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THE NUREMBERG ROLES OF JUSTICE ROBERT H. JACKSON

John Q. Barrett
Professor of Law

ST. JOHN'S UNIVERSITY SCHOOL OF LAW
8000 UTOPIA PARKWAY
QUEENS, NY 11439

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John Q. Barrett
St. John's University School of Law
Robert H. Jackson Center

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Abstract:

During 1945-1946, U.S. Supreme Court Justice Robert H. Jackson served, by appointment of President Truman, as U.S. chief prosecutor at Nuremberg of the principal surviving Nazi war criminals. This article, based on a lecture at Washington University's conference on the 60th anniversary of that trial before the International Military Tribunal (IMT), introduces Jackson the person and the public figure. It then considers some of the facets and roles that the Nuremberg trial year was in and for Jackson: the project's importance; relevant background; ambition; self-sacrifice; commitment to law; innocence and optimism; constant recalibration; eloquent, effective voice; international diplomacy; the London Agreement and IMT Charter; dream (and nightmare) staffing; the Nuremberg indictment; life and work in Allied-occupied former Germany; building and prosecuting the case; effective trial work; vengeance foresworn; seeing the job through; and victory.

Keywords: Justice Robert H. Jackson; Nuremberg; International Military Tribunal; Nazi war crimes.

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THE NUREMBERG ROLES OF JUSTICE ROBERT H. JACKSON

JOHN Q. BARRETT*

It is an honor to be at this conference, and especially on this panel, with heroes. "Heroes" is not too strong a word. My friends Whitney Harris, Henry King and Benjamin Ferencz, who are present here, and other senior Nuremberg prosecutors such as Justice Benjamin Kaplan and Professor Bernard Meltzer who are not at this conference, are among my own heroes, but that is a personal point. Their general, permanent significance includes the fact that they are heroes of the law for what they did sixty years ago and have done ever since to develop the law and legacy of Nuremberg.

I will redefine my topic a little bit. The program of this Nuremberg conference states that I will be speaking about "The Crucial Role of Robert H. Jackson." In fact, there were multiple Jackson roles at Nuremberg—many, many roles and moments were encompassed in the undertaking that has come to be so significant historically that the primary, global meaning of the word "Nuremberg" today is, and probably always will be, the 1945–46 international trial of the principal surviving Nazi criminals.[1]

Justice Jackson's Nuremberg was over 15 months of full time involvement in an unprecedented, post-World War, two continent, five major world capital,[2] wreckage-strewn, military occupied, twenty-plus nation, alliance-based, alliance fraying, four language, multi-million page, prisoner-inundated, debris- and body- and victim-surrounded, cold, hungry and unsafe, Nazi-fearing, Germany-fearing, World War III-fearing, fact

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* Professor of Law, St. John's University School of Law, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, New York (www.roberthjackson.org). This article grows out of my September 30, 2006, lecture at Washington University's "Judgment at Nuremberg" conference. I am very grateful to Professors Leila Sadat, John Haley, Larry May and their Washington University faculty colleagues; to the University's Whitney R. Harris Institute for Global Legal Studies, especially Linda McClain; and to the co-sponsoring institutions for their work on this extraordinary conference and commemoration. I thank my friends Whitney and Anna Harris for their special, generous and inspiring friendship. I also thank Professor Alice Kaplan for information about her father, Nuremberg prosecutor Sidney J. Kaplan; Professor Carol Needham for accurate St. Louis University data; and Richard C. Spatola for excellent research assistance.

1. One demonstration of this reality was Professor Cherif Bassiouni's powerful intonation, at the start of these conference proceedings, of the word "Nuremberg" in multiple languages and national accents.

2. I refer to Washington, London, Moscow, Paris and Berlin. Perhaps Rome also belongs on this list.

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finding, institution creating, law building, crime defining, criminal guilt proving, punishment imposing and historical record publishing human endeavor. Given all of that, to understand "Nuremberg"—Jackson's Nuremberg roles and the 1945–46 proceedings before the International Military Tribunal ("IMT")—really requires one to look at Nuremberg not merely as a sixty-year-old finished product, preserved in the London conference record,[3] in forty-two volumes of trial transcripts,[4] in ten volumes of trial briefs, documentary exhibits and interrogation transcripts,[5] and in the IMT's judgment,[6] all of which sit on library shelves throughout the world and much of which is available in virtual form on the Internet.[7] History should see and remember Nuremberg from the front end: as it unfolded, and as Justice Jackson unfolded it; as something that was far from easy or foregone; and as something that in many ways could have turned out very differently.

This sense of the contingency of Nuremberg is captured in many moments. One that I like very much is a paragraph that United States Coast Guard Reserve Commander Sidney J. Kaplan, a senior attorney on Justice Jackson's United States prosecutorial staff, wrote from Nuremberg to his wife Lena, who then was at their home in Minneapolis with their one-year-old daughter, Hattie, on the evening of Monday, November 19, 1945:

> *Lena dearest,*
>
> *Here we are on the eve of the opening of the second most important trial in the history of the world (No. 1: the trial of Jesus Christ). Tomorrow morning the trial opens. And believe me, the prosecution is utterly, completely, hopelessly, unprepared. Jackson*

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3. *See* UNITED STATES DEPARTMENT OF STATE, INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON, 1945 (PUBLICATION 3080, RELEASED FEB. 1949).

4. *See* TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 November 1945–1 October 1946, vols. I–XLII (1947–49) *available at* http://www.yale.edu/lawweb/avalon/imt/imt.htm#proc (known informally as "the blue series" or "the blue set").

5. *See* OFFICE OF UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION, vols. I–VIII, Supp. A and Supp. B (1946–48) *available at* http://www.yale.edu/lawweb/avalon/imt/imt.htm#docs (known informally as "the red series" or "the red set").

6. *See* OFFICE OF UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION, OPINION AND JUDGMENT (1947) *available at* http://www.historiography.project.com/nca/index.html.

7. *See*, *e.g.*, Yale Law School's Avalon Project, *available at* www.yale.edu/lawweb/avalon/imt/imt.htm.

> *will deliver a sensational opening statement—and from that point on we're in the soup.*[8]

Nuremberg was about that soup, and about flailing in it, and about managing to swim well enough not to drown in it, and thus about accomplishing what we are here commemorating today. Nuremberg was all of the dimensions that I have mentioned, including many, many people, and it is an honor to be with some of them here at Washington University School of Law. At the top, however, Nuremberg was Robert H. Jackson—its course, its accomplishments and thus its legacy bear too distinctly the qualities and imprint of Jackson himself as Nuremberg's distinctly gifted, and distinctly human, architect, chief prosecutor and leading figure to overlook this personal identification. (Someone else, to be sure, could have been assigned to do the job that became Jackson's job and his "Nuremberg," but frankly, in historical hindsight, I am hard pressed to think who among his contemporaries in the United States government or private bar had his combination of stature and skill, and whose performance thus might have allowed us to be here commemorating anything like the Nuremberg we know historically.) Accordingly, this lecture will cover, in an utterly summary fashion I assure you, the background of Robert H. Jackson and then the story of "Nuremberg," which is Jackson's Nuremberg.

I. JACKSON

Robert H. Jackson's life is an American story like few others. He was born in 1892 in a family farmhouse in northwestern Pennsylvania.[9] He spent his early years with animals, on horseback, in fields and woods, and on mountains. His education came in small town public schools in southwestern New York State, in his own reading, debating and public speaking, and in the friendships, mentoring and explicit tutoring that he received from special teachers who knew and loved words, theory, literature, economics, law, government and history. Jackson's higher education included no college education whatsoever and only one year of law school.[10] He became a lawyer, after training primarily as an apprentice

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8. Sidney J. Kaplan to Leonore (Lena) Kaplan, Nov. 19, 1945. *See generally* ALICE KAPLAN, FRENCH LESSONS: A MEMOIR (1993) (written by their younger daughter).

9. John Q. Barrett, *Albany in the Life Trajectory of Robert H. Jackson*, 68 ALBANY L. REV. 513 (2005).

10. Jackson's Early Life and Career, *available at* http://www.roberthjackson.org/Man/theman2-1-1/.

in a two-man law office in Jamestown, New York, in 1913 when he was twenty-one years old.[11] Jackson then spent twenty years in private practice based in western New York State, rising to become an accomplished trial and appellate lawyer,[12] a city lawyer, a corporate lawyer and counselor, a member of the American Law Institute, and, in 1934, national chairman of the American Bar Association's Conference of Bar Association Delegates, a predecessor of today's ABA House of Delegates.[13]

Robert Jackson's life included, in addition to the law, involvements in local, state and national Democratic Party politics.[14] When Jackson was eighteen or nineteen, he met Frank Roosevelt, a freshman state senator from Dutchess County, New York, who himself was twenty-eight or twenty-nine years old.[15] At that time (1911), neither one of them could have imagined the heights that the other would reach. Of course it was this Roosevelt, who in those early years had a politically potent surname but not very much else suggesting destiny, who later became "Franklin," and the governor of New York, and in 1933 the president of the United States, and in Jackson's life the crucial political benefactor, promoter and personal friend.[16] In 1934, President Roosevelt brought Jackson to Washington, where he was nominated and confirmed to serve in a series of prominent, increasingly senior executive branch positions: in 1934, as Counsel of the Bureau of Internal Revenue in the Treasury Department;[17] in 1936, as Assistant Attorney General heading the Tax Division in the Department of Justice;[18] in 1937, as Assistant Attorney General heading the Antitrust Division;[19] in 1938, as Solicitor General of the United

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11. Barrett, *supra* note 9, at 513.

12. John Q. Barrett, *Robert H. Jackson's Oral Arguments before the New York Court of Appeals*, 3 HIST. SOC'Y. OF THE CTS. OF THE ST. OF N.Y. NEWSL. 3 (Spring/Summer 2005).

13. *See* Robert Hartley, *Eighteenth Annual Meeting of Conference of Bar Association Delegates*, 19 AM. BAR ASSN. J. 669, 676 (1933) (reporting Jackson's ascent to the chairmanship); *Bar's Aid Pledged in War on Crime*, N.Y. TIMES, Aug. 29, 1933, at 15 (same). In August 1936, the American Bar Association changed its structure, abolishing the twenty year old Conference of Bar Association Delegates and creating a new, more powerful and more democratically representative House of Delegates to be its successor. *See* E. Smythe Gambrell, *Conference of Bar Association Delegates Ends Work—Names In Its Book of Gold*, 22 AM. BAR ASSN. J. 721 (1936); William L. Ransom, *Questions and Objections to the Pending Plan Answered*, 22 AM. BAR ASSN. J. 452, 457 (1936).

14. Jackson's Government Service, *available at* http://www.roberthjackson.org/Man/theman2-2-2/.

15. *See* Jackson's Early Life and Career, *supra* note 10.

16. *See generally* ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT (John Q. Barrett ed., 2003).

17. *See* Jackson's Government Service, *supra* note 14.

18. *Id.*

19. *Id.*

States;[20] in 1940, as Attorney General of the United States;[21] and in the summer of 1941, as an Associate Justice of the Supreme Court of the United States.[22]

Although few résumés report a comparable ascent in public life, Jackson's government job titles actually understate the substance of his work. He was, ahead of each of those titles, a figure in the inner, inner circles of Roosevelt's New Deal, an eloquent and successful lawyer and leader in high profile battles, a leading voice and, in time, a national headline name. In 1935, for example, Jackson led the successful civil tax fraud prosecution of Andrew W. Mellon, the former Secretary of the Treasury.[23] As Solicitor General beginning in 1938, Jackson built a stellar—really an unsurpassed—record and reputation while winning, in a Supreme Court that had changed course, the constitutionality of the New Deal.[24] Jackson became a prominent visitor and speaker in cities and venues across the country and a renowned national radio voice. He was known generally as FDR's trusted, supremely capable, if perhaps a bit radical, young lieutenant. Jackson at times was understood to be, and discussed widely as, FDR's favorite to succeed him as president when his second term would conclude in January 1941. Indeed, Jackson probably would have been the New Dealers' presidential torch bearer in 1940—whether the Democratic Party barons and convention delegates would have nominated Jackson is a separate, and harder, issue for speculation—had FDR decided not to seek a third term.

In the summer of 1941, Jackson became an associate justice and the Supreme Court's distinctively dazzling writer. During the next years, it was widely believed and reported that President Roosevelt intended to make Jackson the next chief justice of the United States. In 1945 and into 1946, it was believed by many, including Jackson's friend Harry Truman, who had become the new president that spring, that Jackson was the person uniquely qualified to be president of the United States and perhaps was still heading for that destination even as he served as the president's appointed chief prosecutor at Nuremberg.[25]

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20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *See generally* E. Barrett Prettyman, Jr., *Robert H. Jackson: "Solicitor General for Life," in* JOURNAL OF SUPREME COURT HISTORY: 1992 Yearbook of the Supreme Court Historical Society 75; (The Supreme Court Historical Society 1992); Victoria A. Graffeo, *Robert H. Jackson: His Years as a Public Servant "Learned in the Law,"* 68 ALBANY L. REV. 539, 542–45 (2005).
25. *See* GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 226–26 & 453 n.3 (Simon and Schuster 1977) (describing President Truman's spring 1946 statement to his aide Clark

II. JACKSON'S NUREMBERG

The foregoing summary is a glimpse of Robert H. Jackson, the person and the public figure. Jackson met his moment, and he earned a large measure of his significant place in history, in the year-plus that he devoted to the Nuremberg Trials that included, in him and for him, many complex, defining facets:

First, Jackson personified Nuremberg's importance. The decision to send him to prosecute Nazi war criminals was a Roosevelt concept that became a Truman decision. With no slight intended to our host Washington University's former law dean and later Jackson's Supreme Court colleague Justice Wiley B. Rutledge, whose portrait looks down from the wall of the Anheuser-Busch Hall courtroom in which these conference proceedings are occurring, Jackson in the spring of 1945 was not merely one of nine Supreme Court justices. He was, even among his colleagues on one of the most talented Supreme Courts ever, a figure of distinctly high national and international reputation and experience. As a matter of branding, President Truman's decision to appoint Jackson to prosecute Nazi war criminals was a strong statement indicating how seriously the United States took the prosecutions. It prompted the British, the Soviets and the French to appoint counterpart chief counsel of capability, high rank and sufficient authority to represent their nations.

Second, Jackson also brought relevant experience to the task. His past included not merely the varied and relevant work of litigator, senior government official, foreign traveler and, in spots, international diplomat, but work in policy positions, especially during his eighteen months as Attorney General when the United States was preparing for and moving toward military involvement in the European war. His experience as Attorney General included literally the theoretical foundation of what was to become the core criminal law concept of Nuremberg: that Germany and its leaders had waged an illegal war of aggression. That perspective, with a thorough supporting analysis, was the basis of the Jackson-approved legal theory for President Roosevelt's assistance to Great Britain, beginning in late summer 1940, by providing United States destroyers, our neutrality laws and other domestic legal restrictions notwithstanding.[26] The same factual and legal analysis led to Lend-Lease legislation and assistance to Great Britain and then to the Soviet Union beginning in 1941. Jackson's

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Clifford that Justice Jackson, who then was serving as chief U.S. prosecutor at Nuremberg, was the "one man . . . whose experience and talents seemed to make him presidential timber").

26. *See* JACKSON, *supra* note 16, at 81–103.

March 1941 speech to the lawyers of the Western hemisphere, delivered in Havana, Cuba, after he and FDR had gone over it together on a presidential yacht offshore, is in many respects the first draft of the London Agreement and IMT Charter of August 1945 and the Nuremberg indictment that soon followed.[27]

A third aspect of Jackson's Nuremberg was personal ambition—he wanted this job. In a sense it was his war service. He went on the Supreme Court in July 1941 and, within months, Japan's attack on Pearl Harbor changed everything. Jackson volunteered to leave the Court repeatedly, but the President told him to stay put—in FDR's view, Jackson was not a warrior and he was being groomed through judicial service for his later elevation to chief justice, and each of those reasons argued against bringing him back from the Court into the executive branch during the war years. The President also recognized, however, as he saw from an early date the possible legal tasks that would follow the War, that Jackson was "particularly qualified" to do them[28]—and, in 1945, that promised work became Nuremberg. The presidential assignment to prosecute Nazis also was, for Jackson, a trial separation from the Supreme Court. He was unhappy there in 1944 and early 1945, primarily because some of his colleagues had turned out to be not the principled, apolitical types he thought justices should be. President Truman's request that Jackson prosecute leading Nazis while on leave from the Court thus offered him not only a vital and challenging task but, in some senses, a welcome professional respite. (During the course of the trial, Truman repeatedly declined Jackson's offers to resign from the Supreme Court, so his leave never turned into a permanent departure.)

Jackson's Nuremberg also involved, however, self-sacrifice. He got to be the man of Nuremberg, to be sure, but he knew it would cost him dearly. Jackson recognized that leaving North America and the identity of judicial office to take on an enormously complex international diplomatic and legal project that could fail probably would cost him the chief justiceship, and in 1946 it did. Jackson also viewed the decision to prosecute the Nazis as requiring him never to seek political office thereafter, and he made that serious choice without hesitation. He also

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27. This speech, which the U.S. Ambassador to Cuba read to the Inter-American Bar Association for Jackson because rough seas prevented him from traveling from FDR's yacht to Havana to deliver it in person, was published widely. *See*, *e.g.*, Robert H. Jackson, Address before the Inter-Am. Bar Ass'n: International Order, 27 A.B.A. J. 275 (1941); Address of Robert H. Jackson, Attorney General of the United States, International Bar Association, Havana, Cuba, 35 AM. J. INT'L L. 348 (1941).

28. JACKSON, *supra* note 16, at 107.

thought that the workload and hardships of this assignment might shorten his life, and probably they did.

Jackson's Nuremberg assignment personified a commitment to the path of law, not force. As he sketched it early on, the Allies at the end of the war had three options in dealing with the defeated Nazis. At one extreme, the victors had power to line up and shoot as many of the vanquished as they preferred. At the other extreme, the victors could accept salutes from the defeated and watch them retreat into their territory. Between these two extremes came Nuremberg: an effort, for the first time, to bring law, at the level of actual enforcement and individual accountability, to the wreckage of war. Jackson believed in this law path and defined it as his condition for taking the job. He got the job on these terms because lawful individual accountability was President Truman's vision as well.

Jackson's Nuremberg also was characterized, particularly at the start, by innocence and foolish optimism: he thought that this could be a summer job. To be fair, he was recruited on representations (which turned out to be false) that there were assembled cases ready to prosecute. The calendar indicates, strikingly, which "cases" those were—President Truman announced Jackson's appointment on May 2, 1945, but when their private conversations about this task actually began eight days earlier, the prospective lead defendant was Adolf Hitler, perhaps to be joined in the dock by Benito Mussolini, Josef Goebbels, Martin Bormann, Heinrich Himmler and Hermann Goering. They were the perpetrators who Jackson thought he could prosecute in an international trial, start to finish, between May and the first Monday in October of 1945.

Another defining aspect of Jackson's Nuremberg thus was recalibration, almost on a daily basis. The initial vision of prosecuting Hitler and a few other select, premier culpable defendants was succeeded by a plan to prosecute figures who were in many senses secondary. The Nuremberg defendants tried before the IMT were chosen because they represented slices of Nazi Germany—each individual defendant was chosen for prosecution because he represented a sector of Nazi power, and the defendant organizations that were prosecuted were pursued in the belief that establishing in a first trial the guilt of these entities would, through such verdicts, permit efficient subsequent prosecutions of culpable organization members. Prosecutor staff documents put actual, and somewhat mind-boggling, numbers on this proposed undertaking. In one such document, dating from January 1946, the number at the first tier of potential culpability was one: the Fuehrer. The second tier, Reich leadership, jumped to 1,000. Gauleiters and staff numbered 4,000 more. Circle leaders were an additional 21,000. Group leaders were 2,000 more.

Then came cell leaders, numbering almost 60,000 others, followed by block leaders numbering more than 300,000 others. Those persons, totaling 463,048, were the criminals to be prosecuted. And who would be spared prosecution? The spared would include 400,000 lesser members of the Nazi Party leadership, about 4,000,000 Party members, and more than 40 million additional Party voters, along with the surviving segments of the 30 million others who had been German citizens in 1939—a total of about 79 million Germans would not be prosecuted.[29] This all was determined, fitfully and over months and years, to be foolishness—massive prosecution never happened.

Another aspect of Jackson's Nuremberg was his voice, which articulated eloquently and effectively the legal vision, the factual record and the prosecutorial position. Jackson's Nuremberg trial work is remembered most widely for his opening and closing statements, which deserve separate mention below. His public articulation of Nuremberg itself actually began in June 1945 when he wrote and released a report to the President that was the blueprint for everything that followed. This report was a beautiful, sparkling document that came from Jackson's mind and pen. It was published in newspapers across the United States and caused a flood of lawyers to seek jobs from Jackson. It also, more substantively, did much to bring the British on board with the United States' vision going into negotiations with their French and Soviet allies.

Jackson's job, no turnkey operation, turned out to require, at the start, almost two months of intense international diplomacy. At London, the Allied nations conferred, drafted, debated and struggled to agree on a substantive plan to prosecute Nazi war criminals, but after weeks, coming from quite different legal systems and political perspectives, they remained far from agreement. In late July 1945, Jackson traveled from London to Potsdam in Allied-occupied Germany, just outside of Berlin, where he joined high level meetings with United States decision makers who were there for the "Big Three" conference (and who, in these meetings at least, interestingly included Secretary of State James F.

29. A chart containing these data, which was prepared in January 1946 by or under the supervision of Major Warren Farr, a lawyer on Jackson's staff, is preserved in Jackson's personal files (the so-called "Lindenstrasse Files") in the National Archives and Records Administration ("NARA"), Entry 52, Box 5, College Park, MD, in a folder that he hand-captioned "Facts as to Organizational Criminality." *See generally* Memorandum from Maj. Warren F. Farr to Justice Robert H. Jackson, (Jan. 4, 1945 [sic—1946]) (distinguishing the total number of Germans who might have been treated as implicated in the conspiracy that then was being prosecuted as Count One before the IMT from the number of Germans who actually were being prosecuted as part of the NSDAP Leadership Corps, and reporting to Jackson that an illustrative chart—the document cited here and described in the text—was being prepared).

Byrnes, Assistant Secretary of War John J. McCloy, senior legal adviser Charles Fahy and various generals, but not President Truman). They reiterated to Jackson the blank check nature of his power as United States chief of counsel for the prosecution of Nazi war criminals: he had discretion to insist on any legal arrangements he thought necessary, even if his uncompromising positions could blow up the London conference should the French and Soviets not recede from disagreeing. Such a breakdown would have forced each nation to prosecute the particular German war criminals it had in its own custody and, in effect, might well have marked the end of the Allies more generally. Jackson, thus armed and also burdened with authority and complete discretion, returned from Potsdam to London, delivered various ultimata and, within days, obtained Allied agreement to key United States positions on procedures he thought central to a lawful trial process.

The August 8, 1945, London Agreement and Charter are the next facet of Jackson's Nuremberg. The Charter is a seminal document of modern international law: it defines crimes, creates the independent judiciary of the IMT and establishes the due process of the Nuremberg trial, including its commitments to proceeding in public, to a prosecution burden of proof, and to defendants' rights to counsel and defense resources.

Jackson's Nuremberg tasks also included staffing the incredibly talented group of lawyers and other personnel with whom he surrounded himself during this project. They included his own son William Eldred Jackson, age twenty-six, who served as his father's executive assistant. The staff early on recruited a Los Angeles lawyer and Naval officer, Whitney Robson Harris, who was with the OSS in London, very talented and in possession of evidence of German war crimes.[30] The United States team at Nuremberg included a young lawyer from St. Louis, Edgar G. Boedeker.[31] It did not include Mark Eagleton, another St. Louis lawyer whose family name has remained prominent—Jackson declined to add Eagleton to his staff, notwithstanding Missouri political leader, presidential friend, Democratic National Committee chairman and

30. *See generally* John Q. Barrett, Postscript: Justice Robert H. Jackson on "My dear Whit," Lectures (Spring 2002) (Whitney R. Harris Institute for Global Legal Studies) (on file at the Washington University School of Law, St. Louis, MO).

31. Edgar George Boedeker, a St. Louis native, graduated from St. Louis University School of Law in 1937. During World War II and after, he served in the Judge Advocate General's Department of the U.S. Army. At Nuremberg, Captain Boedeker was part of a JAG team within the U.S. legal staff that prepared evidence for presentation to the Tribunal. He later served in the Missouri House of Representatives, was in private law practice and served as the city attorney of Clayton, Missouri. *See Edgar G. Boedeker, Longtime Clayton City Attorney*, ST. LOUIS POST-DISPATCH, Aug. 8, 2001, at B4 (reporting his death at age 85).

Postmaster General Robert Hannegan getting former Supreme Court Justice James Byrnes to set up a meeting about Eagleton (who even was willing to work *pro bono*), because Jackson was convinced that Hannegan was looking only to advance Eagleton's political career.[32] Jackson's Nuremberg team also had many excellent lawyers who did not stay for the duration of the trial—some were civilians who had signed on for a fixed period, and they left after fulfilling those commitments; others who were in active military service left Nuremberg when they had earned enough "points" to be discharged. Jackson, by contrast, had signed on for the international trial job and saw it through—as he once put it, he was not eligible to earn the points to leave early.

Jackson's Nuremberg included the Allied nation indictments in October 1945 of twenty-four individuals and six Nazi organizations. The indictment's principal draftsman was United States lawyer Benjamin Kaplan; he returned to the U.S. from Nuremberg in December 1945, resumed private legal practice in New York and subsequently became an eminent professor and scholar at Harvard Law School and a distinguished jurist on the Massachusetts Supreme Judicial Court. One of the lawyers with whom he worked closely was Bernard Meltzer, who also prepared evidence of German concentration camps, presented in January 1946 the trial case against defendant Walther Funk, and later that year commenced his long career as a distinguished law professor at the University of Chicago. Other international and criminal law giants who played consulting roles in the indictment process included Professor Hersch Lauterpacht of Cambridge University and Professor Sheldon Glueck of Harvard Law School.

Jackson's Nuremberg also included the reality of living in and being a senior official in Allied-occupied Germany. He and his staff worked with

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32. In the early 1950s, Jackson recalled that Hannegan had pushed for Mark Eagleton's appointment as Jackson's chief assistant because the prestige would help Eagleton, who was an important Hannegan political ally. *See* THE REMINISCENCES OF ROBERT H. JACKSON (Harlan B. Phillips ed., 1955) (available at Columbia Univ., Oral History Research Office); *see also* Robert H. Jackson diary entry, May 10, 1945 (available in Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C. ("RHJL"), Box 95) (describing Byrnes's telephone call about Hannegan's desire to meet with Jackson to urge him to put Eagleton on Jackson's staff); Letter from Robert H. Jackson to Mark D. Eagleton, May 14, 1945 (available in RHJL, Box 105, Folder 12) (acknowledging Hannegan's communication of Eagleton's offer to help Jackson but explaining that he is relying chiefly on government personnel who have been involved in working on war crimes materials); Letter from Mark D. Eagleton to Robert H. Jackson, May 21, 1945 (available in *id*.) (acknowledging Jackson's letter and setting forth his extensive civil litigation experience and explaining his desire to serve); Letter from Secretary [Ruth M. Sternberg] to Mark D. Eagleton, May 25, 1945 (available in *id*.) (acknowledging his May 21st letter, received in Jackson's Supreme Court chambers while he was on his first trip to Europe as U.S. Chief of Counsel).

the occupation government on numerous issues, including so-called denazification. Jackson also had close working relationships and friendships with the Supreme Allied Commander, General Dwight D. Eisenhower, with his successor General Joseph T. McNarney, with Judge Advocate General Edward C. Betts, and with General Lucius D. Clay of the occupation government, among others. In Germany, Jackson also met and worked closely with Colonel Charles Fairman, who was serving in the Judge Advocate General Division on leave from his position as a political science professor at Stanford University, headed General Betts's international law branch in Frankfurt and supervised responsibility for war criminal prosecutions throughout the occupation theater.[33] (Later, during two years (1953–55) that fell between his tenure at Stanford and his tenure on the faculty at Harvard Law School, Fairman was the Nagel Professor of Constitutional Law here at Washington University in St. Louis. He was an extremely significant figure in the development of United States constitutional law, thinking and scholarship.[34]) Jackson's trial endeavor was one part of the occupation land and population problems that the United States was grappling with following Nazi Germany's unconditional surrender, and he was enmeshed to some degree in every aspect of the occupation.

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33. *See*, *e.g.*, Letter from Charles Fairman to Chief Justice Harlan Fiske Stone, Mar. 1, 1946 (available in Harlan Fiske Stone Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 12):

> Before I left Germany, it was my privilege on numerous occasions to meet your wandering Brother [Justice Jackson]. I had many opportunities to observe what a very large contribution he had made to the operation of getting the war crimes trials started. I think particularly of his leadership and the influence of his character in the unbelievably difficult business of obtaining common action, quite aside from any technical legal matters.

See also Letter from Robert H. Jackson to Charles Fairman, Mar. 13, 1950, *reprinted in* WILLIAM M. WIECEK, XII HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, 713–15 (2006) (writing, in a letter about the constitutionality of racial segregation in schools in the United States, that "[y]ou [Fairman] and I [Jackson] have seen the terrible consequences of racial hatred in Germany" and thus "can have no sympathy with racial conceits which underlie segregation policies," and noting that "[y]ou and I have seen that nothing promotes fascism as surely as a real and widespread popular fear of communism and 'radicalism'").

34. *See*, *e.g.*, Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights: The Original Understanding*, 2 STAN. L. REV. 5 (1949); CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–88, vol. 6 (1971); CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–88, vol. 7 (1987); CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877 (Supp. 1988). Following Jackson's death in October 1954, Fairman wrote an assessment and tribute that focused on Jackson's Supreme Court work. Charles Fairman, *Associate Justice of the Supreme Court*, 55 COLUM. L. REV. 445 (1955).

The building and presenting of the prosecution case was another central aspect of Jackson's Nuremberg. During the spring and summer of 1945, he made the fundamental decision that the case would be built primarily on captured German documents, not on memory and honesty-dependent testimony obtained by making deals with cooperating witnesses. The documentary approach made for a longer, duller trial and thus some press irritation and related external criticism, but it resulted in a record that was in the trial, and that is in history, unimpeachable. And of course what we know of Nazi depredations, both the crimes of individual perpetrators and the history of that regime, is based in that Nuremberg trial record.

Jackson's Nuremberg also included his trial voice, which lead the advocacy and was consistently, if not perfectly, effective. His November 21, 1945, opening argument and his July 26, 1946, summation were spell-binding in the courtroom and will always be remembered in history. Jackson also gave on February 28, 1946, an extensive and impressive, if today less-remembered, argument to the Tribunal on the criminality of the Nazi organizations that were being prosecuted and the legal theory of those cases. He cross-examined three defendants: Hermann Goering, with some low moments but also more effectiveness than the popular memory believes; Hjalmar Schacht, building a record that shines harsh light on his ultimate acquittal by the Tribunal; and Albert Speer, who Jackson may at times have treated too gently but at others questioned in ways that produced historically devastating admissions. Jackson also personally, and effectively, cross-examined leading defense witnesses, including former German air force General Karl Bodenschatz, former Field Marshal Erhard Milch, former German air force Colonel Bernd von Brauchitsch, former Prussian State Ministry secretary Paul Koerner and former German diplomat and intelligence officer Hans Bernd Gisevius, and Jackson outside of the courtroom interrogated and also supervised and tracked his staff's interrogations of many former Nazis who were in Allied custody.[35]

Jackson's Nuremberg also included, at its core, a determination not to be about vengeance. The record obviously shows prosecutor Jackson working aggressively for many months to build cases, get them to trial and win convictions. It does not, however, include any Jackson argument for particular punishment for any defendant—he left those assessments and determinations to the Tribunal. Jackson believed personally that these defendants deserved enormous punishments and he, who personally

35. The memoir of Jackson's Interrogation Division chief interpreter, who participated in many of these interrogations, is RICHARD W. SONNENFELDT, WITNESS TO NUREMBERG (Arcade Publishing 2006).

opposed the death penalty, felt no qualms about the executions of ten criminals (nor Goering's suicide) following their Nuremberg convictions. But Jackson, in not arguing punishment, was taking seriously the role distinctions—his own responsibilities as a trial prosecutor, and the Tribunal's independence—that were part of his core concept of Nuremberg's legality.

Jackson's Nuremberg involved, finally, seeing it through. He saw it through in the sense that he remained throughout the trial and then summed up on July 26, 1946, the evidence against the individual defendants. He then, in August 1946, came home to Washington and remained there into mid-September, preparing for the impending start of the new Supreme Court Term that would include extra work carried over from the 8-justice previous term that Jackson had missed entirely. But Jackson also saw Nuremberg through in the sense that he returned himself to face judgment day.

Jackson returned to Nuremberg, for the last time, on Saturday, September 28, 1946. He returned with a delegation of trusted friends and former colleagues, including some whom he had with regret effectively fired in earlier stages of the prosecution project. When they arrived, they found that "Jackson's" house (a private home, at Lindenstrasse 33 in Dambach, Fürth, which the United States occupation Army had seized from a German family in 1945 and held for a number of years) had been passed on since late July to his deputy, General Telford Taylor, who would be heading up the United States-only trials that would follow the IMT trial and constitute a second phase of Nuremberg. This meant that Jackson was, in a light sense, homeless. He went with his party to the large "VIP house" that the Allies were using, but it was largely filled with other VIPs who had arrived earlier; Jackson and his group found beds under its eaves, up in the attic.

On September 30, 1946—sixty years ago—Jackson and his group traveled to the Palace of Justice. They sat through the Tribunal's reading of its judgment, which must have been both gripping and, as it filled that full day and continued into the next, excruciating. On September 30th, Jackson heard the judgments on the legal validity of the crimes charged and the verdicts on the defendant organizations. On October 1st, he heard in the morning the verdicts on the individual defendants and, in the afternoon, the sentences imposed on the nineteen of twenty-two defendants who that morning had been found guilty. What Jackson heard in those judgments was corroborating vindication of his core thoughts and efforts during the preceding seventeen-month process: the crimes proven; the guilt established; and the acquittals that, although they stung in the

moment, came to embody in his later reflections very tangible proof of the fairness of the Nuremberg process.

III. A JUDGMENT

And so what are we to make of Justice Robert H. Jackson's Nuremberg, which also was and is the Nuremberg of all who played constructive roles in the international trial sixty years ago?

They won.