



“A POST OF GREAT LEGAL POWER AND EVEN GREATER MORAL INFLUENCE”

William R. Casto

This article is an excerpt from Professor Casto’s book-in-progress about the relationship between President Franklin D. Roosevelt and his Attorney General, Robert H. Jackson.

– The Editors

IN ADDITION TO RENDERING legal advice, Jackson was not bashful about advising on policy matters, and he viewed himself as a moral actor in this regard. In reflecting on his experience as attorney general, Jackson advised a soon-to-be attorney general, “I congratulate you upon being assigned to a post of great legal power and even greater moral influence.”¹

Litigation obviously presented Jackson with opportunities to exert moral influence. As Solicitor General, he had been ready, willing, and able to confess error in cases before the Supreme Court.² When the president

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¹ Robert H. Jackson to Herbert Brownell, Jr., Nov. 24, 1952, Robert H. Jackson Papers, Library of Congress, box 9, folder 12.

² See E. Barrett Prettyman Jr., “Robert H. Jackson: ‘Solicitor General for Life,’” *Journal of Supreme Court History* (1992), at 75.

asked Jackson to become attorney general, Jackson tentatively accepted the post but warned, "I could not undertake the task if I were expected to present insufficient cases against citizens to make good [the outgoing attorney general's] improvident announcements."³ In the same letter, he warned that he would not prosecute labor unions on the basis of older Supreme Court opinions that he deemed misguided.

Once Jackson became attorney general, he was true to his word. He immediately reconsidered three-year-old charges regarding the recruitment of American volunteers to fight in the Spanish Civil War against the fascist forces of Francisco Franco. That war was now over. Jackson dismissed the stale charges and explained that he could see no good "in reviving in America at this late date the animosities of the Spanish conflict as long as the struggle has ended."⁴

At about the same time, Jackson chided Assistant Attorney General Thurman Arnold on the practice of fingerprinting defendants in antitrust cases. Apparently labor union defendants were fingerprinted and other antitrust defendants were not.⁵ The practice was based on wealth and social status. At a cabinet meeting, Jackson explained, "Rich men are allowed to escape through the pleas of themselves, their lawyers, and their Congressmen and Senators because of the disgraceful connotation connected with fingerprinting."⁶ The next day, Jackson ordered the Antitrust Division to adopt a uniform rule applicable to all antitrust defendants.

NEW YORK SUBWAY STRIKE

He also exerted moral influence in situations unrelated to litigation. Less than three months after Jackson became attorney general, New York Mayor Fiorello LaGuardia was contemplating an urban nightmare: Manhattan without an operating subway system. Even worse, the nightmare was of LaGuardia's own making. As part of a plan to consolidate New York's transit system, the city planned to purchase subway lines from two

³ Robert H. Jackson to the President, Jackson Papers, box 81, folder 3.

⁴ "Orders Dismissal of Spanish War Case," *N.Y. Times*, Feb. 16, 1940 (quoting Jackson).

⁵ Attorney General, Memorandum for Mr. Arnold, Jan. 27, 1940, Jackson Papers, box 85, folder 7.

⁶ Harold Ickes, *The Secret Diary of Harold L. Ickes* (NY: Simon and Shuster, 1954), III: 119.

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private companies, the Interborough Rapid Transit Co. (IRT) and the Brooklyn-Manhattan Transit Corp. (BMT). Because the transit workers would become municipal workers, they no longer would have the right to bargain collectively. Nor would they have the right to strike. The idea was that the workers would be represented by a toothless association. The Transport Workers Union was furious and planned to oppose the “union-busting, company union” scheme by calling a strike against the private companies before the city acquired them.⁷

To stave off the strike, Mayor LaGuardia devised a clever scheme. The city would effectively federalize the transportation system by having the federal government use the subway to carry the mail. Under this scheme, a strike would impede the delivery of the mail and violate federal law. LaGuardia liked the idea and called the White House to put the plan in motion. He told General Edwin “Pa” Watson, the president’s appointments secretary, that the ploy would give him a “big stick” to hold over the heads of the strikers.⁸ LaGuardia was a key supporter of the president, and 1940 was a presidential election year. Pa immediately sought an opinion from the Department of Justice on the mail-delivery scheme.⁹

At Justice, Solicitor General Francis Biddle, with the assistance of a very capable staff attorney, looked into the matter and advised Jackson, “It seems clear that the I.R.T. could be required to carry U.S. Mail.”¹⁰ The law was clear, but Jackson decided not to offer a legal opinion. Instead, he advised the White House, “I would strongly advise against [La Guardia’s scheme].” To use the mail in this way “would be an obvious effort to extend federal jurisdiction [or power] to cover a labor situation not theretofore within its jurisdiction.”¹¹

⁷ See “Quill Defies City on Transit Labor,” *N.Y. Times*, March 5, 1940; “N.Y.C. Nears Ownership of Transit Lines,” *Christian Science Monitor*, March 12, 1940.

⁸ [Edwin Watson], Memorandum for the President, April 1, 1940, Edwin Watson Papers, University of Virginia, box 11, folder “April 1940.”

⁹ See Francis Biddle to the Attorney General, April 1, 1940, Jackson Papers, box 94, folder 7.

¹⁰ Ibid; Francis Biddle to the Attorney General, April 1, 1940 (second April 1 memorandum), *ibid*. See also Richard H. Demuth, “Authority of the Interborough Rapid Transit Company to carry United States mail,” April 1, 1940, *ibid*.

¹¹ Robert H. Jackson to General Watson, April 1, 1940, Jackson Papers, box 94, folder 7.

Biddle had advised that there were “no legal objections to [the scheme],” and Jackson could have limited his advice to this legal issue, but he did not do so. Indeed, he offered no legal advice at all. His only reference to legal authority was an ambiguous phrase, prefacing his policy advice: “Irrespective of legal possibilities I would think it unwise policy to take jurisdiction of a situation of this kind at this time.”¹²

By not advising on the legality of the scheme, Jackson enhanced the power of his recommendation that the scheme should not be implemented and erected a significant bureaucratic road block to LaGuardia’s request. Jackson’s advice left the White House with his strong policy recommendation against the scheme coupled with the possibility that the scheme might be illegal. The president followed Jackson’s advice, and Watson telephoned LaGuardia that Roosevelt “didn’t feel that [he] could comply with [the] request regarding the threatened Interborough strike.”¹³

Although Jackson was not a lock-step supporter of organized labor, he sought to assure fair treatment of labor in situations like Justice’s fingerprinting policy and the New York subway system. He understood that labor was a key component of the New Deal coalition. Organized labor also furthered Jackson’s personal New Deal philosophy, which he succinctly explained in a 1935 letter to his sixteen-year-old son. “It is the old fight,” he wrote, “of those who have things well in their control against those who want the benefits of civilization a little more widely distributed.”¹⁴

THE D.C. BAR LIBRARY

Toward the end of Jackson’s service, he had to deal with exclusionary practices at the District of Columbia Bar Association’s library. For over sixty years, the library had been housed in the D.C. Courthouse and was a very convenient resource for litigators in federal court. Black attorneys, however, were barred from the library. A prominent member of the white bar association commented, “I had never thought that it was fair to them to be forced to try cases against members of our Association and not

¹² Ibid.

¹³ [Edwin Watson,] Memorandum for the President, April 2, 1940, Watson Papers, box 11, folder “April 1940.”

¹⁴ Robert Jackson to William (Bill) Jackson, Aug. 4, 1935, Jackson Papers, box 2, folder 5.

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have the books in Court to support their argument.”¹⁵ Jackson was the third attorney general who had to deal with the problem.

Attorneys General Homer Cummings and Frank Murphy gave complaining black attorneys the runaround. Cummings said that he “had no control over the [library’s] rules and regulations.”¹⁶ A statute, however, vested the attorney general with management of the courthouse.¹⁷ Attorney General Murphy embarrassed himself with the *non sequitur* that the attorney general only gave legal opinions to the president and cabinet members.¹⁸ Finally, a black attorney, Huver Brown, sued the bar association, Attorney General Murphy, and others to have the exclusionary rule enjoined. In October, 1939, a Federal District Judge dismissed the suit.¹⁹

When Jackson became attorney general, the litigation was festering in the court of appeals. The matter came to Jackson’s attention as early as April, 1940,²⁰ and he “believed that there was discrimination and that the discrimination was unfair, that he could not justify himself in perpetuating a denial of equal privileges in the Federal Court on the grounds of race.”²¹ Being a thoroughgoing pragmatist, Jackson encouraged the parties to settle the case. By the end of the year, the litigation was on the brink of settlement. A bar committee, the bar board of directors, and the plaintiffs unanimously approved a compromise.²² In the spirit of separate but equal, white lawyers would not have to study in the same room with black lawyers. A segregated, black reading room would be created in the library. Unfortunately (or as it turned out, fortunately), the bar association rules required a supermajority (2/3) vote to change the rule of exclusion, and the measure failed by five votes.²³

¹⁵ “Comments by Mr. Richardson,” *Journal of the Bar Association of D.C.* 8 (1941), 105.

¹⁶ James Tyson to Frank Murphy, quoted in “Fail to get Action on Jim-Crow D.C. Library,” *Chicago Defender (National Edition)*, Oct. 28, 1939.

¹⁷ See Robert H. Jackson to Francis Hill, Feb. 12, 1941, Jackson Papers, box 89, folder 2.

¹⁸ “Fail to get Action on Jim-Crow D.C. Library,” *Chicago Defender*, Oct. 28, 1939.

¹⁹ “Lose in Fight to Break D.C. Library Color Bar,” *Chicago Defender (National Edition)*, Oct. 14, 1939.

²⁰ Francis Hill, “The Bar Library Problem,” *Journal of the Bar Association of D.C.* 8 (1941), 95.

²¹ *Ibid.*

²² Jackson Letter, above, note 17.

²³ “Bar Votes Down Plan to Widen Library Use,” *Washington Post*, Dec. 19, 1940.

And so it was back to the drawing board. Jackson's Justice Department was "loath"²⁴ to defend the library's exclusionary rule, and on February 12, Abraham Lincoln's birthday, Jackson took the bull by the horns. He issued an order that if the exclusionary rule was not rescinded by April 1, the bar association would have to move the library from the courthouse to some other location.²⁵

Unlike his predecessors, Jackson refused to dodge responsibility. In the order, he noted that "the responsibility for the District Court Building is by law placed upon me." Although technical legal defenses were available to the pending judicial appeal, Jackson refused to defend the practice:

Technical defenses to Mr. Brown's complaint whether good in law or not, do not justify me in perpetuating a denial of equal privileges in a Federal Court Building on grounds of race, of color, of religion, or of sex.

Jackson's reference to "race . . . color, . . . religion, or . . . sex" seems almost like boilerplate today, but Jackson included the gender reference to resolve a related ongoing issue. Female attorneys were also excluded from using the law library, and the December compromise, which the association rejected, also provided for a separate women's reading room²⁶ so that white males would not be offended by skirts. Jackson's order expressly required the admission of female attorneys to the library.

A few of the association lawyers wished to "maintain" the white-male sanctity of the library. One James Craven cravenly argued

You are not going to get a Portia. You are inviting Pandora, and she's going to bring her box as a dowry.²⁷

Nevertheless the association mustered the supermajority vote (190 to 22) necessary to allow woman lawyers into the library.²⁸ At the same meeting, however, efforts to have the association reconsider the rule of racial exclusion failed on a point of order.²⁹

²⁴ "D.C. Courts Draw Fire of Lawyers," *Washington Post*, Jan. 15, 1940.

²⁵ Jackson Letter, above, note 17.

²⁶ "Bar Votes Down Plan to Widen Library Use," *Washington Post*, Dec. 18, 1940.

²⁷ "Bar Groups to Admit Women," *Washington Post*, Feb. 18, 1941.

²⁸ *Ibid.*

²⁹ *Ibid.*

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Notwithstanding the point of order, the association’s leadership persevered. The bar president gave the association a dose of reality.³⁰ He warned that the increased cost of moving the library to private quarters would be \$10,000 a year. Because the association’s annual budget was only \$17,000, there would have to be a substantial increase in bar dues. Finally, the white bar association saw the light or felt a pinch in their pocket books. The association rescinded its exclusionary policy by a slim margin of two votes.³¹

In the library episode, Jackson carefully declined to offer a legal opinion, and the court of appeals might very well have affirmed the trial court’s dismissal of Brown’s suit. In this situation, Jackson viewed himself as a moral actor and not a lawyer. The law gave him authority to administer the courthouse and therefore charged him with reaching a proper policy decision. Ever the pragmatist, his initial approach was to resolve the problem in an inclusive process involving all interested parties, and the parties tentatively reached a separate-but-equal compromise. Whether he personally liked the separate-but-equal compromise is unclear. He studiously avoided giving his opinion on the merits of the compromise. Instead he explained, “The [compromise] was also satisfactory to the complainants and was, therefore, acceptable to me.”³²

Jackson probably did not like the separate-but-equal compromise. When the association rejected the compromise and Jackson issued his ultimatum, he could have made acceptance of the compromise a condition to the association’s continued use of the courthouse. Instead, he went whole hog and demanded full integration. His exercise of administrative discretion was not without potential cost. If the library were moved, the judges in the courthouse would still need a library, and the federal government would have had to supply one at an estimated cost of \$100,000.³³ Jackson surely considered this cost in his pragmatic weighting and balancing, but in the end fairness outweighed dollars in Jackson’s mind.

It has been argued that in the library episode Jackson was primarily interested in poking his finger in the bar association’s eye and not particularly

³⁰ “Hill Asks Bar to Extend Use of its Library,” *Washington Post*, March 6, 1941.

³¹ “Bar to Open its Library to Colored,” *Washington Post*, March 12, 1941.

³² Jackson Letter, above, note 17.

³³ “Bar to Open Its Library to Colored,” *Washington Post*, March 12, 1941.

interested in fairness.³⁴ The basis of the argument is that Jackson had an ongoing feud with the American Bar Association (ABA). The argument, however, is weak. Although Jackson did not especially like the ABA's conservatism, he willingly participated in ABA activities before and after the library episode. In fact, at about the same time that he wrote his ultimatum to the D.C. Bar, he agreed to speak at the ABA's coming annual dinner.³⁵ Moreover, the D.C. Bar Association was a local organization separate and independent from the ABA. Why would Jackson vent his supposed anger on a local organization not connected to the ABA and at the same time graciously agree to speak at the ABA's upcoming annual dinner?

Jackson's desegregation of the law library highlights an aspect of the conservatism that he subsequently demonstrated on the Supreme Court. In the 1930s, Jackson was a New Deal liberal. He served a liberal administration and frequently defended liberal congressional enactments. One of his fundamental principles, which he explained in a 1941 book,³⁶ was that courts generally should defer to other branches of government. He told Paul Freund, who assisted him in writing the book, "[a] common thread that runs through all of our constitutional arguments has been the plea for power in the legislative and executive branches to solve [the federal government's and the nation's] problems."³⁷

On the Supreme Court, Jackson struggled mightily with the problem of racial segregation.³⁸ He was philosophically inclined to leave the solution of society's significant problems to the executive and legislative branches of government. In 1950, he wrote his friend, Charles Fairman, "[t]here are several questions which give me a good deal of trouble about the segregation issue *as a judicial problem* based on the Fourteenth Amendment."³⁹ The emphasis in this quotation was Jackson's.

³⁴ Ken Krayseske, "Justice Robert H. Jackson: Racist?," www.the40yearplan.com.

³⁵ Robert Jackson, "The Challenge of International Lawlessness," *American Bar Association Journal* (1941), 690.

³⁶ Robert H. Jackson, *The Struggle for Judicial Supremacy* (New York: Knopf, 1941).

³⁷ Robert Jackson to Paul Freund, May 21, 1940, Jackson Papers, box 55, folder 6.

³⁸ See, e.g., Noah Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices* (New York: Twelve, 2010), 391-95 & 399-402.

³⁹ Robert Jackson to Charles Fairman, Feb. 28, 1950, (emphasis in original) Charles Fairman Papers, South Texas College of Law.

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Jackson made clear that he detested the racial hatred that segregation embodied. “You and I,” he wrote, “have seen the terrible consequences of racial hatred in Germany. We can have no sympathy with racial conceits which underline segregation policies.”⁴⁰ He continued, “I am clear that I would support the constitutionality of almost any Congressional Act that prohibited segregation in education.”⁴¹ On the other hand, he harkened to his experience in service to Roosevelt’s Administration: “I really did, and still do believe the doctrine on which the Roosevelt fight against the old Court was based – in part, that it had expanded the Fourteenth Amendment to take an unjustified judicial control over social and economic affairs.”⁴² Although he had these qualms, he ultimately decided to sign the Court’s unanimous decision to declare racial segregation in public schools unconstitutional.

As a matter of process jurisprudence, Jackson believed that courts generally should defer to the (more) political branches of government. But in the D.C. library episode, he was not acting as a judge. He was an executive officer, and the law had entrusted him with discretionary authority to manage the D.C. Courthouse. He was not reviewing rules established by a state government or a coequal branch of government. He was making the rules, and he forthrightly mandated the fair treatment of black and female attorneys.

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⁴⁰ Robert Jackson to Charles Fairman, March 13, 1950, reprinted in William M. Wiecek, *The Birth of the Modern Constitution* (New York: Cambridge, 2006), 713-15.

⁴¹ *Ibid.*

⁴² *Ibid.*