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Robert H. Jackson, Nuremberg, and the Spectacle of Wartime Tyranny

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History
Robert H. Jackson, Nuremberg, and the Spectacle of Wartime Tyranny

On a cold December morning in late 1945, Robert Jackson became a spectator. For much of 1944, he had spent many days and sleepless nights preparing the case against the remnants of Hitler’s Third Reich. In late November, Jackson’s opening arguments had stressed the unprovoked nature of Nazi aggression and outlined evidence of premeditation in Hitler’s attack against Europe. Now, Jackson sat and watched as one of his young colleagues rose to address the packed courtroom. Thomas Dodd, thirty-eight and already a veteran within the Justice Department, gestured to a small table covered with a white sheet. As court stenographers clattered away on their typewriters and press reporters hastily jotted down notes, an assistant removed the sheet to reveal United States Exhibit 254. A murmur of revulsion swept through the courtroom, and several spectators gasped audibly.\(^1\)

“This exhibit which is on the table is a human head,” remarked Dodd, “with its skull bone removed, shrunken, stuffed and preserved. The Nazis had one of their many victims decapitated after having hanged him apparently for fraternizing with a German woman.”\(^2\) Taken from the commandant’s office at the Buchenwald concentration camp, the shrunken head had served as a grisly paperweight during the war. Several yards in front of Dodd, the seated defendants displayed a range of reactions. Some turned away or whispered to one another. For the preceding two weeks, Jackson and the American legal team had been hammering home the theme of Nazi brutality; now, the withered skull provided visual evidence of the horror that could be wrought by a small but determined group of individuals.

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\(^1\) Gail Jarrow, Robert H. Jackson: New Deal Lawyer, Supreme Court Justice, Nuremberg Prosecutor (Honesdale, PA: Boyds Mills, 2008), 86.

The grisly exhibition at Nuremberg became one of the most striking moments in a monumental trial that cast a long shadow over the career of Robert H. Jackson. During the 1940s and early 1950s, Jackson became one of the most influential American legal figures of the twentieth century. In thirteen years as an associate justice on the United States Supreme Court, he participated in a number of seminal decisions. Jackson’s time on the bench spanned two wars and forced him to confront the most controversial political and social questions of his era; his opinions in World War II sanctioned the detention of “unlawful combatants” and questioned the wisdom of legal precedents grounded in military exigency, while the 1950s brought about the issue of institutionalized segregation with *Brown v. Board of Education* (1953). By the time of his death in 1954, he had written over three hundred opinions and developed into one of the nation’s most respected jurists.

All the same, perhaps his most significant career achievement--and the one which may have most dramatically influenced his legal philosophy after the Second World War--took place not in the hallowed halls of the United States Supreme Court but inside the hastily rebuilt Nuremberg Palace of Justice. Here, Jackson took on the challenge of breaking new ground in international law. In America, Jackson was part of a judicial body steeped in common law precedent; in Germany, as chief prosecutor for the United States, Jackson orchestrated a decidedly unprecedented series of proceedings. Indeed, as the justice himself noted in his opening address to the International Military Tribunal on November 21, 1945, the establishment of the “first trial in history for crimes against the peace of the world” by the victorious Allies was “one of the most significant tributes that Power has ever paid to Reason.”

Apart from its sheer novelty, Nuremberg marked a turning point in Robert Jackson’s individual approach to the law. In his early years as a lawyer and rising star in the Roosevelt

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administration, Jackson had exhibited an almost fanatical devotion to the preservation of individual liberties. He built a career representing union workers against their corporate bosses and later expressed concern when, as Attorney General, he was directed to authorize wiretaps of American citizens at the start of World War II. Upon his appointment to the Supreme Court in 1941, however, Jackson became markedly more deferential to executive authority. Despite lingering doubts as to the efficacy of wartime legal precedents, Jackson attributed sweeping powers to the presidency in the early 1940s. Then, after the war, his stance changed again; neither unequivocally in favor of personal liberty nor excessively submissive to executive power, Jackson’s post-war jurisprudence was somewhere in-between the two extremes he had previously occupied.

Since the International Military Tribunal came about at the focal point of Jackson’s second philosophical transition--away from deference, with a few reservations--his experience at Nuremberg and the extent of its lasting impact on the justice may shed light on his post-war opinions. Could the trial of 21 prominent Nazis and the lasting repercussions of their deeds have profoundly affected Jackson’s subsequent jurisprudence? Determining the underlying reasons for particular intellectual evolutions is invariably challenging, and Jackson left no definitive clues in this regard. Even after the trial, his private journals remained devoid of declaratory resolutions to curb executive tyranny or prevent the rise of American fascism; in other words, the justice himself left no “smoking gun” which might attest to the tribunal’s lingering effect on his post-war legal rationale. Nevertheless, a number of Jackson’s written opinions after 1946 suggested that the lessons of Nuremberg were never far from the justice’s mind. His decisions--and, perhaps more importantly, the rhetoric they employed--began to reflect a consciousness of

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4 Twenty-four were actually indicted, but three were unable to stand trial for various reasons. One defendant, Martin Bormann, was tried and given a death sentence in absentia. See Michael Marrus, *The Nuremberg War Crimes Trial 1945-46: A Documentary History* (Boston: Bedford Books, 1997), 258-260.
how Hitler had seized and secured power in Germany. Months spent untangling the web of conspiracy and savagery that underpinned the Nazi regime exposed Jackson to the complex machinery of National Socialism. As a result, he was well equipped to bring his unique experience to bear as the post-war Supreme Court considered new domestic challenges in the late 1940s and early 1950s. A glance at his biographical background and a chronological examination of his post-war legal arguments suggests that the haunting legacy of Nuremberg figured prominently in his subsequent deliberations.

*A Lawyer and a Justice*

The future Justice Robert Jackson’s long road to Nuremberg began rather inauspiciously. Growing up in New York state around the turn of the century, Jackson developed an early taste for adversarial argument. Debate became his hobby of choice as a student, and he was particularly drawn to the oratorical style of the infamous Populist leader William Jennings Bryan. Ideologies aside, Jackson was taken with Bryan’s “magnetic personality and his oratory...” and the way “[he] didn’t talk down to people.” Despite his knack for public speaking, Jackson had difficulty pursuing a career in law; his father held a low opinion of lawyers and would not finance young Robert’s studies in law school. Undeterred, Jackson secured an apprenticeship with a small law firm in Jamestown, New York. According to his Nuremberg colleague Telford Taylor, Jackson thus became “probably the last nationally prominent lawyer to gain admission to the bar by serving an apprenticeship rather than by a law school degree.”

At this nascent stage of his legal career, Jackson emerged as a fervent proponent of individual and workers’ rights, often representing union employees against their corporate

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6 Jarrow, Robert H. Jackson, 27.
bosses. His first case, in 1913, grew out of a transit strike and allowed Jackson to defend twenty streetcar workers charged with rioting. After several lawyers turned down the job, the union approached Jackson. Without an actual law degree, Jackson had to request permission to try the case from Edward J. Green, the local district attorney. According to Jackson’s biographer, Eugene C. Gerhart, Green consented “a little too readily to be complimentary.”8 Despite his relative inexperience, Jackson won an acquittal for his clients and made a name for himself as a skilled advocate. The case also crystallized Jackson’s early dedication to championing the individual; as Jackson’s friend John Wright would later recollect, Jackson the attorney “was no young man concerned only with fees and with corporate distinction. He was always available to the underdog and the unfortunate.”9 With barely any formal legal education, Robert Jackson quickly carved out a niche defending those who most needed representation.

Jackson continued to practice in the Empire State for the next twenty years, until the political rise of another prominent New Yorker opened up a new career path at the heart of American government. As president of the Federation of Bar Associations of Western New York between 1928 and 1932, Jackson had been consulted by Governor Franklin Delano Roosevelt on numerous state projects.10 When FDR was elected to the U.S. Presidency in 1932, he was already familiar with Jackson’s work. As the New Deal administration sought capable Democratic lawyers to litigate tax cases, Jackson emerged as a logical choice. In the fall of 1933, Secretary of the Treasury Henry Morgenthau offered Jackson a position as general counsel for the Department of Revenue.11 Over the next decade, Jackson gradually rose through the ranks of

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9 John Wright, memorandum to Eugene C. Gerhart, in Gerhart, *America’s Advocate*, 40.
10 Gerhart, *America’s Advocate*, 64.
the administration by displaying a fervent devotion to New Deal policies. At the same time, however, he encountered aspects of executive authority that began to make him uneasy.

The first of these came almost immediately after his appointment and pitted Jackson against one of the living symbols of the Great Depression. In late 1933, the Justice Department instructed Jackson to pursue a case against Andrew Mellon, the industrial magnate who had served as Treasury Secretary under three Republican presidents.\(^\text{12}\) Now, with a Democrat in the White House, the Roosevelt cabinet sought to indict Mellon on charges of intentional tax fraud, alleging that he had knowingly evaded income taxes. Despite his commitment to the New Deal plan, Jackson recommended that the Justice Department drop the case because intentional fraud would be extremely difficult to prove, given the slim body of evidence available. When he voiced these concerns to Morgenthau, the latter told Jackson, “I consider that Mr. Mellon is not on trial but democracy and the privileged rich [are] and I want to see who will win.”\(^\text{13}\) According to Gail Jarrow, Jackson was troubled by this conversation and the implicit admission that the case against Mellon was politically motivated.\(^\text{14}\) Despite his qualms, however, Jackson went ahead with the prosecution and secured a judgment against the wealthy industrialist. The Mellon episode was not enough to shatter Jackson’s devotion to Roosevelt and the aims of the New Deal, but it was a striking reminder that executive power carried with it the potential for abuses of authority.

As the decade wore on, Jackson once again found himself asked to carry out a presidential directive that ran counter to the young lawyer’s developed concern for individual liberty. Having risen through the ranks of the Justice Department during the latter half of the

\(^{12}\) Mellon served in this capacity in the Harding, Coolidge, and Hoover administrations from 1921-1932.


\(^{14}\) Ibid., 29.
1930s, Jackson was appointed Attorney General of the United States in 1940, just a few short months after war broke out in Europe. Amidst a rising tide of domestic security concerns, the Roosevelt administration ordered Jackson to conduct wiretap surveillance of American civilians in an effort to root out potential spies or Nazi sympathizers. Despite his close ties to FDR, Jackson balked at the command. In his annual report to the White House, he stressed that efforts to ensure the safety of the United States must be carried out “with due regard to the civil liberties of the individual as guaranteed by the Bill of Rights and embraced in our American traditions.”

Consequently, Jackson wrote, the agenda of national security would veer into dangerous territory if it ignored or marginalized the fundamental freedoms so sacrosanct to the American public. “In the process of upholding democratic ideals,” he continued, “we must not unwittingly destroy or impair what we are cherishing and endeavoring to preserve.” As in the Mellon case, however, Jackson ultimately acquiesced and did as he was told. Still, the two episodes underscored the potential for misappropriation of power when the executive was left unchallenged.

Following these uncomfortable brushes with unitary decision-making, Jackson continued to climb the American legal ladder during the Second World War. On June 12, 1941, President Roosevelt nominated Jackson to fill a newly vacated seat on the U.S. Supreme Court. Sworn in a month later, Robert Jackson would serve as an associate justice for the rest of his life. His judicial tenure throughout the remainder of the war was marked by a series of landmark cases concerning the extent of discretionary executive power during wartime. Robert Jackson had come a long way from his early days as a local advocate in New York, and the Court appointment now afforded him the opportunity to directly influence the character of American constitutional law.

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16 Ibid.
Having been appointed to the bench thanks largely to his New Deal bona fides, Jackson repeatedly articulated a philosophy of judicial deference during World War II. In 1942, the Court’s holding in *Ex parte Quirin* sanctioned the ability of the president to create military tribunals in order to try captured Nazi saboteurs. Jackson’s concurrence claimed that the White House had the inherent authority to create such military commissions. The treatment of enemy forces captured on American soil, he wrote, was “an exclusively military responsibility.”¹⁷ To Jackson, the Court would be “exceeding [its] powers in reviewing the legality of the President’s Order...”¹⁸ Two years later, in *Korematsu v. United States*, Jackson reiterated his conviction that the Court should stay out of military matters during times of conflict. In considering the detainment of Japanese-Americans under Executive Order 9066, Jackson argued that “in the very nature of things military decisions are not susceptible of intelligent judicial appraisal.”¹⁹ The new justice perceived considerable danger in creating a domestic legal precedent on the back of wartime exigency; the emergency status “would eventually be forgotten, leaving the constitutionality of the classification as the lesson of the case.”²⁰ Better to avoid these problematic entanglements altogether by deferring to the executive as Commander-in-Chief. Thus, after building his legal career as a tireless advocate for individual freedoms, Jackson the Supreme Court justice was markedly friendlier towards centralized government authority during the latter stages of World War II.

After cutting his teeth as an advocate of individual rights and then winning an appointment to the nation’s highest bench, the next major milestone in Robert Jackson’s career—and the one which very likely colored his judicial philosophy after the war—came as the Allies

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¹⁸ Ibid.
²⁰ Ibid.
surged toward victory in 1945. The Big Three had considered the question of Nazi war criminals as early as 1943; at the Teheran Conference in November of that year, Stalin called for the execution of 50,000 members of the German General Staff, leading Franklin Roosevelt to joke that 49,000 would be sufficient.\textsuperscript{21} Despite Roosevelt’s levity, the prospect of summary executions remained on the table until Secretary of War Henry Stimson convinced FDR that dealing with captured Nazis in the aftermath of an eventual German surrender would require “careful thought and a well-defined procedure” that should incorporate “at least the rudimentary aspects of the Bill of Rights.”\textsuperscript{22} Reaching a consensus proved difficult, however, and Allied intentions on the subject of German war criminals remained unclear right down to Roosevelt’s sudden death in April of 1945. Under FDR’s successor, Harry Truman, the United States succeeded in convincing the other Allied powers to sign off on the creation of an international military tribunal for captured Nazis. With this framework in place, the Truman administration began its search for an accomplished litigator who would spearhead the case against Hitler’s former lieutenants.

So it was that Robert Jackson, then 53 and a four-year veteran of America’s highest court, was asked to step back into the role of an attorney in early May of 1945. Initially, Jackson was overwhelmed by the nomination; fearing that his participation in the tribunal might compromise the operation of the Supreme Court, he offered to resign his position as associate justice before eventually agreeing to a leave of absence.\textsuperscript{23} Ultimately, Jackson could not turn down a direct request from the White House, and the justice quickly began to orchestrate a plan

\textsuperscript{21} Lord Hartley Shawcross, “Robert H. Jackson’s Contributions During the Nuremberg Trial,” in Mr. Justice Jackson: Four Lectures In His Honor (New York: Columbia University Press, 1969), 93.


\textsuperscript{23} Jarrow, Robert H. Jackson, 71.
for the prosecution of captured Nazi prisoners of war. By June 6, when he filed a report to Truman, Jackson had “worked out a plan for preparation, briefing, and trial of the cases...”24 At a conference in London, Jackson and representatives from Great Britain and the Soviet Union hashed out the parameters of the tribunal, including the charges to be leveled against the defendants and the structure of the court itself. This proved to be a contentious process, both because of the disparate goals of the parties involved and thanks to the sheer novelty of the endeavor.25 The Soviets in particular wanted the trial to be an exercise in punitive pageantry; as the historian Michael Marrus noted, the Russians considered the tribunal a mere formality rather than anything approaching a fair hearing for the Germans.26 Eventually, however, Jackson and his British colleagues persuaded the Soviets to sign the London Charter in early August of 1945. Along with the charges--Crimes against Peace, War Crimes, and Crimes against Humanity--the Charter also set up rules of evidence and provided for the defense of the accused. With the preliminary work complete, Jackson could begin the case against the Nazis.

On November 21, 1945, the International Military Tribunal commenced inside Nuremberg’s hastily rebuilt Palace of Justice. Eight judges--two apiece from the United States, Britain, France, and the USSR--sat across from the prisoners in the docket. The twenty-one Germans ranged from Göring and other high-ranking military officials to Albert Speer, Hitler’s favorite architect.27 Hundreds of media members crowded into a gallery behind the prosecutors’ tables, while scores of translators described the proceedings over state-of-the-art headsets

25 At the end of World War I, provisions in the Treaty of Versailles had allowed alleged German war criminals (such as Kaiser Wilhelm) to be tried in German courts. This process failed spectacularly, as widespread acquittals undermined the international credibility of the proceedings and nearly brought about the end of efforts to resolve post-war allegations with some form of judicial inquiry.
26 Marrus, The Nuremberg War Crimes Trial, 47.
27 Ibid., 259-260.
donated by IBM.28 After spending the better part of a year in feverish preparation, Jackson began the trial with a lengthy opening statement that highlighted the tribunal’s vital contribution to international law and cast the defendants as members of a grand conspiracy to wage a war of aggression. He was careful to point out the momentous nature of the trial’s very existence, calling the decision to bypass summary executions “one of the greatest tributes Power has ever paid to Reason.”29 After Jackson finished, lawyers from the other Allied delegations took turns excoriating the German defendants and condemning various Nazi atrocities. With this backdrop in place, the events that would leave such a profound mark on Robert Jackson’s memory began to unfold.

At the start of the trial, the American contingent attempted to piece together the intricate web of Nazi conspiracy by relying almost exclusively on documentary evidence and direct questioning of the defendants themselves. However, Jackson soon discovered the limitations of this strategy as the delay in translation blunted the force of his cross-examinations and some of the more prominent defendants proved nearly impossible to control. In particular, Hermann Göring turned many of his answers into non-responsive soliloquies, at which point a frustrated Jackson asked the tribunal to restrict the Reichmarshall’s responses:

> We can strike [Göring’s answers] out. I do not want to spend time doing that, but this witness, it seems to me, is adopting, and has adopted, in the witness box and on the dock, an arrogant and contemptuous attitude towards the Tribunal which is giving him the trial which he never gave a living soul, nor dead ones either.30

However, Jackson received little aid from the judges, who refused to censor Göring’s testimony. Between the technological hurdles and the stubbornness of many German defendants, the Americans’ initial exposition seemed less effective than they had hoped. Fortunately for the

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28 Ibid., 71.
30 IMT, 9:417-21, 507-08.
prosecution, the catalogue of incriminating documentary evidence was only a part of Jackson’s plan to lay bare the crimes of Hitler’s regime.

With the conventional strategy of witness examination producing questionable results, Jackson and his team relied on an unprecedented introduction of theatrical spectacle to demonstrate the extent of Nazi brutality. Inside the Nuremberg courtroom was a giant projection screen, which the Americans used to present a film detailing the horrendous conditions in various German camps. This documentary, entitled *Nazi Concentration Camps*, marked the first use of motion picture technology in a trial setting. It was coupled with a host of grisly physical exhibits collected by Allied troops and by Jackson’s own investigators prior to the trial. Along with Thomas Dodd’s skull exhibition came photographs of emaciated prisoners and pictures of incinerators lined with human remains. When the Americans finished, the British, French, and Soviets continued to paint the gruesome picture of Nazi savagery on both the Eastern and Western fronts. The Soviets were especially determined to articulate the scale of German war crimes; the Russian prosecutor, Roman Rudenko, turned a February speech into a laundry list of the thousands of villages and people that had perished during Hitler’s campaign in the East. As the evidence mounted, Jackson and the other Allied prosecutors sought to secure a conviction by demonstrating the horrors of Hitler’s regime in the most visceral way possible.

In the end, the exposition of the horrors visited upon European Jewry and other victims of Nazi aggression proved conclusive. Nineteen German defendants were convicted on some or all charges, and twelve—including Göring and Foreign Minister Joachim von Ribbentrop—were sentenced to hang. Tasked with the unprecedented duty of prosecuting some of the most violent war criminals in modern history, Robert Jackson had seen the International Military

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31 Marrus, *The Nuremberg War Crimes Trial*, 125.
32 Ibid., 261.
Tribunal confront Nazi brutality with the mechanisms of rational legal inquiry rather than a series of summary reprisal killings. In the process, though, the American jurist came face-to-face with the ghastly reality of the death camps and the conspiratorial network that helped Hitler consolidate power. As Jackson returned to the United States and to his seat on the Supreme Court, he seemingly carried with him the memories of Nuremberg and a heightened awareness of the horrific consequences that might follow should America ignore the spectacle he had just witnessed.

*The Long Shadow of Nuremburg*

Like many others who participated in or observed the International Military Tribunal, Robert Jackson never forgot the horrific scenes brought to light during the trial. Over the next several years, the haunting lessons of Hitler’s aggression exerted a profound effect on Jackson’s judicial rhetoric. Prior to Nuremberg, the directive to prosecute Andrew Mellon and FDR’s subsequent treatment of American citizens during World War II had given Jackson pause. Now, with Harry Truman in the White House, the legacy of Nazi aggression affirmed Jackson’s opposition to untrammeled unitary power even during wartime. However, the case against Göring and his other co-defendants also challenged Jackson’s commitment to individual liberty. As he attempted to expose the network of conspiracy that facilitated a wholesale slaughter of European Jews, the justice grew acutely aware of just how easily the radical sentiments of a few could provoke a violent reaction of the many. As Jackson applied these somewhat contradictory principles--diminished executive discretion and a more skeptical treatment of personal speech--the shadow of the war and the trial that followed it loomed large in a series of domestic cases.

The crucible of Nuremberg crystallized Jackson’s opposition to untrammeled executive authority during wartime. “There are only two real choices of government open to a people,” he
would later write. “It may be governed by law or it may be governed by the will of one or of a group of men.” Law, the justice intoned, had clearly proven to be the much safer guardian of liberty. To Jackson, the legal profession had abdicated its duty in Nazi Germany, offering little resistance to Hitler throughout the 1930s and ‘40s. Determined to prevent the same kind of rubber-stamping in post-war American jurisprudence, Jackson took on the Truman administration in a succession of cases. In both SEC v. Chenery Corp. (1947) and FTC v. Morton Salt Co. (1948), Jackson opposed the “absolute subservience of judicial judgment to administrative experience.” In the latter case, Jackson’s dissenting opinion criticized the majority for granting the Federal Trade Commission broad discretion over appropriate retail discounts. The Court’s willingness to cede such authority to a government agency threatened to make judicial review “a word of promise to the ear to be broken to the hope.” Having witnessed firsthand the dereliction of legal duty under Adolf Hitler, Jackson emerged from Nuremberg with a skeptical eye towards judicial deference.

In early 1948, Jackson and the Court considered the case of Woods v. Miller Co., in which Jackson voiced his concerns regarding the far-reaching invocation of war powers. With hostilities ended overseas, President Truman pushed Congress to pass the Housing and Rent Act of 1947. Citing wartime exigency, the legislation set up strict rent regulations for landlords with the proposed goal of making housing more readily available to returning veterans. One day after the law took effect, a Cleveland landlord demanded increased rent from his tenants. The resulting legal dispute eventually landed in the District Court, where it was deemed an unconstitutional

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35 Ibid.
application of the war power. President Truman had issued a formal termination of hostilities on December 31, 1946. This declaration, according to the lower court, marked the end of any ability to invoke war powers; after all, neither Congress nor the President could reasonably cite such justifications if the nation were no longer at war. The Supreme Court majority disagreed, citing precedents from World War I to support its view that “the war power includes the power ‘to remedy the evils which have arisen from [war’s] rise and progress.’” In effect, the law was permissible because Truman and the legislature retained emergency authority even in the aftermath of conflict.

Jackson did not dissent in *Woods*, but he felt compelled to write a separate concurrence detailing his misgivings about the extension of wartime authority. As the only member of the Court to come face-to-face with the horrific human cost of the second World War, Jackson wrote, “I cannot accept the argument that war powers last as long as the effects and consequences of war, for, if so, they are permanent—as permanent as the war debts.” Jackson’s reluctance to construe the war power as a post-conflict *carte blanche* introduced a new experiential emphasis in his legal writing. During his year as American chief counsel, he had encountered the consequences of war and fascism in a way that his fellow justices never could. In *Woods*, Jackson applied this understanding to caution against liberal interpretation of what he termed “the most dangerous” power afforded to government. Hence, in the years after Nuremberg, Jackson’s wartime experience began to figure noticeably in his considerations of wartime authority. Instead of his professed deference in cases like *Korematsu*, Jackson began to exhibit a greater willingness to question decisions made in the name of necessity.

37 Ibid.
39 Ibid., Justice Jackson concurring.
40 Ibid.
At the same time, however, Jackson’s concern for personal freedom became somewhat more limited as a result of his encounter with the Nazis. Perhaps the most striking testament to Nuremberg’s effect on Jackson’s legal rationale came in 1949, when the Court considered a question of protected speech. Father Arthur Terminiello, a controversial priest from Birmingham, Alabama, had delivered a vitriolic diatribe inside a packed Chicago auditorium. As nearly one thousand unruly protesters gathered outside, Terminiello began to lambaste various racial groups and political figures, calling Eleanor Roosevelt “Queen Eleanor” and “one of the world’s communists.”

As police struggled to maintain order, the crowd surrounding the theater grew increasingly agitated; several stones and ice picks smashed into the auditorium windows, and the assembled mass very nearly broke into a full-fledged riot. Under a Chicago ordinance, Terminiello was arrested and convicted of disturbing the peace. The trial court’s analysis of the statute held that the priest could be convicted for words that “stirred people to anger, invited public dispute or brought about a condition of unrest.”

Although the mob’s wrath had been primarily directed towards Terminiello, he could still be held liable for provoking such an explosive response.

In a 5-4 split, the Supreme Court disagreed and reversed Terminiello’s conviction. Writing for the majority, Justice William O. Douglas argued that the municipal statute was overly broad. If a chief function of free speech is its capacity to invite dispute, wrote Douglas, “[i]t may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”

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44 Ibid.
unrest and issued deficient instructions to the jury; consequently, jurors in the original trial had
determined Terminiello’s guilt based on faulty criteria. As such, the original conviction was
problematic for reasons both procedural and constitutional.

Based on his background as a litigator, Jackson might have been expected to side with
Douglas and the majority. His early years practicing law in New York had seen him represent
numerous union members and other private citizens charged with violating municipal statutes,
and he had been a firm proponent of individual liberties throughout his tenure on the Court. But,
as in the Woods case, Jackson’s recent wartime experience led him to favor a different course of
action. During his investigation prior to Nuremberg and throughout the course of the trial,
Jackson had become intimately familiar with the tactics the Nazis had employed to seize power
in the 1930s. In a striking rhetorical decision, Jackson introduced a quote from Adolf Hitler
himself. In Mein Kampf, Hitler had written, “it is not by dagger and poison or pistol that the road
can be cleared for the movement but by the conquest of the streets.” Jackson included this
passage in his dissent, linking the Terminiello riot to a more general concern about the dangers
of mass demonstrations and disorder.\textsuperscript{45} The presence of such an explicit reference to European
totalitarianism indicated that Jackson’s experience with the Nazi power structure figured
prominently in his opinion.

With his decision apparently shaped by his Nuremberg experience, Jackson asserted that
the Court was being cavalier in its protection of Terminiello:

This Court has gone too far toward accepting the doctrine that civil liberty means the
removal of all restraints from these crowds, and that all local attempts to maintain order
are impairments of the liberty of the citizen. The choice is not between order and liberty;
it is between liberty with order and anarchy without either. There is danger that if the
Court does not temper its doctrinaire logic with a little practical wisdom it will convert
the constitutional Bill of Rights into a suicide pact.\textsuperscript{46}

\textsuperscript{45} Ibid., Justice Jackson dissenting.
\textsuperscript{46} Ibid.
Jackson’s cautionary tone in *Terminiello* was particularly noteworthy because he had adopted a decidedly more liberal interpretation of protected speech just six years earlier. In 1943, Jackson wrote the majority opinion in *West Virginia State Board of Education v. Barnette*, a case involving several Jehovah’s Witnesses who resisted the compulsory flag salutes instituted in a West Virginia school district. The Court held that the school board could not mandate flag salutes or other forms of similar expression. “If there is any fixed star in our constitutional constellation,” Jackson wrote, “it is that no official...can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion...” 47 However, in *Terminiello*, Jackson intimated that government bodies sometimes did have the authority--and the obligation--to proscribe certain forms of expression.

The legacy of the Second World War had evidently left Jackson convinced that neither stringent promotion of individual liberty nor willing deference to executive demands could be a suitable agenda for the post-war Supreme Court. His opinions in *Chenery*, *Morton*, and *Woods v. Miller* displayed a heightened awareness of the dangers posed by unitary leadership left unchecked. At the same time, the *Terminiello* case suggested that Jackson also recognized the potential power a charismatic individual might wield; to him, the inflammatory priest represented the very kind of instability that had nurtured Hitler and the Nazis. Thus, throughout the latter part of the 1940s, Jackson’s juridical writings offered hints that the memory of Nuremberg weighed heavily on the justice and factored into his formal opinions.

The story of Nuremberg and its lasting impact on Robert H. Jackson remains insightful as both a personal vignette and a general commentary on the factors that influence even the highest, most rational forms of legal thought. As an individual narrative, Jackson’s time in Germany may help account for certain shifts in his individual jurisprudence after the Second World War. Having spent months sifting through piles and piles of documents and confronting the Nazis with their own grisly trophies, Jackson was exposed to the raw human cost of World War II like few other American jurists. With no confession from the man himself, it remains difficult to state conclusively whether or not the memories of his time at Nuremberg had any bearing on Jackson’s subsequent opinions. However, both the rhetoric of his post-war opinions and the decisions reached therein are highly suggestive. After years of judicial deference to the wartime executive, Jackson began to push back against the President. At the same time, he drew a connection between incendiary speech and Hitler’s own instructions. By the end of the 1940s, Jackson had settled somewhere between his early commitment to personal liberty and his initial years as a Supreme Court justice. After Nuremberg, Jackson was neither a champion of the individual nor a man unwilling to check the authority of the Commander-in-Chief. Instead, Jackson advocated a healthy skepticism towards both extremes. Given his involvement in the International Military Tribunal and the character of his later opinions, it seems Nuremberg was never far from his mind after the war.

Apart from the individual saga of jurisprudential evolution, Jackson’s relationship with Nuremberg also underscores the distinctly human element of legal decision-making. Along with his formal expertise and legal education, Jackson’s particular experience during the Second World War very likely played a role in the way he developed a legal philosophy for the Cold
War world. The episode serves as a reminder that even the most respected and dignified legal minds are never fully insulated from the emotional realities of the human experience. Although the mechanisms of legal interpretation are ostensibly logical and rational, they are executed by living beings who may be unable to fully transcend the long shadow of their memory. In this manner, the clinical structure of the law is always colored by the individual recollections, hopes, fears, and biases of the men and women administering those rules. At the highest echelons of legal interpretation, then, the decisions of a justice may be shaped by memory rather than directed solely by precedent.
Bibliography


*Ex parte Quirin*, 317 U.S. 1 (1942).


