayor of London. He served the administration of President Franklin D. Roosevelt well during the seven years he held office under the administration. He served the United States well as a prosecutor in the Nuremberg trials. He served the "Constitution and laws of the United States", which he swore to uphold at the time he took office as Associate Justice of the United States, equally well during the thirteen years he held that position. Though others still living know him much better than I did, I had the strongest sort of feeling that he did not regard his private practice in Jamestown as merely a stepping stone to high office in Washington, nor the various high executive branch positions he held as merely stepping stones to a seat on the Supreme Court of the United States. He served each of the interests he was bound to serve faithfully and well during the

---

[17] R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1962).

[18] *Id.* at 58.

time which he undertook to serve them. He never used them as a means merely to further his own career.

I do not mean to overstate my case. Obviously, if Robert Jackson had not moved from Frewsburg to Jamestown, even though he ultimately became a lawyer, he might well have been limited to a small country town practice. There is certainly nothing wrong with a small country town practice, and I think the present law school generation has been teaching my generation some lessons to that effect; but insofar as it presents complex legal problems, as opposed to frequently even more complex and more difficult problems of counseling, Frewsburg is not Jamestown, and Jamestown is not Washington. Had Jackson not accepted the appointment as General Counsel to the Internal Revenue Commission in 1934, he would never have had an opportunity to display his splendid legal talents as an advocate and as a judge upon the national and international stage.

But I never felt in the times that I talked with him, nor have I discerned in anything which I have read about him, that as he ascended the legal ladder, so to speak, he left behind either those who are less fortunate or less able than he was, or the places where he had been.

I think it was said of Benjamin Disraeli, when he became Prime Minister of England in the latter half of the nineteenth century, that he had finally "climbed the greasy pole". There are doubtless some who cherish ambition for high office from an early age, who are astute enough to recognize that it is attained as often as not by accident, and who also realize that the best way to achieve their ambition is to avoid any possible pitfall which may lie in their way. But from everything I know about Justice Jackson's career, in spite of its stunning successes, it was never regarded by him as the "climbing of a greasy pole". His duties from 1941 until his death, with the exception of the interval which he spent at Nuremberg, required him to live in Washington. But I do not think he ever felt that by moving to Washington and achieving national recognition he somehow left behind his clients, friends, and kinsmen in Western New York. As I indicated earlier, at each station of his life he devoted his full legal energies to those who then had a claim upon them. I think I can summarize this sense of his career by observing that of him it can never be said, as Cardinal Wolseley says in Shakespeare's Henry VIII: "Had I but served my God with half the zeal I served my King, he would not in mine age have left me naked to mine enemies."