

ROBERT H. JACKSON:

Country Lawyer
Supreme Court Justice
America's Advocate



EUGENE C. GERHART

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FOREWORD



Robert H. Jackson served from 1941 to 1954 as an Associate Justice of the Supreme Court of the United States. He had previously risen through the ranks of the Department of Justice, serving first as Assistant Attorney General, then Solicitor General “for life,” a high compliment from one who did not bestow compliments casually.

Two attributes, I think, characterized Jackson’s service on the Supreme Court. First of all, he was, in contrast to some of his colleagues, a “lawyer’s lawyer.” He left Jamestown, New York, for Washington, D.C., in his early forties. His practice in Jamestown—a small city—netted him in excess of \$30,000 annually in the heart of the Depression. More than one of his opinions reflect a concern for the effect of the Court’s decision on practicing lawyers throughout the country. Responding to a claim by counsel in a case involving discovery that the Court should not allow a trial to be “a battle of wits between counsel,” he said:

But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.

329 U.S. 495, 516 (1947).

Second, he was not simply an excellent legal writer, he was an excellent writer, period. Justice William O. Douglas, who often

disagreed with him, described him as an “essayist whom one was always glad to have on one’s side.” Having served as one of his two law clerks in the early 1950s, I soon became convinced that he needed little, if any, help from his law clerks in drafting opinions. And surely his opinion in the *Steel Seizure* case, speaking only for himself at that time, is a superb example of a legal essay which eventually became the governing law on the subject.

Lawyers and laymen alike should welcome the reprint of Eugene Gerhart’s fine biography of this remarkable man.

William H. Rehnquist

Chief Justice

Supreme Court of the United States

January 2003

INTRODUCTION



The Legacy Lives On

On November 2, 1953, United States Supreme Court Justice Robert H. Jackson spoke at the laying of the cornerstone of the American Bar Center in Chicago. In his address he set forth his creed for American lawyers. After outlining the specific ideals of the legal profession, he said:

A story that I have often told seems especially apt today. A visitor at a cathedral under construction questioned three workmen as to what they thought they were doing. The first muttered: "I am making a living." The second gave the uninspired reply, "I am laying this stone." The third one looked up toward the sky and his face was lighted up by his faith as he said, "I am building a cathedral." (39 ABA J. 1086; 40 ABA J. 19.)

What are we doing today? We are building a cathedral to testify to our faith in the rule of law.

His legacy points out that a life of the highest usefulness remains possible for any lawyer who devotes himself or herself to the high-minded practice of the law.

By combining *America's Advocate* and *Supreme Court Justice Jackson: Lawyer's Judge* into a single volume, the leaders of the Robert H. Jackson Center for Justice in Jamestown made Jackson's

legacy available to lawyers everywhere. Congratulations to the Jackson Center for the splendid decision to help make Justice Jackson's professional legacy immortal.

Eugene C. Gerhart
Binghamton, New York
January 2003

AMERICA'S ADVOCATE:
Robert H. Jackson

EUGENE C. GERHART

The Bobbs-Merrill Company, Inc.
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*This book is dedicated to
AMERICA'S ADVOCATES
through whose efforts the world
may yet attain Kipling's goal—
"Leave to live by no man's
leave, underneath the law."*

First Edition

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Foreword

I VALUE VERY HIGHLY the invitation to write an introductory word to the life of Mr. Justice Jackson which Mr. Eugene Gerhart has written. It was most desirable that such a biography should be written, so that the name and the fame of a most distinguished son of the United States of America should be preserved and perpetuated far beyond the recollection of men and women now living. The world has always had a very special place in its affections for the "lad o' pairts," in the old Scots phrase, who wins his way to the highest places solely by his merits, and yet keeps his integrity in the doing of it; and this book will give to generations of young Americans the spur and the incentive to noble living. President Lincoln is perhaps still the supreme example. He it was who made the country lawyer an immortal figure, and James Russell Lowell gave the country lawyer a place in literature:

God sends country lawyers and other wise fellers
to start the world's team when it gets in a slough.

Mr. Justice Jackson, or Bob Jackson as he was affectionately called, was a country lawyer too, and was proud to be so named; but destiny called him to the larger life and the larger world; and the country lawyer became the member of the Supreme Court and the world figure of the International Trial at Nuremberg.

Since his death in October of 1954, so much has been written in his praise that it is almost impossible to find anything new or distinctive to say about him that has not already been said by those who were in many ways more qualified to speak of him than I could possibly be. In the present book Mr. Gerhart has written of every phase of his life with great understanding, and insight, and completeness; and those of his friends who knew him most intimately have contributed to the making of the full and satisfying picture. In particular, the Nuremberg phase of his life has been chronicled with exactness and detail, and there is nothing of any moment to be added. The book is extremely well documented, and the notes are sometimes most fascinating additions to the text, and should not be overlooked. The book has also

this very great advantage in having been begun by Mr. Gerhart during the lifetime of Mr. Justice Jackson, so that on many matters it is the Justice himself who speaks with authority, having been expressly consulted by Mr. Gerhart for this purpose. In these circumstances I am sure that the best thing I can do is to commend the book as one of great value, as a record of a public-spirited and devoted life, and then merely add a few words by way of tribute to one who was my friend, and to attempt nothing more ambitious.

I first met him at the meeting of the American Bar Association at Indianapolis when he was the Attorney General of the United States, and I had the great pleasure of sitting by his side at the annual dinner in the James Whitcomb Riley room of the hotel, and heard him make the most delightful speech, rich in humour and in profound common sense. I was instantly attracted to him by those qualities of heart and mind which made him the great personality he was, and which were immediately discernible. Here was a man who had read Blackstone and was obviously a man of law; but here also was a man who had read and loved King James's Bible, and was also obviously a man of letters. Here was no dry-as-dust lawyer, no pedant, no shrinker from life, but a warm, friendly, eager man of affairs, brimming over with energy and ideas, and with a philosophy of life which was the expression of his character. Looking back it is quite extraordinary how that first immediate impression remains. Although I was to meet him at Nuremberg, and spend more than a year in his company when he was Chief of Counsel in 1945-46, doing the work which he himself described as "the most enduring, important, and constructive work of my life," it is to that first happy, carefree meeting at Indianapolis that my mind most frequently turns back. From time to time we wrote letters to each other, and he would send me copies of the addresses he delivered at law schools and elsewhere, and copies of the books he wrote and published; and I would visit him in Washington and see him and his colleagues in the Supreme Court. But for over a year at Nuremberg we saw each other every day, and not merely in the International Court, but at each other's houses, and in all the activities which inevitably spring up where men and women of many nationalities are gathered together with a common purpose.

In the court itself, sitting as I did on the Bench day by day, I had the opportunity of seeing a superb exhibition of advocacy, notably in the opening speech when he outlined the case for the prosecution in most memorable and striking language, and in the closing speech

when, after many, many months of evidence, he made the most masterly summing-up of "as vast and varied a panorama of events as ever has been compressed within the framework of a litigation," to use his own description. These two speeches have been singled out by lawyers all over the world as supreme examples of advocacy, and I will therefore only add this word. One of the marks of the highest advocacy has always been the ability to make an orderly presentation to the court of the most complicated facts, but it is safe to say that never in the history of criminal trials was so complicated a case ever set before counsel, and never did any counsel emerge from it so triumphantly. These two great speeches, in my opinion, are the superb triumphs of his days at Nuremberg.

It was notorious that the trial was looked upon by many lawyers with grave misgiving, and much doubt as to its wisdom; there was no precedent of any real value as a guide; the judges were of four different nationalities and were drawn exclusively from the ranks of the victors; the accused were all members of a recently defeated nation; the mass of documents was perfectly overwhelming; and a score of other difficulties had to be faced and surmounted. Mr. Justice Jackson held the view that it was right and proper, and indeed essential, that the trial should take place to vindicate certain principles of international law and to take a decisive step in the condemnation of aggressive war. Controversy has raged and will continue to rage about the effect of the trial on future international law, but the trial at least demonstrated, as never before, what happens to a great nation and a great people when justice is cast out and the rule of law is no longer operative. It is most fitting that in any account of the life of this many-sided man tribute should be paid to his eloquence, his forensic skill, his powers of judgment and all the other qualities with which he had been endowed in such abundance, and which made him the great figure that he was.

But as an eye-witness of the great events at Nuremberg, I would lay stress upon the qualities of faith and courage of Mr. Justice Jackson, for it was the combination of these two things which sustained him to the end of his great task, and without which the great experiment might have failed before the eyes of the world. He had the faith to believe that his tremendous task was of the highest value to the world, and he had the courage to confront appalling difficulties and triumph over them all. As the trial was conducted before a world audience, it was quite essential that the world should be made to see that the trial conformed to the highest standards of fairness and justice.

This made it imperative that the accused should be given every opportunity to present their defenses to the charges with fullness, and that nobody should ever be able to say that they were deprived of that opportunity. They were given German counsel of their own choosing, they were allowed to give evidence for themselves, and also to make speeches on their own behalf at the conclusion of the case. Mr. Justice Jackson was insistent that there should be no complaint on this head at any time. The only occasion when he displayed real anger in the court was when he considered that the Tribunal was allowing Goering to take advantage of this in the most unjustifiable way, by delivering speeches when he ought to have been answering questions during the cross-examination by Jackson. Mr. Justice Jackson expressed his own view about this matter in his lifetime and Mr. Gerhart duly records it, and there perhaps the matter may rest; for the passage of the years has made what was once called the Jackson-Goering duel a mere incident of the trial, whereas the solid achievement of Mr. Justice Jackson stands out more clearly as the years pass, and is destined to endure. To those of us who were privileged to know Bob Jackson he will remain in memory as a very well-loved figure, but it is to be hoped that this book will preserve his memory for those who never knew him in life, but who will be inspired by his great example.

Royal Courts of Justice
Strand
London, W.C.2, England

NORMAN BIRKETT

October, 1956

Preface

ROBERT HOUGHWOUT JACKSON was America's advocate at the first international criminal trial in history which held individual defendants personally responsible for making aggressive war. Besides holding that unique position, he served his country as a lawyer, as Solicitor General, as Attorney General, and as a United States Supreme Court Justice. When I first voluntarily approached him about writing the story of his life, he modestly replied on October 30, 1947:

It has not occurred to me that my career up to date warranted a biography. Until a life is closed it is pretty difficult to say what its credit and debit balance will be. . . . That you find it of interest is flattering. But I would not want to encourage the belief that it would have either wide or permanent value.

Justice Jackson from time to time expressed doubts about the wisdom of publishing a biography during the subject's lifetime. His unexpected death in 1954 settled that question.

This biography of his life is entirely my own undertaking. The book is therefore not an "authorized biography" in the sense that it was written at the behest either of the subject, his family or his literary executors. Justice Jackson never dictated what I should include in it nor did he ever try to restrict my independent, objective appraisal of his work.

There are certain real advantages in commencing a biography during the biographee's lifetime. Contemporary comment of living witnesses is available to the writer. The author is able to meet the biographee personally and to examine in retrospect aspects of his past life with him. This valuable opportunity was afforded me by Mr. Jackson. Our first interview took place on October 8, 1947; our last on March 19, 1954, shortly before his first heart attack which ultimately resulted in his untimely death on October 9 of that year. During this period of almost seven years we reviewed together in detail the important events of his life. At our last interview he remarked, "I think you have exhausted the sources." In our interviews Mr. Justice Jackson's observations were recorded stenographically in his own words. They therefore

provide us with an accurate record of his personal views of many of the events of his varied career.

My goal has been to portray Robert H. Jackson as a lifelike human being. No life is ever composed entirely of consistent success and unrelieved excellence. He made mistakes—as we all do—one of which he permanently recorded in our Supreme Court Reports in the *Kristensen* case. Jackson was a man. Like other men he had interests, motives, ambitions, passions, limitations, faults, failures, successes and ideals. Some of his outward actions revealed to us the motives of the inner man. I have striven to show how he acted in his environment; to present him in just proportion as a man and a lawyer, as an advocate and a judge.

In biography, as in life, small things are often significant and revealing. To determine what is meaningful in any man's life necessarily involves judgment and selection. What is essential? What is characteristic? What is permanently interesting? The inevitable choices these questions present require decisions with which every reader cannot reasonably be expected to agree. I have aimed for the middle ground. I have tried to paint Justice Jackson as he was, without omitting what seemed important and also trying not to exaggerate what appeared to be less significant. In this delicate task I have earnestly tried to neither include nor exclude anything which would present Mr. Justice Jackson in an unfair light. Certainly it is not a biographer's function to merely re-echo the reader's presuppositions, nor, on the other hand, to force on the reader the author's own estimate of his subject. What is to be gained by glossing over the truth and prettifying matters? Mr. Justice Jackson and I both admired M. André Maurois' approach to biography:

Here is a man. I possess a certain number of documents, a certain amount of evidence about him. I am going to attempt to draw a true portrait. What will this portrait be? I have no idea. I don't want to know before I have actually drawn it. I am prepared to accept whatever a prolonged contemplation of my subject may reveal to me, and to correct it in proportion to such new facts as I discover. . . . Neither fear, nor admiration, nor hostility must lead the biographer to neglect or pass over a single one of them in silence.

A biographer who undertakes to improve upon nature by omitting what he feels are the mistakes made by great men distorts, mutilates and in the end belittles his own hero.

In this writing of his life Mr. Justice Jackson gave me full access to

his speeches and his public papers. He also made available his autobiographical notes, various personal memoranda, diaries of trips and other events, notebooks and such other items from his personal files and personal correspondence as seemed relevant to the subjects under discussion. Of special value were our interviews and our correspondence between 1947 and 1954. In our interviews Justice Jackson spoke freely, candidly, openly, about the various facets of his whole life. Most of these interviews took place in his own chambers in the Supreme Court building in Washington. After the Justice's death, Mrs. Robert H. Jackson and the Justice's son, William E. Jackson, lent valuable assistance in reviewing various portions of the manuscript which dealt with those aspects of his life with which they were most intimately familiar. I am deeply indebted to them for their kind assistance and their suggestions.

A special acknowledgment must be made for the assistance I have received from the following friends and relatives of Mr. Justice Jackson: his sister, Mrs. Percy Adams of Jamestown, New York; and his Jamestown friends, John H. Wright, Judge Harley N. Crosby, Ernest Cawcroft, C. George Niebank, Judge Charles B. Sears, Henry S. Manley, Marion H. Fisher and Rollin F. Cass, as well as Judge Lee L. Ottaway. In connection with Justice Jackson's public life, my special thanks are tendered to the following who contributed valuable information: Charles H. Warren, historian of the United States Supreme Court; Arthur Krock of the *New York Times*; Merlo J. Pusey of the *Washington Post*; Professor Philip C. Jessup of Columbia University; Dean Emeritus Roscoe Pound, Dean Erwin N. Griswold and Professor Arthur E. Sutherland, all of Harvard Law School; Miss Virginia Warren, formerly secretary to Frank Hogan; Chief Justice Arthur T. Vanderbilt of New Jersey; James M. Marsh; former President Herbert Hoover; former President Truman's Press Secretary, Joseph P. Short; former Attorney General Homer Cummings; Supreme Court Justice Felix Frankfurter, and former Postmaster General James A. Farley. Mr. Gordon Dean, intimate friend and assistant of Mr. Justice Jackson both in Washington and Nürnberg, deserves my special gratitude.

For their substantial aid in contributing to those chapters which deal with what Mr. Justice Jackson himself regarded as the most important and enduring work of his life, the Nürnberg Trials, I acknowledge my great indebtedness first and foremost to his friend and colleague, Sir David Maxwell Fyfe, now Lord Kilmuir, and Lord Chancellor of England. Thanks are also due to Sir Hartley Shawcross;

to Hon. Francis Biddle and Judge John J. Parker, America's judges at Nürnberg; and to Lord Justice Lawrence, now Baron Oaksey, presiding judge at Nürnberg; to M. François de Menthon; to Sidney S. Alderman, Whitney R. Harris and Robert G. Storey for their valuable contributions to the Nürnberg story. To my long-time friend and mentor, Manley O. Hudson, formerly Judge of the World Court, I say a very special "Thank you." Sir Norman Birkett deserves my sincerest appreciation for contributing the Foreword and for his aid on the Nürnberg chapters. Valuable help is gratefully acknowledged from John W. Davis, George Wharton Pepper and Lloyd Paul Stryker—each an outstanding advocate in his own right—for their appraisals of Robert Jackson as an advocate. I readily acknowledge my debt to my deeply admired friend and respected former teacher, Alpheus Thomas Mason of Princeton. He himself stands in the front rank of judicial biographers. His own success was the inspiration which kindled my ambition and the beacon which guided me along this pleasant literary journey. I also have received helpful advice from two other pre-eminent biographers of Supreme Court Justices, Professor Charles Fairman of Harvard Law School and Professor Donald G. Morgan of Mt. Holyoke College.

Writing judicial biographies would be an almost insuperable task were it not for the aid rendered by libraries and their helpful staffs. I readily admit my debt to the Library of Congress, the New York State Library, the Cornell Law School Library and its efficient Dr. Lewis W. Morse. Special thanks are due to the Parliamentary Library in Ottawa, Canada, and to Mr. T. E. Monette as well as to Misses Romana Javitz and Louise Leak of the New York Public Library. Outstanding, however, has been the assistance so graciously given to me for ten years by the ladies of the Binghamton Public Library, chief of whom has been Miss Pauline Goembel. These efficient ladies have learned how right Dr. Johnson was when he declared that "A man will turn over half a library to make one book."

Mrs. Elsie L. Douglas, Justice Jackson's own secretary, has been unfailingly gracious in supplying material, answering my numerous inquiries and in helping me in those many important ways which are the hallmark of a superlative secretary. My own secretary, Mrs. Lorraine S. Wagner, has been my dependable partner throughout in this portrayal of Mr. Justice Jackson. Her untiring aid and cheerfulness through long and oftentimes weary hours were a constant and happy inspiration. To my friend and college classmate, William M. Oman, I express my warm and cordial thanks for his help. To my wife Mary

and my daughters Catherine and Virginia I return thanks for that help and inspiration which a man's family knows best how to give.

Lord Bryce observed that "No author, however great, is exempt from error." Justice Jackson's biographer surely cannot aspire to be the exception to that rule. I am grateful to all those who have contributed to this work, for a large share of its merit is theirs. The responsibility for this book is not theirs; it is mine alone. I am consoled by Professor Fairman's observation that "No biography of a judge is so poor that there is no one to speak well of it, none is so good that there is no one to find it disappointing." Whether I have succeeded or failed in my task, time and the reader will judge. I do know that I have tried faithfully to create a true and fearless biography of a man, a lawyer, a judge and an American advocate who was, as I knew him, both true and fearless.

Binghamton, New York
1956

EUGENE C. GERHART

The Advocate

Now it is difficult for any man, however wise or eloquent, to speak for himself, when fortune, reputation, happiness, life itself, are in jeopardy and rest on the decision of strangers, sworn before God to find an impartial verdict from the evidence brought before them. Hence has arisen the honourable and necessary profession of the advocate; it is indeed a high and responsible calling; for into his keeping are entrusted the dearest interests of other men. His responsibility is wider in its scope than a physician's, and more direct and individual than that of a statesman; he must be something of an actor, not indeed playing a well-learned part before painted scenery, but fighting real battles on other men's behalf, in which at any moment surprise may render all rehearsal and preparation futile. "My profession," once said Sir Edward Marshall Hall, "and that of an actor are somewhat akin, except that I have no scenes to help me, and no words are written for me to say. There is no back-cloth to increase the illusion. There is no curtain. But, out of the vivid, living dream of somebody else's life, I have to create an atmosphere—for that is advocacy."

The advocate must have a quick mind, an understanding heart, and charm of personality. For he has often to understand another man's life-story at a moment's notice, and catch up overnight a client's or a witness's lifelong experience in another profession; moreover, he must have the power of expressing himself clearly and attractively to simple people, so that they will listen to him and understand him. He must, then, be histrionic, crafty, courageous, eloquent, quick-minded, charming, great-hearted. These are the salient qualities which go to make a great advocate. . . .

—*Marjoribanks*, *For the Defence*, pp. 1-2.

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