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“Consolidating the New Position (1938-1940)”:

A Study of the Tenure of Robert H. Jackson:  
March 5, 1938 to January 18, 1940

by

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A Thesis  
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for the Degree of Master of Arts  
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Approved \_\_\_\_\_  
Professor Andrew Wender Cohen

Date \_\_\_\_\_

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“Consolidating the New Position (1938-1940)”:

A Study of the Tenure of Robert H. Jackson:

March 5, 1938 to January 18, 1940

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“Consolidating the New Position (1938-1940)”

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## *Introduction*

Robert H. Jackson's service as Solicitor General has attained mythic status, prompting academics and commentators consistently to rate him as one of the greatest appointees to that office.<sup>1</sup> In part, his stature reflects his extraordinary skill as an attorney.<sup>2</sup> In some measure, Jackson's legend draws upon the Supreme Court's growing liberalism, which occurred upon his watch. As Peter Ubertaccio argues in his history of the office, *Learned in the Law and Politics*, the stature of the Solicitor General suffered during the early 1930s, when the court generally ruled against the government, then improved as the court sided with the Roosevelt Administration later in the decade.<sup>3</sup> But it also flows from the perception that Jackson was an "apolitical" official. In *The Tenth Justice*, a study of the Solicitor General during the Reagan administration, Lincoln Caplan approvingly cites Archibald Cox's ranking of Jackson as one of the three most-

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<sup>1</sup> William M. Wiecek, *The Birth of the Modern Constitution The United States Supreme Court 1941-1953*, vol. 12 of *The Oliver Wendell Holmes Devise History of The Supreme Court of the United States* (New York: Cambridge University Press, 2006), 108.

<sup>2</sup> E. Barrett Prettyman, Jr., "Robert H. Jackson Solicitor General for Life," *Journal of Supreme Court History* (1992), 76. Prettyman gives a box score for Jackson's service as Supreme Court advocate. Jackson won sixteen of twenty-two Supreme Court arguments while Solicitor General; prior to serving as Solicitor General, Jackson had argued fourteen cases before the Supreme Court, winning ten. After service as Solicitor General—while serving as Attorney General, Jackson won all three of the cases he argued personally. See also Eugene C. Gerhart, *America's Advocate: Robert H. Jackson* (Indianapolis, IN: Bobbs-Merrill, 1958), 108-122. Gerhart's is the only full-length biography of Jackson. Gerhart met Jackson in 1946 at an ABA meeting in Atlantic City, NJ, where as a young lawyer Gerhart won an essay contest and Jackson, just returned from Nuremberg, spoke. Gerhart, also an upstate New York lawyer (Binghamton), convinced Jackson to allow him to write his biography and met with Jackson nearly a dozen times in the ensuing years for that purpose. Gerhart and his secretary, Lorraine Wagner, traveled to Washington where Gerhart would interview Jackson, often in chambers, while Wagner took notes. Gerhart's biography has the benefit of these personal interviews, but suffers from Gerhart's hero worship of his subject and his uncritical presentation of his subject's rendition of events. Personal interview with Gerhart, 2006 and Robert Q. Barrett, "Eugene C. Gerhart (1912-2007), Jackson Biographer." *NYSBA Journal*, 2008, 26-28.

<sup>3</sup> Peter N. Ubertaccio III, *Learned in the Law and Politics: The Office of the Solicitor General* (New York: LFB Scholarly Publishing LLC, 2005), x, 78, 89.



respected Solicitors General in the history of the office.<sup>4</sup> Disagreeing with Reagan's policies, Caplan argues that the Reagan Solicitors General, Edwin Meese and Charles Fried, corrupted the office, once a bastion of impartiality. Though political scientists like Rebecca Mae Salokar have questioned this alleged historical independence of the office, the sense that Jackson was a figure above political considerations nonetheless survives.<sup>5</sup>

This thesis examines Jackson's thinking during his tenure as Solicitor General by evaluating his non-judicial writings and speeches during the time he held the office of Solicitor General, specifically examining Jackson's thinking regarding the roles of the elected branches of the federal government and the judiciary.

Though Jackson styled himself as a non-partisan, professional Solicitor General, he was actually an ardent supporter of the New Deal constitutional revolution who played a significant role in "consolidating the new position."<sup>6</sup> Jackson assumed the office on March 5, 1938, nearly one full year after the Supreme Court of the United States ceased barring progressive and New Deal legislation. This change in constitutional interpretation gave Jackson and the Roosevelt Administration a Court more sympathetic to their views, allowing Jackson to explore the new limits of governmental power. Jackson gave a number of political speeches while serving as Solicitor General, was active in Democratic

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<sup>4</sup> Lincoln Caplan, *The Tenth Justice: The Solicitor General & the Rule of Law* (New York: Alfred A. Knopf, 1987), 10.

<sup>5</sup> Rebecca Mae Salokar, *The Solicitor General: The Politics of Law* (Philadelphia: Temple University Press, 1992), 174-5.

<sup>6</sup> Jackson, "Autobiography," Box 189, folder 2, Robert H. Jackson Papers, LCMss; Robert H. Jackson, *The Struggle for Judicial Supremacy* (New York: A.E. Knopf, 1941). *Chapter* title of Chapter VIII, and Cushman, 37. This set him apart from the recent past; as Cushman points out, twelve New Deal acts of legislation were declared unconstitutional before 1937, six were unanimous decisions and two more had only one dissenting vote. In part, this reflected the fact that, not only were early New Deal laws poorly drawn, but also the Department of Justice under Attorney General Homer Cummings was quite weak. It also suggests that the evolution of legal thought regarding government regulation of the economy was not yet complete.

Party campaigns, and briefly contemplated running for governor of New York. When he did engage the politics of his day, he discussed judicial restraint and anti-trust issues as well as the general themes of Democratic Party politics. Jackson was a politically active Solicitor General.

Furthermore, in his 1941 book *The Struggle for Judicial Supremacy*, Jackson helped create the myth of the New Deal “Constitutional Revolution.”<sup>7</sup> Written with Law Professors Paul A. Freund and Louis L. Jaffe, the book contested the standard narrative of the court’s 1937 shift, which placed two particular court decisions in the spotlight: *West Coast Hotel Co. v. Parrish* and *National Labor Relations Board v. Jones & Laughlin Steel Corp.*<sup>8</sup> Tradition posits that the United States Supreme Court defended conservative, moneyed interests against the liberal forces of the New Deal until FDR’s 1937 “Court Packing” plan essentially convinced Justice Roberts to defect to the liberal bloc.<sup>9</sup> Jackson rejected this theory in favor of an interpretation tinged with Legal Realism, a philosophy held by many New Deal lawyers.<sup>10</sup> Legal realism gave little weight to judges’ understandings of Constitutional law and looked instead at the justices’

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<sup>7</sup> Jackson, *The Struggle for Judicial Supremacy*. Many others also aided in the promulgation of this version of events, perhaps most interestingly Professor Edward S. Corwin, an important actor in the court packing plan, in his many writings. For example, *The Twilight of the Supreme Court: A History of Our Constitutional Theory* (New Haven: Yale University Press, 1934) and, *Court over Constitution: a Study of Judicial Review as an Instrument of Popular Government* (Gloucester, MA, Peter Smith, 1938).

<sup>8</sup> Jackson, *Struggle for Judicial Supremacy*, i- xx; M. L. Dudziak, “West Coast Hotel Co. v. Parrish” in *The Oxford Guide to United States Supreme Court Decisions*, ed. K. L. Hall (New York: Oxford University Press, 1999), W. E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995); R. G. McClosky, *The American Supreme Court* (Chicago: University of Chicago Press, 1960). *West Coast Hotel Co. v. Parrish* 300 U.S. 379 (1937); *National Labor Relations Board v. Jones & Laughlin Steel Corp.* 301 U.S. 1 (1937).

<sup>9</sup> Leuchtenburg, *Supreme Court Reborn*, 142,154,161.

<sup>10</sup> Jerome Frank, author of *Law and the Modern Mind* (New York: Tudor Publishing Co., 1936), and lawyer in the A.A.A., thought the statute creating the A.A.A. was unconstitutional, Barry Cushman. *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998), 37.

political interests and affiliations. In his book, Jackson gave just passing attention to legal thought as an independent issue in judicial behavior.<sup>11</sup> In *The Struggle for Judicial Supremacy*, Jackson made the case for electoral politics trumping legal theory: in essence, judges should and did follow election returns.<sup>12</sup>

Jackson's legal thought emphasized three key themes. First, Jackson conveyed a sense of national peril, a true and significant concern about the viability of the American democracy. His repeated reference to the failure of democracies in Europe to respond to the crises they faced and the subsequent rise of totalitarian governments, be they Fascist, Socialist or Communist, was a compelling and practical fear present in his mind during this period. The failure of democratic governments to deal with the crisis of the Depression was a key vulnerability of American government, and the Court was an impediment to the democratic process.

Second, Jackson argued that judicial restraint (the court deferring to the elected branches) was the only viable position for the Court to take on issues relating to matters of economic regulation.<sup>13</sup> Jackson saw himself as the lawyer for the government and

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<sup>11</sup> Cushman, *Rethinking the New Deal Court* also G. Edward White, *The Constitution and the New Deal* (Cambridge, MA: Harvard University Press, 2000). Barry Cushman and G. Edward White present an alternative to the standard narrative, by portraying the events of the 1920's and 1930's in terms of the development of legal thought and philosophy. Likewise, two recent doctoral dissertations give a prime position to philosophical pragmatism as the force behind the changes in legal thinking leading to the Constitutional revolution of 1937. David M. Nowacek, "Pragmatism in American Jurisprudence and Social Organization: Reconstructing the Discursive Background of the Judicial Revolution of the 1930s", Ph.D. Diss., University of Wisconsin-Madison, 2005) ProQuest UMI #3200037. Bernard Jackson, "Pragmatism, Constitutional Interpretation and the Problem of Constitutional Change," (Ph.D. Diss., University of Iowa, 2003) ProQuest UMI #3114364.

<sup>12</sup> Jackson's argument was that the justices of the Supreme Court were following accepted legal theory too closely and the election returns not closely enough. See *Struggle for Judicial Supremacy*, 176 where he opens Chapter VI, "The Challenge," with a detailed account of Roosevelt's 1936 election victory.

<sup>13</sup> Jackson later marked the completion of the Constitutional revolution with his opinion in *Wickard v. Filburn*, 317 U.S. 111 (1942).

more particularly the President. While he might not always agree with a policy, his role was to present the case of his client before the Court.<sup>14</sup>

The third and final aspect of Jackson's thinking during this period was his sense of a "new founding," a theme he emphasized on many occasions. Though Jackson often used the seemingly contradictory phrase "going back to the Constitution" he believed that his generation was called upon to re-interpret the founding document.<sup>15</sup> Jackson thought his re-interpretation was more faithful to the original meaning of the Constitution than the one-hundred and fifty years of case law that followed the ratification of Constitution. The concept of "going back to the Constitution" had two advantages: It not only freed New Dealers to pass legislation (by positing that the original Constitution allowed for such legislation), it also connected those who favored the theories of the New Deal with the nation's founders. This approach helped fend off critics, who painted the New Deal as a socialist and anti-American undertaking. Roosevelt also put the theme of "going back to the Constitution" forth in his court-packing plan.<sup>16</sup>

During his service as Solicitor General, Jackson's philosophy helped fill the lacuna left by the decline of classical legal liberalism. Once the change in Supreme Court philosophy occurred in 1937, there existed a crucial philosophical void wherein the Court and the administration articulated the parameters of, and more importantly, the limits of, the new Constitutional order. Though the court jettisoned its foundation of classical legal thought and began a search for a new legal philosophical foundation, both

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<sup>14</sup> Robert H. Jackson, *That Man: An Insider's Portrait of Franklin D. Roosevelt*, ed. John Q. Barrett (Oxford: Oxford University Press, 2003), 119-35. Jackson described FDR's views on the conflicts between anti-trust actions and the actions of the N.R.A. as confused and contradictory.

<sup>15</sup> The first use of this phrase is attributed to Charles W. Pierson in *Our Changing Constitution*, (Garden City: Doubleday, Page & Co., 1922).

<sup>16</sup> Jackson, *Struggle for Judicial Supremacy*, 328-40.

the “government,” or the legislative and executive branches, and the judicial branch had to work out the new rules, procedures, and presumptions that would govern their interactions in the future.<sup>17</sup> It was critical to Roosevelt that his administration be seen as “defending the Constitution” and not as abandoning it.<sup>18</sup> The power of the federal government now included the regulation of minimum wages and maximum hours for workers and seemed to include any and all aspects of American economic life, but was there a limit to these powers? Harry Hopkins suggested no, when he told the National Advisory Committee, “I want to assure you that we are not afraid to explore anything within the law, and we have a lawyer who will declare anything you want to do legal.”<sup>19</sup> If Hopkins was correct, what purpose did the Court have, and if incorrect, how were the new limits to be determined?<sup>20</sup> Holding politics above law, Solicitor General Jackson was far from a mere professional lawyer, representing the government. He was an advocate for the new vision of state power being proposed by the Roosevelt administration.

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<sup>17</sup> Wiecek, *The Birth of the Modern Constitution*, 4.

<sup>18</sup> Jackson, *Struggle for Judicial Supremacy*. This was key for the administration, for this “fight” was between two camps with diametrically opposed views of the Constitution and its instructions to those who followed the founders. Both sides in this “fight” claimed to be the rightful intellectual descendants of the founders and needed, for purposes of public validation, the public’s acceptance of this image. One sees more than a passing similarity here to the founders who, in writing the Declaration of Independence, did want a revolution but did not want to completely abandon the old order or the legal order as a whole. In fact, Jackson took as the title of Chapter VIII of *The Struggle for Judicial Supremacy* “Consolidating the New Position 1938-1940,” giving insight into how he saw his time as Solicitor General.

<sup>19</sup> William E. Leuchtenburg, *Franklin D. Roosevelt and The New Deal, 1932-1940* (New York: Harper and Row, 1963), 340. It is not clear whom Hopkins was referring to.

<sup>20</sup> E. Barrett Prettyman, Jr., *Robert H. Jackson “Solicitor General for Life”* *Journal of Supreme Court History*. 1992. 75-85. Prettyman quotes Kurland as attributing the famous quote of Brandeis’ in a conversation with the President, also quoting Gerhart as attributing the quote from a Brandeis conversation with Felix Frankfurter.

*The Life and Career of Robert H. Jackson to 1938*

Robert H. Jackson, born in rural northwest Pennsylvania, spent nearly all of his early life in Jamestown, New York. With the exception of a little more than a year in Albany, New York, all of his early educational and professional experiences were in this conservative, generally Republican, upstate New York region. Jackson's experiences in Jamestown shaped his view of the world and of the law, for it was there that he learned to serve both rich and poor, both mighty and weak, both Democrat and Republican and both conservative and liberal clients. Jackson was "born a Democrat," in a region dominated by Republicans.<sup>21</sup> While Jackson did not disguise his Democratic Party affiliation, he had to learn a way to serve both Democratic and Republican clients, especially those associated with the larger businesses of the region. Jackson did learn to do this successfully, integrating himself into the leadership of the local banking, telephone, and power-utility structure of his community. Thus, he was able to represent workers, unions, and telephone utilities, bankers as well as murderers. This served him well during his time in Washington, wherein he established a reputation as a lawyer for the government, not a policy maker or political actor, but rather an effective advocate.

Robert H. Jackson was born into a family of modest means, on the family farm in Spring Creek, Pennsylvania on February 13, 1892. Jackson's family, in his words, "voted for Franklin Pierce and had voted for every Democratic candidate for President from that time down."<sup>22</sup> His father was, among other things, a horse trader, and from him

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<sup>21</sup> Jackson, "Autobiography," Box 189, Robert H. Jackson Papers, LCMss.

<sup>22</sup> Gail Jarrow, *Robert H. Jackson: New Deal Lawyer, Supreme Court Justice, Nuremberg Prosecutor*. (Honesdale, PA: Calkins Creek, 2008), 17.

Jackson acquired his life-long love of horses and riding.<sup>23</sup> Jackson was educated in the public schools of Frewsburg, New York and after graduation from Frewsburg, took an extra year at Jamestown High School in Jamestown, New York.<sup>24</sup> Jackson excelled at Jamestown, and was chosen to deliver his class's Graduation Day speech.<sup>25</sup>

Jackson, who was known for his debating skills in high school, embarked on a legal education following the time-honored tradition of reading law in a private law office. Upon graduation from high school Jackson began to work in the Jamestown law office of Frank H. Mott, an older cousin of his mother.<sup>26</sup> Jackson's father, William, did not encourage his interest in a legal career and could not or would not consider funding a college or a legal education.<sup>27</sup> However, Jackson did well in "reading law" in Mott's office and after a short period, borrowed money from another relative and entered Albany Law School, in 1911. Accounts of Jackson's time in Albany vary; he spent one year there, perhaps a full academic year plus one summer, at a time when the full course of study was two years. Some suggest that he completed the full course load and was given

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<sup>23</sup> Jackson's home and horse farm in Northern Virginia, Hickory Hill, would later be sold to Senator John F. Kennedy, who sold it to Attorney General Robert F. Kennedy. Jarrow, 61.

<sup>24</sup> Gerhart, *America's Advocate*, 26. Jackson, like his father and grandfather, was not church-going in his early years. He described his ancestors as Scotch-Irish Presbyterians, while much of his known lineage was English. In his later years he would attend Episcopal services.

<sup>25</sup> Robert H. Jackson, "An Unappreciated Heritage", Speech given in Jamestown, New York on June 21, 1910. <http://www.roberthjackson.org/Man/theman2-7-10-1/>, accessed August 2, 2008.

<sup>26</sup> Gerhart, *America's Advocate*, 33. Mott was a cousin of Jackson's mother and prominent in Democratic New York State politics. He ran as a Democratic candidate for Secretary of State, was Deputy Attorney General and Secretary of the New York State Public Service Commission.

<sup>27</sup> Gerhart, *America's Advocate*, 33. At that time the process for the bar examination required three years of clerkship. His later attendance at Albany Law was financed by a loan from his uncle John Houghwout.

a certificate of attendance and not a degree because he was not old enough (under twenty one) to sit for the bar exam when this was a requirement for a degree.<sup>28</sup>

Jackson chose to study law at Albany, the seat of New York State government, in part so that he could gain exposure to a higher level of government and politics than he had previously observed. It was there that he first met the young New York State Senator, Franklin Delano Roosevelt. Jackson's initial impression of Roosevelt was somewhat less than outstanding.<sup>29</sup>

The Jamestown where Jackson practiced from 1913 until going to Washington in 1934 was a town of roughly 31,000 people. To Jackson's good fortune, Mott left Jamestown in 1913 upon his appointment to the Public Service Commission, leaving his entire law practice in Jackson's hands. In Jackson's first case at trial, he received special permission from the presiding judge to argue because he had not yet passed the bar exam. In it he defended transit workers on strike in Jamestown, and won.<sup>30</sup> He would later go on to serve as a council for the transit company.

It was through Mott, who was active in local Democratic politics, that Jackson had his initial exposure to party politics. As soon as he was twenty one years old, Jackson was elected to the Democratic State Committee. In that role, it fell to him to organize the patronage jobs after the 1912 Democratic Presidential electoral victory.

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<sup>28</sup> Many accounts downplay Jackson's formal legal education; however it was typical of his time. Gerhart claimed that he completed two years work in one (see Gerhart, *America's Advocate*, 34). Jackson passed the bar exam in October of 1913.

<sup>29</sup> Robert H. Jackson, *That Man*, 3. Jackson referred to FDR in the New York State Senate as "all amateur."

<sup>30</sup> Gerhart, *America's Advocate*, 49. Jackson took this case against the advice of other lawyers who felt it would injure their standing with the business community. As can be seen from Jackson's finances later in this work (Table 1) this was not the case. Jackson was proud of the independence his general practice gave him, boasting often that any one client accounted for no more than 10% of his gross income.



The positions Jackson was responsible for filling consisted mostly of local postmasterships, and in deciding on the distribution of these jobs his contact in Washington was the New Yorker and Assistant Secretary of the Navy, Franklin D. Roosevelt. Jackson found party matters unpleasant, and at the end of his term stepped down and said “Never again!” and did not serve in a party position again.<sup>31</sup> Prior to going to Washington in 1934, Jackson held only one public office: Acting Corporation counsel for the city of Jamestown.<sup>32</sup> These experiences were formative in Jackson’s development as a professional lawyer but not as a politician, especially in terms of his self image.

Mott’s leaving Jamestown for Albany left Jackson in command of his own legal practice, and his practice flourished. Jackson became widely regarded as preeminent among the local bar; he argued trial cases in Buffalo and appellate cases in Albany and handled a wide range of general cases, from property to corporate to criminal cases, including murder. Jackson remained averse to the trend for legal specialization and was a strong supporter of general practice law. Jackson’s reputation grew with his active role in the local and New York State bar, and he often addressed the latter at its annual convention. Jackson’s practice was lucrative, bringing him over \$30,000 annually during the Depression and giving him the independence that financial security gave, independence he later felt useful in public office.<sup>33</sup> Later, while in Washington, he often

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<sup>31</sup> Philip B. Kurland, “Robert H. Jackson” in *The Justices of the United States Supreme Court 1789-1969 their Lives and Major Opinions*. eds. L. Friedman and F. Israel (New York: Chelsea House, 1969), 2545. Jackson would, however, continue to serve as a delegate to conventions and to make political speeches in support of Democratic candidates. Also during this period, Jackson made repeated trips to Washington, D.C. on party matters.

<sup>32</sup> *Ibid.*, 2546.

expressed concern about his practice and at least once felt the financial need to return to Jamestown. This time in his life also placed him in close contact with those who owned or ran the local businesses of Jamestown, who then placed him on some of the boards of these concerns.<sup>34</sup> Though a Democrat, these experiences involved Jackson in many close relationships with the business and moneyed interests of his community. This also set a pattern of behavior in that Jackson had to function as a Democratic lawyer in a Republican majority town. This helped to develop the belief on his part that the law and party politics could be separated and demarcated.

The relationship that Jackson developed with John H. Wright, the owner or the Jamestown Telephone Corporation, was long lasting and served as an important catalyst in the formation of Jackson's views of the anti-trust laws. He would speak out forcefully, and controversially, about the evil of large trusts, just before his nomination to the office of Solicitor General. His views were influenced by Wright's long and successful battle to remain independent of the Bell System. Jackson served as lead counsel for the Jamestown Telephone Corporation and came to see the difficulties of a small, local business in competition with a large national trust, placing Jackson squarely on the side of the smaller firms.

This experience, from 1913 when he passed the bar, to 1934 when he entered public service, served to form key elements of Jackson's style and approach to the law.

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<sup>33</sup> In 1940 as Attorney General his salary would be \$14,000. (Box 198, Robert H. Jackson Papers, LCMss.) While in Washington, income from investments, mostly in Jamestown firms, would equal or exceed his government salary. Estimates of the 2007 buying power of \$30,000 place it around half a million dollars, <http://eh.net/hmit/>, accessed August 2, 2008.

<sup>34</sup> Gerhart, *America's Advocate*, 37-9. Jackson formed a close bond and life long friendship with John H. Wright, the president of the Jamestown Telephone Corporation, fighting (successfully) to keep the firm independent of the Bell System. Jackson also represented the Jamestown Street Railway, the Central Labor Council, the local gas company and the Bank of Jamestown.

Jackson, widely known for his engaging wit and ability to turn a phrase, was at times a showman, but could be modest and effective before a jury or a judge. Jackson's experience with the law was as a pragmatic tool of those who were his clients. His wide experience with the law and with a wide breadth of clients gave him a powerful basis from which to serve the New Deal administration and his affiliation with John Wright may explain, in part, his anti-trust views. Perhaps the most important tool Jackson took from Jamestown was an ability—native to a large degree, but honed over many years of legal practice— to, make concise and convincing arguments as an advocate.

As Jackson told the story, he went to Washington neither as a reward nor as a political actor but as an experienced lawyer to do a job — the job of clearing a backlog of cases as general counsel to the Bureau of Internal Revenue. It was during this time that Jackson first gained national attention because of his involvement in the tax case against former Republican Secretary of the Treasury and multimillionaire Andrew Mellon.<sup>35</sup> This investigation began inauspiciously for the government with a Pittsburgh grand jury failing to indict Mellon on criminal charges that had been brought against Mellon (against the advice of Jackson). Jackson won attention for his balanced and apolitical approach to the case and for his handling of Mellon on the witness stand. The case was decided in 1937 with a finding of \$750,000 owed by Mellon.<sup>36</sup>

In August of 1935, Jackson began a Treasury Department investigation of the tax case of Ivar Kreuger; an investigation requiring a trip to Europe. Kreuger's financial

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<sup>35</sup> "Tax Bureau Says Mellon used Treasury Experience in avoiding Income Levies. \$3,075,103 is demanded," *New York Times*, 16 September 1934, 1.

<sup>36</sup> Gerhart, *America's Advocate*, 76-79.

network was complex and required that Jackson visit many cities in Europe, including Germany, where Jackson saw Nazi storm troopers first hand.<sup>37</sup>

Upon Jackson's return from Europe, Thomas Corcoran<sup>38</sup> and Benjamin Cohen<sup>39</sup> managed to secure leave for him from the Treasury department and have him assigned to serve as special counsel for the Securities and Exchange Commission, working on the trial of a case related to the Public Utility Holding Company Act of 1935. Jackson won at each level prior to this case eventually reaching the Supreme Court. Arguing together with Ben Cohen, Jackson prevailed at the Supreme Court as well.<sup>40</sup> Unlike Corcoran and Cohen, Jackson was never part of FDR's "brain trust." But, both recognized and admired

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<sup>37</sup> William E. Leuchtenburg, *Franklin D. Roosevelt and The New Deal 1932-1940*, 20. Frank Partnoy, *The Match King: Ivar Kreuger, The Financial Genius Behind a Century of Wall Street Scandals*, (New York: Public Affairs, 2009) 32, 157. The Kreuger case was one of the most infamous of the century. Kreuger, "the Swedish Match King" shot himself in a Paris apartment in March 1932. A financial titan, it became clear after his death, that Kreuger had been a swindler who had forged \$100,000,000 in bonds. Kreuger had worked on the building of Syracuse University's Archbold Stadium in 1906 and received an honorary doctorate from Syracuse University in 1930.

<sup>38</sup> Corcoran was born in Pawtucket, RI, in 1900 and graduated first in his class at Brown University and at Harvard Law School, where he was the favorite student of Felix Frankfurter. He then served as secretary to Justice Holmes. His next five years were spent on Wall Street specializing in corporate reorganization and the issuance of new stock. President Herbert Hoover appointed him to the Reconstruction Finance Corporation in 1932 and when Roosevelt defeated Hoover, Corcoran, a life long Democrat, stayed on. Corcoran used his friendship with Miss Marguerite Lahand ("Missy" Lehand was FDR's secretary and perhaps closest confidant) to his advantage and this coupled with his closeness with Frankfurter helped him become the closest of Roosevelt's advisors. His greatest victories included the passage of the Securities Act of 1933, the Securities Exchange Act of 1934 and the Fair Labor Standards Act of 1938. He fell from power with the defeat of the Court Packing Plan and the effort to defeat certain Democratic members of Congress in 1938. Corcoran was an admirer of Jackson and was supportive of advances in Jackson's career in Washington. See Wolfgang Saxon, Obituary, *New York Times*, 7 December 1981. Alan Brinkley. "Corcoran, Thomas Gardiner"; <http://www.anb.org.libezproxy2.syr.edu/articles/07/07-00430.html>; *American National Biography Online* Feb. 2000. Access Date: Sun Jul 26 08:49:03 EDT 2009.

<sup>39</sup> Cohen was born in Muncie, IN in 1894 and graduated from the University of Chicago and its Law School. He came to Washington in 1933 to serve as general counsel to the Public Works Administration. He would work with Corcoran at the Reconstruction Finance Corporation. He was instrumental in drafting such New Deal Legislation as the Securities and Exchange Act, The Public Holdings Company Act, the Federal Housing Administration Act and the Tennessee Valley Authority Act. Obituary *New York Times*, 16 August 1983. Nelson L. Dawson. "Cohen, Benjamin Victor"; <http://www.anb.org.libezproxy2.syr.edu/articles/06/06-00788.html>; *American National Biography Online* Feb. 2000. Access Date: Sun Jul 26 08:48:01 EDT 2009.

<sup>40</sup> Gerhart, *America's Advocate*, 82-3.

his skills as an advocate, and they sought his help in advancing their agenda of oversight at the Securities and Exchange Commission.

Admirers like Corcoran and Cohen, not to mention Roosevelt himself, helped Jackson's rise within the administration, and in early 1936 he moved to the Justice Department as Assistant Attorney General in charge of the Tax Division. Here Jackson argued Supreme Court cases and worked closely with Solicitor General Stanley Reed. Jackson described his relationship with Reed, both personal and professional, as cordial and "a very happy working arrangement."<sup>41</sup> Jackson was active in the 1936 presidential election and during this time became closer to Roosevelt, playing poker and going on fishing trips with the president.<sup>42</sup> Jackson gave a number of pro-Roosevelt speeches during this time.

While Jackson's star continued to rise, he remained ambivalent about continued government service and he made plans to return to private practice in Jamestown in late 1936.<sup>43</sup> Jackson was concerned about own finances, and about the viability of his legal practice back in Jamestown; his clients could remain loyal for only so long. In part to keep him in Washington, in 1937 Roosevelt appointed Jackson Assistant Attorney General in charge of the Antitrust Division, the highest post among the assistant Attorneys General. While at Antitrust, Jackson encountered a fundamental problem within the Roosevelt administration. As with much of New Deal policy, there were differing views within the administration regarding issues related to antitrust enforcement. A faction (led by Donald Richberg) supported large entity business units, a

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<sup>41</sup> Kurland, *Lives and Major Opinions*, 2550.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

controlled economy.<sup>44</sup> Their counterweights supported a Brandeis—style small unit economy, which would require strong antitrust enforcement. Jackson found Roosevelt inconsistent on these issues. The National Recovery Administration was based on a philosophy completely at odds with the antitrust philosophy, and Jackson found the administration “bogged down in conflict and confusion.”<sup>45</sup> After consultation with both Attorney General Homer Cummings and the President, Jackson embarked on a reinvigorated anti-trust litigation program. Jackson began or resumed suits against aluminum, movie, finance, and oil companies as well as suits against labor unions for inhibitory trade practices.<sup>46</sup> Simultaneously with Secretary of the Interior Harold L. Ickes, Jackson gave a series of speeches on the topic of antitrust law. This led some conservatives to label Jackson a “socialist.” At best, he became known as a radical New Dealer.<sup>47</sup>

His friend Thurman Arnold, the Wyoming-bred Legal Realist from Yale, succeeded Jackson at the antitrust position. Arnold was a leading thinker in the area of antitrust policy, and wrote two significant books on the topic. *Symbols of Government* (1935) and *The Folklore of Capitalism* (1937) established Arnold’s reputation as a New

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<sup>44</sup> Richberg was known in the press as the “Assistant President” during his tenure as general counsel and later acting administrator of the National Recovery Administration. His use of the code writing power of the NRA often favored large businesses. Irons, *The New Deal Lawyers*, 1982, 17-86. T. E. Vadney, “Richberg, Donald Randall”; <http://www.anb.org.libezproxy2.syr.edu/articles/06/06-00554.html>; *American National Biography Online* Feb. 2000. Access Date: Sun Jul 26 12:10:39 EDT 2009.

<sup>45</sup> Jackson, *That Man*, 119-121.

<sup>46</sup> Kurland, *Lives and Major Opinions*, 2550-1.

<sup>47</sup> Ibid. and “Text of Address of Robert H. Jackson to Political Scientists in Philadelphia,” *New York Times* 30 Dec 1937; “NEW DEALER WARNS THE SUPREME COURT; Democracy Being 'Frustrated' by 'Monopoly' of Tribunal by Lawyers, He Says,” *New York Times*, 30 Jan 1937.

Dealer.<sup>48</sup> Prior to his appointment, Arnold had criticized the antimonopoly traditions in American politics but had no practical experience in prosecuting antimonopoly cases. Despite this, Arnold was active and initially successful at the Antitrust Division.

Though Jackson was active in speaking on antitrust policy, Arnold was more active in actual prosecution.<sup>49</sup> In 1938, the division instituted 11 new cases, 59 new major investigations, and undertook 923 complaints. In 1940 (Arnold's third year) 92 new cases, 215 new major investigations and 3,412 complaints were undertaken.<sup>50</sup> However, at the time of his nomination for Solicitor General, Jackson was seen as the leader of that faction of the administration that held strong antimonopoly views. On February 23, 1938 the *New York Times* ran a story on an upcoming speech by Jackson at the Young Democrats Club. The article cited supporters attending, including William O. Douglas, Jerome Frank, Thomas Corcoran, Benjamin Cohen, Herman Oliphant and Thurman Arnold.<sup>51</sup> Jackson, for whom the speech was also a gambit for his run for governor of New York, there, clearly stated his antimonopoly views.

Once nominated for the office of Solicitor General, Jackson appeared before the Senate Judiciary Committee in January and February of 1938. During these confirmation hearings, Senator Warren R. Austin, Republican of Vermont, and Senator William King, Democrat of Utah, led the opposition to his appointment, reading back to Jackson many

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<sup>48</sup> Alan Brinkley, "The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold." *Journal of American History* 80 (1993), 557-79.

<sup>49</sup> William E. Leuchtenburg, *Franklin D. Roosevelt and The New Deal, 1932-1940*, 247, 259-260.

<sup>50</sup> *Ibid.*, 565.

<sup>51</sup> "Jackson Aides Act to Spur Trust War, Will Make Testimonial Dinner Here Tomorrow the Occasion for Monopoly Fight. Richberg Plan Opposed," *New York Times*, 23 February 1938.

of his speeches.<sup>52</sup> They tried to portray Jackson as a radical within the New Deal hierarchy. Austin first probed Jackson's reasons for coming to Washington and working with the Internal Revenue Service. Austin described Jackson's role as one which would "place arbitrary assessments on taxpayers" and take advantage of productive working Americans. The hearings then turned to Jackson's views on the Supreme Court and to his statement that the Court's decisions could not stand when they fail to follow the opinions and will of the people. Austin asked Jackson if he thought force was a viable response to an intransigent Court (Jackson did not, stating that the Court Packing Plan was not force). The questioning also probed Jackson's antimonopoly speeches and his speech in which he attacked the "Sixty families."<sup>53</sup> In answer to Senator Austin's questioning, Jackson stated he did not want the enterprises of the "Sixty families" broken down, but "the methods by which they operate should be done away with."

Jackson also stated his views on the proper role of the Court, "If a law is passed depriving people of religious freedom or civil rights, I want the Supreme Court to stand against it, as I would if I were on the court. But when it comes to legislative policy such as regulation of utilities, I do not think the court should stand against it."<sup>54</sup> The attempt to portray Jackson as a radical failed, and Jackson answered his critics directly, and placed himself in a more centrist position. The hearings for confirmation as Solicitor General proved to be the most difficult of his many trips to the committee, but he was

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<sup>52</sup> Gerhart, *America's Advocate*, 138-9 and Jackson, "Autobiography," Box 189, Robert H. Jackson Papers, LCMss. Austin found them unremarkable, once he read them, presenting fairly mainstream, antimonopoly views.

<sup>53</sup> Joseph Alsop and Robert Kintner, "Roosevelt's Business Advisory Body Near Revolt over '60 family' Blast," *New York Times*, 24 January 1938. The phrase was taken from Ferdinand Lundberg's 1937 book *America's 60 Families*.

<sup>54</sup> "People Rule Court, Jackson Asserts." *New York Times*, 11 February 1938. Latter fulfilled in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).



nevertheless confirmed by the Senate by a vote of sixty two to four on March 4, 1938. He took the oath of office of the Solicitor General the following day.

*The Unpublished Autobiography of Robert H. Jackson: The Chapter on the Solicitor Generalship*

Robert H. Jackson wrote three books, two unfinished at his death in 1954. One book, a portrait of FDR, *That Man: An Insider's Portrait of Franklin D. Roosevelt*, has been edited and published. The other, an autobiography remains unpublished.<sup>55</sup> In this unpublished manuscript Jackson portrayed himself as a non-partisan, non-ideological lawyer and councilor who saw his role in the Office of Solicitor General as one of serving his client, the President, not as defending a dogmatic theory of the law. Both *That Man: An Insider's Portrait of Franklin D. Roosevelt* and *The Unpublished Autobiography of Robert H. Jackson* presented Jackson's observations and judgments of the people around him and the events of day in which he personally played a role. In neither book did Jackson put forth a political or legal philosophy or any specific policy proposal.

In his unpublished autobiography, Jackson included a chapter on his time as Solicitor General. This chapter was, much like the other unpublished work, *That Man*, a series of anecdotes and observations of those around him. However, there are some shards of evidence that allow a glimpse into Jackson's mind and of his view of the Office of the Solicitor General and its role in the greater machine of government and the law. As Jackson related vignettes of his extra-judicial work while Solicitor General, he displayed his problem-solving, pragmatic approach to legal questions. Jackson saw his

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<sup>55</sup> Jackson, "Autobiography," Box 189, folder 2, Robert H. Jackson Papers, LCMss. John Q. Barrett uses excerpts from the Autobiography in his editorial preparation of *That Man: An Insider's Portrait of Franklin D. Roosevelt*.

role as not only providing opinions to his client, FDR, but also as one who worked to find practical solutions to his client's legal problems.<sup>56</sup> Jackson repeatedly contended that a freely elected government must be given broad powers to attack the problems it faced and the judiciary should limit itself to a very narrow scope in considering the Constitutionality of the actions by the elected branches of government. Jackson went so far as to support FDR's third term by positing that the Court had nullified the first term.<sup>57</sup>

Jackson consistently took the measure of those around him; much of this chapter is a review of his interactions with those with whom he worked and a presentation of Jackson's judgments of their characters and performances. In Jackson's posthumously published appraisal of FDR, *That Man*, the chapter "*That Man* as lawyer" began: "While Roosevelt was labeled a Wall Street lawyer at the time of his debut in politics as a New York State senator, it is plain that he was born for politics, not for the law."<sup>58</sup> In this chapter about the president as a lawyer, Jackson reported that in all his years of interaction with the president they only discussed the substance of Supreme Court decisions on two occasions. One was a discussion of the president's options if the decision of the *Gold Clause Cases* were adverse to the government, and the second was

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<sup>56</sup> Jackson saw the client of the Solicitor General as the President of the United States, which Jackson would repeatedly refer to as the spokesman for the people of the country, especially after the overwhelming 1936 victory. This victory would later form the core of Jackson's argument that the Court should yield to elected branches of government in the *Struggle for Judicial Supremacy*. Jackson came to see the President, as the only officer elected by all the people of the nation as having the strongest claim to representing the will of the people.

<sup>57</sup> While Jackson strongly supported FDR in his bid for a third term, Democratic National Committee Chairman James Farley did not.

<sup>58</sup> Jackson, *That Man*, 59. Barrett weaves excerpts from the autobiography into *That Man*, for example in Jackson's measure of Chief Justice Hughes, p 67.

the *Schechter* decision.<sup>59</sup> These discussions centered on the practical issues raised by these decisions, not the legal issues to be considered or dealt with in future cases. Jackson took a positive view of the *Schechter* decision, in part, seeing the facts of the case as the Court did and agreeing with the opinion of Brandeis. However, Jackson focused on the practical political issues of the court prohibiting the NRA enforcement as unconstitutional.<sup>60</sup> Though Jackson thought that the elected branches of government had wide-ranging powers in economic regulation and that the Court was not a proper forum for such policy questions, he quickly turned to the issues of accomplishing the goals of the NRA within the parameters of the Court's ruling.

Jackson's love of legal work and his practical approach to his work were portrayed early in the autobiography chapter describing his time as Solicitor General, "The only office I ever really coveted was that of Solicitor General of the United States."<sup>61</sup> He saw the work of the office as professional, not political, and the Solicitor General as controlling all of the litigation of the government before the Supreme Court.<sup>62</sup> Another "strength" that Jackson brought to all of his work in Washington, and especially to the Office of Solicitor General, was his plan to return to Jamestown to practice law. This was key in allowing him to function as an uninhibited public servant, for while ambitious; he held no agenda above that of his work, certainly not the advancement of his own political career.

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<sup>59</sup> Jackson, *That Man*, 65-7. Again, these discussions were not on the merits of the cases, but rather what the political implications of such a decision were to be. There was no acknowledgment that the 9-0 decision in *Schechter* indicated a fatal flaw in the law as written.

<sup>60</sup> *Ibid.*

<sup>61</sup> Jackson, "Autobiography," 143, box 189, folder 2, Robert H. Jackson Papers, LCMss.

<sup>62</sup> *Ibid.* At that time, 40% of Supreme Court cases involved the government as one of the litigants.

Jackson then gave a brief evaluation of the two men who held the office early in Jackson's time in Washington. In what was perhaps too generous evaluation of the performance of J. Crawford Biggs of North Carolina as Solicitor General, Jackson wrote: "a most agreeable gentleman, but whose work had not fitted him particularly for the post. The assistants he had chosen for the office were not particularly happily chosen."<sup>63</sup> Jackson applauded Stanley Reed's service as Solicitor General, in part because "he had assigned good cases to me for argument, cases which many as Solicitor General might have chosen for himself, because they were important from a public relationship point of view."<sup>64</sup> Upon the retirement of Justice George Sutherland, Reed moved to the Court. The night before the nomination of Reed went to the Senate, Tommy Corcoran called Jackson and let him know that he would be nominated for the post of the Solicitor General. Jackson related the amusing story of how Attorney General Cummings called Jackson to his office in the next few days to ask him if he wanted the office of Solicitor General. Cummings told Jackson he was not sure he could make it happen, as others had a claim on the post as well, but he would do his best to see the appointment go to Jackson.<sup>65</sup>

Jackson's confirmation hearings were not a rubber stamp session. It was being loudly whispered that Jackson was going to be a candidate for Governor of New York and two conservatives, Senator Warren Austin (R) of Vermont and William King (D) of

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<sup>63</sup> Jackson, "Autobiography," 144, box 189, folder 2, Robert H. Jackson Papers, LCMss.

<sup>64</sup> Ibid.

<sup>65</sup> Jackson, "Autobiography," 146, box 189, folder 2, Robert H. Jackson Papers, LCMss. Jackson was unsure if Cummings knew of Roosevelt's decision. Jackson also relates the tension between him and Cummings over the substance of a speech Jackson had recently given in Syracuse, which took issue with Donald Richberg's policies regarding N.R.A.

Utah both led critical opposition to Jackson.<sup>66</sup> Jackson was confirmed by a vote of 62-4 on March 4, 1938.<sup>67</sup> Once in the office of Solicitor General, he inherited a staff of about twenty selected by Stanley Reed, and Attorney General Cummings gave him the freedom to run his office as he wished. Other than serving as Acting Attorney General in Cummings's absence, Jackson had no other administrative roles in the Justice Department while serving as Solicitor General. While Jackson served as Solicitor General, the Attorney General, Homer Cummings retired from public service and moved to private practice. Many expected Jackson would move to the Office of Attorney General. However, Frank Murphy, who lost his bid for re-election as Governor of Michigan, was in need of a position and was named Attorney General.<sup>68</sup> Jackson seems to have been sincere when he repeated the statement that it was the office of Solicitor General he coveted and wanted to remain in. He met with FDR and assured him that he would be content with Murphy as Attorney General.<sup>69</sup> Part of Jackson's attraction to the office of Solicitor General derived from his plan to return to the private practice of law. The professional character of Solicitor General, compared to the administrative and

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<sup>66</sup> Jackson, "Autobiography," 150, box 189, folder 2, Robert H. Jackson Papers, LCMss. Austin came to see Jackson as more moderate than the radical he was portrayed as regarding his speeches. Austin voted against his confirmation as Solicitor General but would later vote in favor of his appointment as Attorney General and to the Supreme Court.

<sup>67</sup> "Senate Confirms Jackson by a Vote of 62 to 4; Norris, Others Mention Him for Presidency," *New York Times*, 5 March 1938, 1.

<sup>68</sup> Murphy had been a strong supporter of FDR and lost re-election in large part for not calling out troops to calm labor unrest. He was outspoken in his desire for the cabinet post of Secretary of War and considered the Attorney Generalship an interim position. His later service on the Supreme Court was highlighted by what many consider an unmatched record of support for minority rights. Roger Daniels. "Murphy, Frank"; <http://www.anb.org.libezproxy2.syr.edu/articles/06/06-00464.html>; American *National Biography Online* Feb. 2000. Access Date: Sun Jul 26 15:32:53 EDT 2009.

<sup>69</sup> Jackson, "Autobiography," 150-1; 185, box 189, folder 2, Robert H. Jackson Papers, LCMss.

political nature of Attorney General suited someone who thought of himself as a lawyer rather than a politician.<sup>70</sup>

Jackson painted an unflattering portrait of Murphy as Attorney General.<sup>71</sup> Jackson recalled his first meeting with Murphy; in which Murphy expressed his ambivalence toward the office of Attorney General and his desire to be Secretary of War. Unfortunately for Murphy, his oft-repeated desire for the job made its fulfillment impossible for FDR.<sup>72</sup> Jackson noted Murphy's penchant for holding news conferences, citing one tax case when Murphy flew to Kansas City, Missouri to be photographed as the government legal team made its presentation to the grand jury.<sup>73</sup> While Jackson was not averse to publicity, he did not find Murphy's seeking of it appropriate. "The Department of Justice under Murphy was in its golden days for publicity."<sup>74</sup> Jackson also complained that he fended off Murphy's attempts to entwine the Solicitor General with administrative roles within the department.

Jackson, like all Solicitors General, interacted frequently with the Justices of the Supreme Court, and formed well considered opinions of the Justices. Jackson held all of the sitting Justices of the Supreme Court, in high regard, except for McReynolds.<sup>75</sup> His

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<sup>70</sup> Jackson, "Autobiography," box 189, folder 2, Robert H. Jackson Papers, LCMss.

<sup>71</sup> Jackson, "Autobiography," 151, box 189, folder 2, Robert H. Jackson Papers, LCMss.

<sup>72</sup> Jackson also relates how he saved the new Attorney General the embarrassment of being admitted to the Supreme Court Bar before being presented to the Court as Attorney General by combining the occasions such that the press did not notice. Jackson, "Autobiography," 187-8, box 189, folder 2, Robert H. Jackson Papers, LCMss.

<sup>73</sup> Jackson, "Autobiography," 193, box 189, folder 2, Robert H. Jackson Papers, LCMss. This was the *Pendergast* Case. Jackson also related his role in the case of corrupt Federal Judge Martin T. Manton and how Manton nearly gained an appointment to the Supreme Court.

<sup>74</sup> Jackson, "Autobiography," 204, box 189, folder 2, Robert H. Jackson Papers, LCMss.

<sup>75</sup> Jackson, "Autobiography," 153, box 189, folder 2, Robert H. Jackson Papers, LCMss.

tales of Hughes help to confirm the Jovian image of the Chief Justice, comparing him only to FDR in his presence and bearing.<sup>76</sup>

Jackson related at great length his role in two significant matters related to presidential powers, which did not involve appearances before the Court. Before 1941, the United States was officially neutral in the European conflict. This led to difficulty when German industrialists applied to buy helium from American vendors. Military analysis found no significant military use for the helium and thus would allow it. However, FDR did not want the sale to proceed, and turned to Jackson for his legal opinion. Jackson used the opinion of Secretary of the Interior, Harold L. Ickes, who felt this resource should not leave the country, to allow FDR to block the sale.

In the other matter, FDR found himself embroiled with a conflict with TVA Chair Dr. Arthur Morgan. It was unclear whether FDR could remove Morgan without Senate action, since the Senate had confirmed his appointment and since the TVA was an independent agency. Jackson wrote a clear and uncompromising opinion supporting FDR's action, which stymied any Senate action on Morgan's behalf. In each case Jackson was involved as Acting Attorney General while the Attorney General was on vacation, and, according to Jackson's account, he played a significant role in each and in each delivered to FDR the desired result.<sup>77</sup> He also related a non-Constitutional case

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<sup>76</sup> Jackson, "Autobiography," 158-9, box 189, folder 2, Robert H. Jackson Papers, LCMss.

<sup>77</sup> Jackson, "Autobiography," 161-7, box 189, folder 2, Robert H. Jackson Papers, LCMss.

Jackson's findings proved to serve FDR's needs: yes he could remove Morgan and no he could not sell the helium. These findings both gave FDR what he wanted but raise an interesting paradox. In the TVA case, the issue of debate related to the power of the President over the quasi-independent TVA board and decided the chair of that board served only at the pleasure of the president, regardless of prior congressional approval. The helium case which led to a holding that the law tied the president's hands when Secretary of the Interior Harold Ickes refused to find the helium of no military consequence, in spite of a U.S. military finding to the contrary. See "Roosevelt Message, Jackson Opinion on TVA; TO THE CONGRESS OF THE UNITED STATES: Holds Morgan Contumacious Removal by President Provided," *New York Times*,

before the court, the deportation case of a communist named *Strecker*—as well as his role in helping fight the disbarment of Ohio labor lawyer Edward Lamb.<sup>78</sup>

Jackson briefly turned to the issues of his work at the Supreme Court and explained that he does not intend to recount or expand on his work or his thinking in this autobiography, but rather: “The litigation of the Supreme Court do [sic] not ordinarily attract much attention outside of professional circles. *The cases are all recorded in the books, and there is little need to add to the record in most of them.* They were varied and interesting, and their advocacy was among the pleasantest work of my life.”<sup>79</sup>

Jackson pointed to a flattering quote from Time Magazine which he modestly reports in the autobiography as a positive reflection on his work:

Lawyers like to say that the brilliance of John Marshall as Chief Justice reflected in no small part the brilliance of Lawyer Daniel Webster, who argued often before him. By such a token, the Supreme Court term was the term of Solicitor General Robert Houghwout Jackson. Working like a nailer, 14 hours a day, he argued 24 cases (in 14 groups)—a prodigious number compared to the ten or a dozen average of his busiest predecessors—and lost but two of them.

True it was that the Court he dealt with had a working New Deal majority of four (Black, Reed, Frankfurter, Douglas) to which, for an actual majority, it was necessary to swing only one of the middle-roaders (Hughes, Stone, Roberts) to down the two conservatives (McReynolds, Butler). And these four were as eager as Bob Jackson to New Dealize the law. Justice Frankfurter went so far as to exult, concurring in the O’Keefe

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24 May 1938, 3. “PRESIDENT TAKES UP REICH HELIUM DEAL; Sees Jackson, Will Hear Army, Navy Chiefs and Ickes Today.” *New York Times* 11 May 1938, 11.

<sup>78</sup> Jackson, “Autobiography,” 172-8, box 189, folder 2, Robert H. Jackson Papers, LCMss. Lamb was at risk for disbarment for his over-zealous representation of Ohio labor factions. “JACKSON TO ASSIST OHIO C. I. O. LAWYER; Other Federal Officials Join Bar Group Fight on Effort to Disbar Lamb Frank Explains Position JACKSON TO ASSIST OHIO C. I. O. LAWYER Jackson Confirms Serving Cited on Injunction Case,” *New York Times*, 11 April 1938, 1.

<sup>79</sup> Jackson, “Autobiography,” 171, box 189, folder 2, Robert H. Jackson Papers, LCMss. Emphasis added.



tax case, about "an important shift in Constitutional doctrine . . . after a reconstruction in the membership of the Court." <sup>80</sup>

What Jackson promoted in his self-portrait was not a Solicitor General intent on “New Dealizing” the law, but rather, a Solicitor General who was committed to promoting the power of the elected branches of government to enact and carry out those programs and laws that they responded to the crises of the Great Depression. While clearly identifying himself as a liberal and progressive, Jackson was not a political actor in the sense of contributing to the substance of the New Deal programs. This can be seen in his response to the *Schechter* judgment, and in his approach to the *Gold Clause Cases*, where he expressed no opinion on the correctness of the administration’s actions, but rather on the administration’s power to take such actions. At the core of Jackson’s philosophy as Solicitor General was a strong sense of judicial restraint.

*The Speeches of Robert H. Jackson given while serving as Solicitor General*

Jackson was a popular and frequent keynote speaker, serving as an active and sought after speaker for Democratic Party events and fundraisers.<sup>81</sup> However, his time in the office of Solicitor General represented a period of relative inactivity with regard to speech making.<sup>82</sup> Jackson saw the office of Solicitor General as one attached to the Supreme Court and not an office from which he should have been active in party politics.

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<sup>80</sup> “Jackson’s Term.” *Time*, Monday 12 June 1939. available at: <http://www.time.com/time/magazine/article/0,9171,762369,00.html>. Accessed 16 May 2008.

<sup>81</sup> See Appendix II for a list of these speeches.

<sup>82</sup> In spite of this he gave at least 46 speeches during his tenure as Solicitor General.

Nevertheless, he did give a number of speeches during his tenure as Solicitor General that largely endorsed FDR's understanding of the proper function of the judiciary.

Three fundamental themes recurred throughout his speeches during this time. He argued that the governments of democratic societies must have the power to act to solve the problems of their citizenry. The fundamental conflict between individual rights and collective powers must be balanced by the magnitude and importance of the problems being addressed by the government. Given the severity of the Great Depression, the balance was clearly in favor of government action, in Jackson's mind. When such power was not exercised, either because of limits on power or by incompetence, the results were clear, seen in the examples of the failure of the governments in Germany, Italy, Spain, and the rise of Communist dictatorship in Russia. Judicial restraint made up a key component of the need for democratically elected legislatures to be allowed to act, and to experiment, in their efforts to solve societal problems. Second, Jackson saw his generation of lawyers, politicians and citizens as "new founders" adapting their form of government to the conditions in which they found themselves. This theme had an oft-repeated subtext in which he spoke of "going back to the Constitution." This argument was important to Jackson's and Roosevelt's views of the conflict between the elected branches of government and the Supreme Court. Jackson saw no impediment in experimentation by the elected branches in the Constitution; the Supreme Court was not being overthrown, but rather being helped to see the Constitution as a flexible document. This sub-textual argument also relied on the dichotomy of the law of the Constitution and the law about the Constitution. The third theme was one of service to the community at large. This outlook developed in Jackson's earlier life as a general practice lawyer in

Jamestown, where he served not only the wealthy and successful citizens and businessmen of the community but also working people, union members and accused criminals as well. Recalling that no one client made up more than ten percent of his annual income, Jackson saw himself and the legal profession as a servant to the community as a whole and not just to one particular class.

Just weeks before his taking his post as Solicitor General, in 1938 Jackson gave a speech at the second annual convention of the National Lawyers Guild in Washington, D.C. For his topic, *The Call for a Liberal Bar*,<sup>83</sup> his audience, was the most receptive he could ask for. Speaking of the lawyer as public servant, they heard Jackson strike a note he would repeat during this period: a comparison of the work of the lawyers of his time with the lawyers of the founding period. He spoke of the statesmanship of the founders, pointing out that they were interested not just in advancing their clients or their own self-interest, but of their country. Experimentation, at the founding and in his own time, was required for progress. Only six years after adopting the Articles of Confederation, these statesmen recognized its failure and drafted the Constitution. He praised their ability to recognize the Constitution's shortcomings and correct them by the Bill of Rights. Jackson then defined the role of the modern lawyer. "It is not enough that we know the forces which brought about *Magna Carta* in the beginning of the Thirteenth Century, we must also understand the forces of today which demand social security and economic justice."<sup>84</sup> The past brought society political freedoms, such as the idea that no man should amass enough political power to deprive another of certain rights, ideas that had come to be considered conservative and widely accepted. Present-day "liberal" ideas of

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<sup>83</sup> Jackson, "A Call for a Liberal Bar," Box 35, folder 7. Robert H. Jackson Papers, LCMss.

<sup>84</sup> Ibid.

economic liberty, rights to collective bargaining, and freedom from starvation wages would some day be widely accepted as well. Jackson stressed the need for a disinterested bar, and repeating another favorite theme, antagonism to legal specialization:

Classification as criminal lawyers, or tax lawyers, or corporate lawyers, or insurance lawyers, or labor lawyers, or negligence lawyers carries a narrowing implication. The public loses at the bar when so many of its best minds become intimately a part of commercial structure, and law firms come to function like business subsidiaries. This results in a loss of the perspective and the independent position necessary to public belief in professional disinterestedness.<sup>85</sup>

While Jackson recognized the good that came from specialization, he saw a far greater evil, that of a loss of independence on the part of the lawyer. This was most acute when a lawyer would be in the employ of one entity or person or would be dependent on one entity for a great part of a lawyer's income.

Jackson also invoked the word "realism" repeatedly during this speech. He was not specifically referring to the school of legal thought in the abstract but to the founders and their recognition of the weaknesses of the Articles of Confederation. This was not accidental, but rather a not so subtle endorsement of Legal Realism, at least in the sense of allowing experimentation by the government.

Jackson ended his speech with the same theme he began, his generation as the new founders:

We too are founders—founders of what will tomorrow become the tradition of our profession in his day of change. We too are makers of a nation—the nation of tomorrow. We too are called upon to write, to defend and to make live, new bills of rights. We too may soberly but bravely advance the frontiers of justice under the law, into economic affairs where heretofore there was no right

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<sup>85</sup> Jackson, "A Call for a Liberal Bar," Box 35, folder 7, Robert H. Jackson Papers, LCMss.

except strength, no rule except of a master over necessitous men,  
no order except pauses between conflicts of force.<sup>86</sup>

This theme was to be repeated in the *Struggle for Judicial Supremacy*.<sup>87</sup>

One of the major issues facing the New Deal and the Court was that of the relationship of the federal government and the states with regard to commercial regulation. On April 6, 1939 Jackson traveled to Chicago and spoke at the National Conference on Interstate Trade Barriers. Jackson reviewed interstate commerce and attempts by states to raise barriers to out-of-state products by a variety of legal devices. He voiced concern about the loss of local control. His concern was at its core “anti-New Deal,” took a negative view of “racketeers and price fixers,” two important aspects of the New Deal:

I am sure men of large affairs do not know how deeply fearful and resentful our people have become over the non-resident control of their local services and opportunities. Local pride and independence has witnessed the replacement of its own initiative and control of its own enterprises by the distant organization. Its merchant, its utility man, its banker is no longer a home man. Disregard of local feeling and interest have contributed to a determination of local officials to turn their local laws to protect themselves against a threatened economic vassalage. I not only recognize this sentiment but I sympathize with it. The Federal Government owes the duty to police the channels of interstate trade to protect it from the racketeer, the monopolist, and the price fixer. Often it has been inadequately discharged.<sup>88</sup>

Jackson, along with Thurman Arnold, was leader of the Anti-Trust Division of the Justice department. In that role both were outspoken in their anti-monopoly views.

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<sup>86</sup> Jackson, “A Call for a Liberal Bar,” Box 35, folder 7, Robert H. Jackson Papers, LCMss.

<sup>87</sup> Jackson, *Struggle for Judicial Supremacy*, xiv.

<sup>88</sup> Jackson, “Trade Barriers – A Threat to National Unity,” Box 37, folder 11, Robert H. Jackson Papers, LCMss. Jackson sent this speech to “Ben” (perhaps Ben Cohen) for his comments prior to delivering the speech. There are handwritten comments on a draft in the folder.

Jackson's views of "racketeers and prices fixers" were not favorable; however this mode of economic association was fundamental to the New Deal. While Jackson portrayed the "racketeers" system as an evil, Andrew W. Cohen presents a history of the development of such economic systems as a forerunner to many of the New Deal programs and regulations.<sup>89</sup> While Jackson saw the racketeer as a problem, Cohen details the local craftsmen's agreements as forming the basis for the local control that Jackson expressed sympathy for and thus the positive side of the racketeer, the side embraced by many in the New Deal.

Jackson laid out his view of the conflict that states and the central government engaged in concerning the Constitution's limits on states' abilities to control or limit individual freedom and the limits on state action under the commerce clause. He wanted an activist court to strike down any state law impacting interstate commerce; he put Justice Frankfurter in step with Chief Justice Marshall's thinking in finding such state action intolerable under the Constitution. It seems Jackson's sense of judicial restraint had its limits.

The growth of federal administration led to a growth in the judicial oversight of such administration. In May of 1939 Jackson addressed the annual meeting of the American Judicature Society on the topic of *Progress in Federal Judicial Administration*. He began by discussing the political nature of the federal appointment process and hinted at his dislike of it. He praised the high level of work by federal judges (at often meager compensation) and noted the large number of such judges in his audience. He presented the Supreme Court statistics for the last year: 873 petitions for certiorari, 718 denied

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<sup>89</sup> Andrew W. Cohen, *The Racketeer's Progress: Chicago and the Struggle for the Modern American Economy, 1900-1940* (New York, Cambridge University Press, 2004), 265-95.

(82%), therefore only 18% granted. Within the office of Solicitor General there were 362 applications for writs of certiorari from government agencies, of these his office approved 69 and of these 72% were granted. This presentation from the man who, as Assistant Attorney General, presented the most coherent defense of FDR's Court-packing plan, ignoring the reason given by FDR for the plan, that failure to grant certiorari was indicative of the Court's falling behind in its work. He then noted the "many changes in the judge-made law of the Supreme Court in the past year. Not in many years have we seen so much willingness to examine the foundations of old rules and to adapt them to the conditions of our time." Invoking the back - to - the - Constitution imagery, Jackson noted that just as each generation must re-write history to suit its needs: "it is even more certain that each generation re-writes the law for itself. We are back to a commerce clause with the virility and breadth envisioned by Marshall, and back to a general welfare clause which authorizes the federal government to attack problems of nation-wide scope as was originally intended."<sup>90</sup>

In the summer of 1939 Jackson drove across the United States with his wife and daughter on a family vacation. On this trip he spoke at the American Bar Association convention in San Francisco. Jackson gave five speeches in six days; he addressed the Legal Education Section on July 11, 1939, on *The Product of the Present-Day Law School*.<sup>91</sup> After congratulating those present on educating a capable crop of young lawyers, Jackson pointed to one criticism of the "present-day legal education." Here

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<sup>90</sup> Jackson, "Progress in Federal Judicial Administration," Box 38, folder 2, Robert H. Jackson Papers, LCMss.

<sup>91</sup> Robert H. Jackson, "The Product of the Present-Day Law School," *California Law Review* 27, 6 (1939): 635-43. and box 38, folder 12, Robert H. Jackson Papers, LCMss. Jackson sent offprints to Felix Frankfurter, William O. Douglas, Charles Clark, Charles Seymour, and friends from Jamestown.

Jackson sounded much like a Legal Realist and criticized legal education as teaching students to “regard law as an end in itself, as a thing apart from life, to be logical and symmetrical and harmonious in it, aloof from the experience of illogical people.” Next recalling the problems of the past quarter century he told his audience “This excessive refinement of legal theory is not only a weakness of the teaching but a devotion to it is the weakness most often to be found in the product of the school who fails to make good in life.”<sup>92</sup> And later returning to the failings of the now fallen Court majority, “it does not matter how refined the concept or how perfect he logic, if it does not solve the problems of “just plain folks,” it is without merit.”<sup>93</sup>

This speech encapsulated Jackson’s philosophy of law, one not based on theory, or a philosophy of legal thought, but on pragmatism, related to the greater good as he or the majority saw it. This view was seen later when Jackson would examine the facts before him, when presented a question and weighing his choices based on his sense of the greater good. This would be in contrast to the actions taken by the Court in striking down New Deal legislation based on the theory of the law held by the Court’s majority, without regard for the impact of such decisions. Jackson’s later presentation in *The Struggle for Judicial Supremacy* puts forth just this case when discussing the conflict of New Deal legislation before the Court, wherein Jackson points to Roosevelt’s 1936 victory as the mandate to the Court to allow for New Deal experimentation in government.

Jackson collaborated with Paul Freund in writing a speech and subsequent paper entitled *The Rise and Fall of Swift v. Tyson*. Here Jackson offered not only a perspective of his thinking, but also of his interaction with Paul Freund, who was an assistant in the

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<sup>92</sup> Ibid., 638.

<sup>93</sup> Ibid., 640.



Solicitor General's office at this time.<sup>94</sup> In a handwritten note to Jackson, July 6, 1938 Freund noted that "This is not intended as a prefabricated speech. But I thought that by putting the material in some coherent form an arrangement would more readily suggest itself to you. P.F."<sup>95</sup> Continuing with their new and formal relationship, Freund again hand-wrote a brief note to "Mr. Jackson" on July 9, 1938 stating that Miss Bartz has told him that the ABA hoped for a paper and "Not knowing how much of the draft you plan to retain, and whether I will have a chance to see your revision, I am sending you a copy containing a few changes and additions." Still somewhat formal, Jackson wrote a two page typed letter to Freund on July 11, 1938, he began "Dear Paul and ended "RHJ."<sup>96</sup> Jackson's opening tells us much: "I have studied over the *Rise and Fall of Swift vs Tyson* and find it pretty satisfactory as it is. I have little access to books here and not much disposition to consult them."<sup>97</sup> Jackson relied almost completely on Freund, with his first addition of substance a practical one, adding a citation to *Ruhlin vs New York Life Insurance Co.* because, he said, it demonstrated the direct practical effect the *Erie* case would have on lawyers.<sup>98</sup> Freund wrote to "Mr. Jackson" on July 15 sending copies of the speech as requested, and provided details of the *Black and White Taxicab Case* and discussed issues of footnoting. This early interaction between Freund and Jackson helped

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<sup>94</sup> Robert H. Jackson, "The Rise and Fall of Swift v. Tyson," *Journal American Bar Association*, 24 (1938): 609-44. The Speech given in Cleveland, Ohio before the Section of Real Property, Probate and Trust Law, July 23, 1938. Box 36, folder 4, Robert H. Jackson Papers, LCMss.

<sup>95</sup> Freund to Jackson, July 6, 1938, box 36, folder 4, Robert H. Jackson Papers, LCMss.

<sup>96</sup> Jackson to Freund, July 11, 1938, box 36, folder 4, Robert H. Jackson Papers, LCMss.

By the end of that year Freund will write to Jackson as "Bob" and Jackson will sign his letters using "Bob" as well.

<sup>97</sup> Jackson appears to have been on his summer vacation Lakewood, New York. The conclusion can be drawn that this speech and subsequent paper were essentially the product of Paul Freund.

<sup>98</sup> *Ruhlin vs New York Life Insurance Co.* 304 U.S. 202 (1938) and *Erie Railroad Co. v. Tompkins* 304 U.S. 64 (1938).

set the pattern for their collaboration in the writing of *The Struggle for Judicial Supremacy*. The final correspondence regarding this speech and article was a note from William O. Douglas of May 11, 1939 in which he told Jackson he just got around to reading the article and enjoyed it “immensely” and that Jackson did a “superb job.”<sup>99</sup>

Addressing one of the major constitutional issues of the day, the paper outlined the facts behind *Swift v Tyson* and the cases, particularly those arising from Iowa, relating to the bonding of railroads that followed. After a summary of the *Erie* case, they noted that in both cases the minority complained of the activism of the majority. Both cases answered questions not posed by the litigants about the constitutionality of questions at hand.<sup>100</sup>

At first glance, it may appear a paradoxical for a “New Dealer,” generally fond of national answers to societal questions, to have found it preferable for diverse options at common law among the states, rather than one national standard under federal common law. However, there were a variety of alternative attractions of the *Erie* majority opinion for Jackson. The philosophy of federal judicial restraint, not only with regard to federal

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<sup>99</sup> Douglas to Jackson, May 11, 1939, box 36, folder 4, Robert H. Jackson Papers, LCMss. There is no evidence that Jackson acknowledged Freund’s contribution to this work.

<sup>100</sup> *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 10 L. Ed. 865 (1842) was a key change in the interpretation of the Judiciary Act of 1789 (1 Stat. 73). The act provided that “the laws of the several states . . . shall be regarded as rules of decision in trial at common law in the courts of the United States in cases where they apply.” Here, Story reinterpreted the act to allow for consideration of only statutory law and that state court common law was not law but only “evidence of what the laws are, and are not, of themselves, laws.” This allowed for the development of a federal common law and was important in the development of national industry and trade. However, this also led to the sorry state of the common law being dependant on residency of the plaintiff and the defendant. This led to “forum shopping” the example of *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab and Transfer Co.*, 276 U.S. 518, 48 S. Ct. 404, 72 L. Ed. 681 (1928) being the one used by Freund. In this case a Kentucky corporation dissolved and was reincorporated in Tennessee to obtain the benefit of the federal common law, more to its benefit than the Kentucky common law. Holmes’ dissent in *Black and White* would later form the backbone of the *Erie* majority opinion. *Swift* was overturned in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Where Brandeis wrote for the majority that the effects of *Swift* were unconstitutional, in essence denying equal protection of the law, that instead of the uniformity of the law Story had hoped to encourage, a variety of law had come to exist; for example in *Erie* the federal standard had come to be “ordinary negligence” while Pennsylvania had a “wanton negligence” standard.

and state legislative acts, but also with regard to state judicial acts, would fit well with the New Deal approach to the Supreme Court and with Jackson's pragmatic view that judges and justices should withhold their veto whenever possible.<sup>101</sup> Jackson pointed out another, less often noted problem with the reign of *Swift v Tyson* — “There remains the further and fundamental question whether the making of uniform rules of law should be entrusted to the federal judiciary in the fields where the national legislature is powerless to act.”<sup>102</sup> Again, this is a position based on judicial restraint.

Jackson's friendship with Thurman Arnold and others among the Legal Realists brought him to the annual banquet of the Yale Law Journal on March 19, 1938.<sup>103</sup> Jackson reiterated one of his bedrock themes in this speech — for a society to succeed as a democracy it must be able to address its problems. For a people to support a democracy and not turn to the dictatorships of fascism or communism, the government must be able to act. Jackson referred to the book *The Cult of Incompetence*, which argued that by its very nature, democracy excludes the competent from government and admits only the incompetent.<sup>104</sup>

This essay writer and others who followed his pattern are now succeeded by the men of action. The Mussolinis and the Hitlers and all the imitators of their success are now talking the same

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<sup>101</sup> Holmes' dissent in *Black and White* strikes an almost nihilistic tone in legal thinking and process.

<sup>102</sup> Jackson, “Rise and Fall,” 614.

<sup>103</sup> Jackson, “Yale Law Journal Banquet Speech,” Box 36, folder 1, Robert H. Jackson Papers, LCMss. Jackson received a letter from law student Willis Reese dated January 14, 1938 in which Reese told Jackson: “The Law Journal Banquet is usually an occasion of some hilarity and consequently we do not wish you to feel that we expect a polished address on some highly intellectual subject. Anything from your ideas on the anti-trust acts to some anecdote of your past experience would be most acceptable.” Jackson, with great wit opened his speech with a reference to this letter, to the fact that it served as both an inducement and a warning, and that he had some misgivings about the fact that his friends at Yale thought that he would be a most appropriate speaker giving his views on Constitutional law at a banquet of hilarity.

<sup>104</sup> Emile Faquet, *The Cult of Incompetence*, John Murray Publishing, 1911.

language of contempt for free government and its doctrines and its works.<sup>105</sup>

He went on to discuss the many problems with the American form of republican government, including conflicts between the states and the federal governments, and between the branches of the federal government.

When Congress and the executive deadlock, nothing happens until an election removes one or the other of them. When the legislative and the judicial power deadlock, nothing happens until – well, until something happens.<sup>106</sup>

Jackson also addressed a second major theme in his thinking at that time – the second founding.

Each generation must not only rewrite its old laws, but it must reanimate its old institutions of government or else build new ones. Our governmental forms are so cast that practically all efforts to modernize and to reinvigorate governmental institutions become legal problems and their success in our system will be determined by our legal thinking.<sup>107</sup>

Jackson saw a new problem, requiring new solutions:

We have the problem of sustaining democratic political institutions which rest on the foundations of an essentially undemocratic industrial economy and society. That puts statesmanship to a new strain. Many individuals feel no identity with society, and their position seems to be determined by forces beyond their control.<sup>108</sup>

These speeches show that the issues uppermost in Jackson's mind during this time were his fundamental belief in the use of the law for the greater good, however that was

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<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

defined; the need for a democratic government to have the power to act to solve the problems of society; the need for the judicial branch of government to show restraint and not interfere when the elected branches of government try to solve such problems. Also, Jackson indicated a subtle understanding of the difficulty in fulfilling democratic potential in a society wherein much of the power in the society resided outside of government. But in doing so, Jackson did not see a need for a new interpretation of the Constitution. Rather, he invoked the image of “going back to the Constitution” to expunge decades of judge-made law about the Constitution. While Jackson clearly saw the need for elected branches of government to have clear authority over the judicial branch of government, he did not see himself as belonging to the former group, for as we shall see he did not see himself as a politician, at least not in the realm of elected politicians.

### *The Solicitor Runs for Governor*

Robert H. Jackson’s short-lived run for governor of New York State provides a window into his personality and thought; a personality not bent toward the rough and tumble world of electoral politics. In fact, as a politician, Jackson was a failure. Early in life, Jackson decided that he wanted no part of internal party authority or responsibility (or unpleasant conflict in which he could not function as a detached lawyer). But in the fall of 1937 and the early winter of 1938, driven by external forces (mostly FDR), he was spoken of as a candidate for governor of New York State. Supporters saw the New York governorship as a platform for a Jackson run for president of the United States.<sup>109</sup>

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<sup>109</sup> This run was to occur in 1940 when FDR retired to Hyde Park after his second term.

Conversely, certain conservative Republicans and Democrats pushed to stop his confirmation as Solicitor General as a way to slow or stop his being considered for higher offices.<sup>110</sup>

In his unpublished autobiography, Jackson portrayed the events surrounding his consideration as a candidate for governor as if he were a passive character, being swept along in a tide driven by others. John Q. Barrett suggests that the initial motive force behind Jackson's run for governor was Franklin D. Roosevelt.<sup>111</sup> Quoting from Jackson's oral history, Barrett details how Jackson and Roosevelt met in the fall of 1937, at which time Jackson told FDR that he felt he must leave the administration and return to his law practice in Jamestown. Jackson expressed his concerns about the financial burden of keeping two homes, and his children soon to be going to college. During one of FDR's famed bedside morning meetings, Jackson claimed that FDR told Jackson that he would prefer that Jackson enter the New York governor race in 1938. That would place him in an "excellent position" for the Presidency in 1940. Jackson protested "I said that I did not know that to be Governor was a particularly desirable thing in itself. As I understand it, it always had left everybody who had had it broke. ... While I was not doubtful that I could at any time make my living at the bar the rest of my life, I was not sure that it was a very attractive office." Jackson considered talking with Jim Farley, who simultaneously held the posts of Democratic Party National Chairman, New York State Democratic Party Chairman and Postmaster General, about a run for governor, but FDR advised against talking with Farley.<sup>112</sup> Shortly after his discussion with FDR, Jackson spoke at a Jackson

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<sup>110</sup> Jackson, "Autobiography," 148-9, box 189, folder 2, Robert H. Jackson Papers, LCMss.

<sup>111</sup> Jackson, *That Man* 31-38.

Day dinner in New York. While he performed well, he saw how others, such as State Attorney General John J. Bennett, had a well-established organization in New York and were in a stronger position to make a run for governor than he.<sup>113</sup>

Jackson saw conservative Senators Warren R. Austin and William H. King, as well as Farley, portray him as a candidate of the extreme left of the New Deal Democratic Party. The group of Jackson promoters in this run for state office included in addition to FDR, Tom Corcoran, Morris Ernst and Ben Cohen. Ernst and FDR soon came to realize that Jackson did not want the office of governor, or at least not badly enough to become a retail politician as was necessary to obtain the position. In a meeting preparing for his speech before the Young Democrats, Jackson met with the three and with Edward L. Bernays, who was there to promote publicity for the speech and the candidacy. Jackson refused to agree to a publicity campaign.<sup>114</sup> Clearly, retail politics were not to Jackson's liking and standing for office himself not an option he embraced, even when promoted by the President of the United States.

FDR continued his discussion with Jackson on a fishing trip in November of 1937, but in the end the proposal came to naught. Jackson summed up the episode, taking a passive view of the events, writing, "The President probably could have gotten my nomination if he wanted to press it, if Lehman had not run."<sup>115</sup>

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<sup>112</sup> Jackson, "Autobiography," 148-9, box 189, folder 2, Robert H. Jackson Papers, LCMss.

<sup>113</sup> Gerhart. *America's Advocate*, 132. Bennett was from Brooklyn and was New York Attorney General from 1930 to 1938; he had previously been an unsuccessful aspirant to the office of governor.

<sup>114</sup> *Ibid.*, 130-32.

<sup>115</sup> Jackson, *That Man*, 37. Sitting Governor Herbert H. Lehman was waffling about running for re-election.

Eugene Gerhart wrote a chapter in his biography of Jackson titled “The New York State Governorship Bubble,”<sup>116</sup> and placed the morning bedside meeting at Thursday October 21, 1937, in the White House. Gerhart’s rendition (really a reprise of Jackson’s) is similar to that in Jackson’s oral history quoted by Barrett.<sup>117</sup> Jackson came away from the Hotel Commodore, where the Jackson Day dinner was held, sure that he was considered an outsider by New York City Democrats and, as Gerhart put it, “a political wallflower.”<sup>118</sup> However, in what was a brief, if not half-hearted effort, Jackson went on to give a number of political speeches in short order: on January 15 in Rochester (where he complimented Eastman–Kodak as an exemplary large corporation and not the type of monopolistic corporation he found fault with), and that same day in Jamestown at the retirement of its twenty-six year Republican mayor. Two weeks later he spoke in Syracuse, before the New York Press Association on “Little Americanisms.” On February 20 he was the keynote speaker at the National Lawyers’ Guild in Washington. Nevertheless, his candidacy never caught fire.

With Justice Sutherland’s retirement, FDR nominated Stanley Reed to the Court and Jackson to the office of Solicitor General, on January 27, 1938. On February 24, 1938 Jackson spoke at the Young Democratic Club of New York. Jackson relayed that due to his appointment as Solicitor General “this was a sort of a bachelor dinner,” his last speech in a political forum for some time.<sup>119</sup>

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<sup>116</sup> Gerhart, *America’s Advocate*, 122-141.

<sup>117</sup> This is not surprising since much of Gerhart’s story comes from direct interviews with Jackson while he was on the Court.

<sup>118</sup> Gerhart, *America’s Advocate*, 132.

<sup>119</sup> *Ibid.*, 136.



Jackson began the process of running for governor with little enthusiasm for elected office and left the process with even less enthusiasm. Thus, his appointment to the office of Solicitor General allowed for a well timed exit from party politics and a return to the comfort of the law—“pure advocacy.”<sup>120</sup> These experiences contributed to the dichotomy that Jackson saw between law and politics. This electoral or nominating adventure likely formed or solidified a significant portion of his concept of politics. Years later, when he wrote his Godkin Lectures,<sup>121</sup> he recognized the commonality of policy making shared among the three branches of the Federal government, but gave a superior position to the elected branches.<sup>122</sup> This evaluation did not come late to Jackson, for it formed the core of his argument in his presentation of the Court battles of the early New Deal period in his book, *The Struggle for Judicial Supremacy*.

*The Writing of The Struggle for Judicial Supremacy*

*The Struggle for Judicial Supremacy*, published in 1941, is considered one of the classic works in legal history. This book played a key role in the historical portrayal of the events surrounding the change in the law as set down by the Supreme Court regarding the limits on governmental (both federal and state) powers to regulate the economy. While this book was a candid and straightforward display of Jackson’s views on these

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<sup>120</sup> Ibid., 141.

<sup>121</sup> Friends of Edwin Lawrence Godkin (1831-1902), editor of *The Nation* and the *New York Evening Post* founded the Godkin Lectureship in 1903. <http://www.hks.harvard.edu/news-events/news/press-releases/nobel-laureate-thomas-schelling-to-speak-on-nuclear-proliferation-at-kennedy-school-forum>. Accessed October 24, 2009.

<sup>122</sup> Robert H. Jackson, *The Supreme Court in the American System of Government* (Cambridge, MA: Harvard University Press, 1955), 53-83.

events, the details of the writing of the book allow for new insights into how and by whom Jackson's views were shaped or refined.

There has long been a question regarding the true authorship of *The Struggle for Judicial Supremacy*. The answer is simple: Robert H. Jackson, and, as is widely known, Paul A. Freund.<sup>123</sup> What is not widely known is that Louis L. Jaffe also contributed significantly to the work.<sup>124</sup> Jaffe's contribution was not hidden, for he was thanked by Jackson in the preface, but his role was larger than previously believed. Jaffe moderated some of Jackson's statements regarding the history of prior conflicts between the executive and judicial branches of government. Jaffe debated with Jackson on how to interpret the Constitution: whether to see the Court as having "gone back" to the Constitution or whether to see the Constitution as flexible. While Jackson continued to use the "gone back" metaphor, Jaffe's ideas stressing a flexible, but not blank Constitution, influenced Jackson's later thinking, and found expression in decisions in Jackson's decisions on the Court.

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<sup>123</sup> Paul A. Freund, born February 16, 1908, in St. Louis, Mo. served in the office of the Solicitor General from 1935 to 1939 and from 1942 to 1946. He served as Professor of Law at Harvard Law School (HLS) teaching Constitutional Law. He graduated from HLS in 1931, and received a doctorate in law also from HLS in 1932. In 1932 and 1933 he was law clerk to Justice Louis Brandeis. He then was an officer in the Treasury Department and the Reconstruction Finance Corporation from 1933 to 1935. He joined the faculty at HLS in 1939, becoming professor in 1940, later named to three endowed chairs in the school, the last, the Carl M. Loeb University Professor, in 1958. He turned President Kennedy down when offered the Solicitor Generalship and was considered but not chosen for a Supreme Court seat by JFK. Eric Pace, Obituary, *New York Times*, 6 February 1992.

<sup>124</sup> Jaffe, a native of Seattle was born in 1905. He earned an undergraduate degree in economics at Johns Hopkins University in 1925 and a law degree at Harvard in 1928. He was a clerk to Justice Louis D. Brandeis and then returned to Harvard for a S.J.D. degree, which he received in 1932. After working for several Federal agencies, (the A.A.A. and the N.L.R.B.) he became a professor of law at the University of Buffalo and in 1948 became dean of the law school. He joined the Harvard Law faculty in 1950 and became one of the school's most widely known analysts and writers in tort law and administrative law, particularly on the role of courts in reviewing administrative agencies like the Federal Communication Commission. He wrote *Judicial Control* (Little Brown, 1965) and was the co-author of *Administrative Law: Cases and Material* with Nathaniel L. Nathanson (Little Brown, 1976). He died December 11, 1996. Obituary, *New York Times*, 15 December 1996.

Why is authorship of the work in question? Kurland and Wiecek have raised questions as to the level of contribution each made to the work.<sup>125</sup> For example, Wiecek writes, “The book seems to have been substantially ghostwritten by Paul A. Freund.”<sup>126</sup> Similarly, Kurland writes, “These views expressed in detail in his book, were written by Jackson, with extensive assistance from Paul Freund, after Jackson has become Solicitor General.”<sup>127</sup> The book was written much like the legal team in the office of the Solicitor General would undertake the writing of a brief for argument before the Supreme Court. Jackson took the role of author, just as he would have taken the role of lead attorney taking responsibility for a brief and of making an oral argument, with Jaffe and Freund working on the preparation of the material to be argued, in this case in the book, not in court.

Jackson told his version in the preface to *The Struggle for Judicial Supremacy*:

This manuscript was originally written in odd intervals between arguments in Court as Solicitor General. It has been revised as opportunity was found. Such intermittent attention leaves much to be desired. Without assuming responsibility for views expressed herein, others have given me valuable help. I am heavily indebted to Paul Freund for many helpful criticisms of my text, and for the index. Heading the staff of the Solicitor General’s office from 1933 to 1939, the government briefs during this critical period bore the impress of his scholarship and judgment. I turn to his counsel from habit. I am also indebted to Professor Louis Jaffe of the University of Buffalo Law School for contributions and suggestions.<sup>128</sup>

The book detailed the battle between the Administration of Franklin D. Roosevelt and the United States Supreme Court over the Constitutionality of New Deal, and other

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<sup>125</sup> Wiecek personal communication June 2, 2007. and Wiecek, *The Birth of the Modern Constitution*, 107. cites Kurland, *Lives and Major Opinions*, 2555.

<sup>126</sup> Wiecek, *The Birth of the Modern Constitution*, 107.

<sup>127</sup> Kurland, *Lives and Major Opinions*, 2555.

<sup>128</sup> Jackson, *Struggle for Judicial Supremacy*, xix-xx.

innovative legislation. Jackson made his view of the issues involved known in the title and in the opening sentence when he began with a reference to the February 5, 1937 Court reorganization proposal of President Roosevelt. Jackson presented his version of these events; the work of the Court was framed as a participant in power politics. Jackson acknowledged the issues of legal philosophy and precedent, but described the Court as an entity that suffered from an excess of commitment to principles and theories. It was insufficiently attentive to the practical needs of a government in a democracy.<sup>129</sup> Cushman said Jackson wrote as an avowedly partisan New Dealer, while White placed the work among those that placed the Court packing plan as the prime cause of the Court's change in Constitutional interpretation in 1937.<sup>130</sup>

Jackson did not write the book without prompting, and was not initially enthusiastic about the project. The idea for a book on this subject was raised by Isidor Lazarus, who wrote Jackson on December 24, 1937, after suggesting Jackson run for governor of New York State, Lazarus then proposed:

I have a concrete suggestion to make. It is that you go over your speeches and briefs of the last few years and compile part or all of that material in a book to be published without delay. I can not imagine a more useful, refreshing and indeed entertaining book on public affairs. I should be only too glad to help in the editorial work or otherwise.<sup>131</sup>

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<sup>129</sup> Jackson, *Struggle for Judicial Supremacy*, xiii.

<sup>130</sup> Cushman, *Rethinking the New Deal Court*, 215, White, *The Constitution and the New Deal*, 17. Jackson clearly defines himself as a partisan in his introduction, not specifically of the New Deal programs but of the elected branches of the federal government to enact and carry them out. Confusion on this key point has bred an image of Jackson as more liberal in his politics than he later proved to be.

<sup>131</sup> Lazarus to Jackson, 24 Dec. 1937, box 35, folder 2, Robert H. Jackson Papers, LCMss. Lazarus was in practice in New York City from 1919 to 1944 and may have known Jackson through interaction with him on the New York State Bar Association. Two written pieces by Lazarus survive: one a book review of a work entitled "Growth of Legal-Aid work in the United States" in the *Columbia Law Review*; the second: "Economic Survey of the Legal Profession" (1935) in the *Bulletin of NY State Bar Assn.* It also appears that Lazarus was active in New York County as well as in New York State Bar activities, writing a number of reports for committees on legal manpower and economics of the legal

Jackson did not respond in writing and undertook no active work in response to this suggestion.

Over one year would pass before the next mention of what would become *The Struggle for Judicial Supremacy* to Jackson. Alfred A. Knopf, the eventual publisher, wrote to Jackson, in March of 1939<sup>132</sup>:

Dear Mr. Jackson,  
 It occurs to me that one of these days you may be interested in setting forth your views in a book addressed for the general public. I believe that such a book would meet with a fairly wide response and that it would be well worth publishing. I would like to have it on my list. Would you let me know if the idea appeals to you?  
 With sincere regard, I am  
 Yours faithfully,  
 Alfred A. Knopf

Jackson responded five days later, saying that the pressures of the office prevented him from devoting time to such a work.<sup>133</sup> Jackson's excuse for not writing such a book was a lack of time; he also cited the restrictions of the proprieties of writing such a book while holding the office of Solicitor General. Whatever limitations or impediments Jackson saw in March of 1939, they seemed to have shrunk and vanished a month later when Jackson wrote to Knopf that "I have under consideration the preparation of something at the present time" and suggested they meet in New York the next time Jackson's travels took him there.<sup>134</sup> Thus began the undertaking that would take nearly two years, until Knopf published the book in early 1941. However, Jackson was a reluctant author, by

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profession. He then worked for the Department of Justice until his death in 1958. Obituary, *New York Times*, 1 September 1958.

<sup>132</sup> Knopf to Jackson, 9 Mar. 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>133</sup> Jackson to Knopf, 14 Mar. 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>134</sup> Jackson to Knopf, 26 Apr. 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss.

mid June of 1939 Knopf had yet to hear from him and wrote to encourage him in the endeavor and to set up a meeting before summer vacations would close the publishing house down.<sup>135</sup> This led to “pleasant discussion” over lunch in late June, but apparently little work on Jackson’s part, as Knopf corresponded in October that they should meet again and inquired as to the progress on the book.<sup>136</sup>

Jackson wrote Knopf, October 14, 1939 telling him, “After a rather long vacation I returned to work and have really made a good deal of progress with the book. In another week or two I hope to get it to the point of a complete first draft which I can turn over to some expert help for checking and polishing.”<sup>137</sup> This was to have been followed by a meeting between the two at which Jackson must have shared some measure of the results of his labors, for on November 3, 1939 Knopf sent Jackson a contract.<sup>138</sup> Jackson may not have originally seen the book as a vehicle to advance his own standing and career. However he did come to use the work in such a way, buying and then distributing many copies to key individuals.<sup>139</sup>

November 1939 proved to be an active month during which *The Struggle for Judicial Supremacy* began to come to life. On November 7, 1939 Jackson wrote Knopf “Professor Paul Freund spent the week end here and is enthusiastic about undertaking the editorial work, particularly in those chapters which deal with matters on which he worked

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<sup>135</sup> Knopf to Jackson, 16 Jun. 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>136</sup> Knopf to Jackson, 10 Oct. 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>137</sup> Jackson to Knopf, 14 Oct. 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>138</sup> Knopf to Jackson, 3 Nov. 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss. What is of interest in this letter is Knopf’s attempt to allay any insult in his striking out the usual “option clause.” Knopf assures Jackson that this would be unfair to Jackson and that he (Knopf) would hope their relationship would continue to be a good one and that Jackson would want to offer Knopf any future work if it were not “so technical or special a nature as to be unsuitable for the list of a general trade publisher.”

<sup>139</sup> See Table I.

while with the government.” Jackson also felt the need for additional help, “In the interest of expediting the matter, I am arranging to see Acting Dean Louis Jaffe of the University of Buffalo Law School, a fine scholar and brilliant writer, formerly secretary to Justice Brandeis, about reviewing the historical background chapters.”

Jackson thought the state of the manuscript mature enough to agree to a deadline less than sixty days away, and this while the Court was in session. It also appears likely that Freund gave Jackson significant positive feedback during his weekend in Washington. Therefore it is reasonable to conclude that the majority of the first draft of *The Struggle for Judicial Supremacy*, whatever the extent of that first draft may have been, was written solely by Robert H. Jackson.

That said, the work on the book done in the ensuing months created a final product that was only a distant relative of the first draft. On November 10, 1939, Louis L. Jaffe sent Jackson a telegram: “Will be very happy to do the work for you.”<sup>140</sup> A note immediately followed this from Jackson to Jaffe, “It was a great comfort to receive your telegram and to know that you can go ahead. I am trying to shape up the final chapters, and Paul is at work on the story of the New Deal litigation.”<sup>141</sup>

Jackson felt his manuscript was close to completion, in November 1939 he directed Ruth M. Sternberg, his Secretary, write to R.A. Preston, an editor at Knopf.<sup>142</sup> Sternberg suggested that she bring to Knopf “some of the completed chapters so that you

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<sup>140</sup> Jaffe to Jackson, 10 Nov. 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>141</sup> Jackson to Jaffe, 11 Nov. 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>142</sup> Sternberg to Preston, 28 Nov. 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss. Sternberg is of interest in that she, like Jackson, hailed from Frewsburg, New York. She wrote to Jackson in early 1937 looking for a job in Washington, telling him she was looking to “get out of a rut.” Jackson arranged for her employment as his secretary in early 1938. She eventually returned to the Jamestown area, but served as Jackson’s secretary during his service as Solicitor General.

might go over them with me and make corrections and suggestions about style, form, etc.,” indicating that Jackson felt that the manuscript was advanced enough in substance that it was ready for stylistic editing.

### The Structure of *The Struggle for Judicial Supremacy*

Much of the correspondence among the three makes reference to specific chapters. While the material of the chapters was constant, the chapter numbers vary—what Jackson referred to as chapter I in his correspondence with both Freund and Jaffe became the preface in the final draft, leaving “Jaffe’s” chapters two and three as one and two, and so on.<sup>143</sup> The book has three major components: the history of judicial action in the American government, (Chapters I and II); the events of Franklin D. Roosevelt’s first term as President, (Chapters III through VII); and the lessons learned and future prospects, (Preface and Chapters VIII through X). Jackson had a hand in all parts of the work, Jaffe worked exclusively on the first section and Freund primarily on the second, with Jackson having exclusive or at least near exclusive responsibility for the third.

### The work of Paul A. Freund on *The Struggle for Judicial Supremacy*

Paul Freund had a special, if not unique, view of the events described in the book. Freund served as Justice Brandeis’ clerk in 1932 and 1933, as officer for the Reconstruction Finance Corporation from 1933 to 1935 and in the office of the Solicitor General from 1935 to 1939.<sup>144</sup> This gave Freund, serving as lead assistant Solicitor

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<sup>143</sup> A replica of the Table of Contents may be found in Appendix I.

<sup>144</sup> If there was a revolution in 1937, perhaps it was Freund who, as a long time counsel in the Solicitor General’s office, was the victorious revolutionary.



General, an intimate knowledge of the cases brought to the Court during this time, since he wrote or contributed to most of the government's briefs on New Deal legislation. Freund worked exclusively with Jackson on the book and had no communication with Jaffe on the subject.<sup>145</sup> Freund did some of his work with Jackson in person, either in Washington or in Boston.

Paul Freund wrote to Jackson about the book for the first time on November 20, 1939.<sup>146</sup> "Herewith a suggested revision of Chapters IV and V. The changes are, I think, self-explanatory, though you may not go along with all of them." Jackson responded that he had made all of the changes and found them all improvements.<sup>147</sup> A week later in a hand-written two page cover from Freund to Jackson, Freund returned the editorial changes to Chapter VI.<sup>148</sup> Here Freund cited extensive changes where he had "depersonalized" the majority opinions, specifically as relates to Justice Roberts. Freund saw no use in opening old wounds and wished to encourage "our friends on the court" in their attempts at "a healing process." In fact, Freund expressed doubts about the wisdom of writing the book on this account, but he deferred to Jackson on this score.<sup>149</sup> Therefore the manuscript did appear to have significant substance before Freund saw it, and his initial work of depersonalizing opinions was the work of an editor, not an author. However, it is clear that Freund did author significant portions of the text, for Freund next turned to the treatment of the A.A.A. decision, and his attempt to "analyze it in a

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<sup>145</sup> The papers of Louis L. Jaffe are not yet available for examination.

<sup>146</sup> Freund to Jackson, 20 Nov, 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>147</sup> Jackson to Freund, 22 Nov. 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>148</sup> Freund to Jackson, 27 Nov. 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>149</sup> We see clearly Jackson's view of the Court's opinions as the exercise of political power with little consideration to the legal thought that led to the Court's decision's negating early New Deal legislation. It is possible that Freund did not share this view; nor did he share in the utility of the book as a tool in the advancement of Jackson's standing and career.

little more complex way.” In this statement, we see, at least through Freund’s eyes, his view of his contributions to the work. He next added a discussion of *Colgate v. Harvey* in connection with states’ rights.<sup>150</sup> “I recall that F.F. [Felix Frankfurter] thought it was the most indefensible and revealing of all the decisions.” Freund approved of Jackson’s treatment of the T.V.A. case, adding that “this is an argument that John O’Brien [John Lord O’Brien] is fond of.”<sup>151</sup> It is probably the only thing in the book he will approve of.” Freund added editorial comments on the nature of subheadings and ended with ruminations on the outcome of January 1.

Freund came to Washington December 16 - 18, 1939 and while there worked in person with Jackson on the book. In late December Jackson asked Knopf to push the publication date to the end of 1940.<sup>152</sup> He gave two reasons: one, that the book might be seen as a campaign document, and second that “the book ready January 1, will not be the book.” Jackson’s time with Freund editing the book earlier that December may have precipitated this evaluation. Also, in this letter Jackson referred to allowing two or three well-informed persons to read and offer criticisms before he undertook a final edit of the work. If indeed Freund played a role in this delay, it appears to have been a passive one, for on January 5, 1940 Jackson wrote him telling him of the delay and explaining that he, Jackson, saw that the book needed “smoothing it up and making it more even.”<sup>153</sup> It seems that Jackson did exactly that, for he did not correspond with Freund again until

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<sup>150</sup> 296 US 404 (1935).

<sup>151</sup> John Lord O’Brien was appointed by President Hoover to serve as Assistant Attorney General of the Anti-Trust Division at the U.S. Department of Justice, in 1929. He was responsible for arguing more than 15 cases before the U.S. Supreme Court. He was retained by the Tennessee Valley Authority in 1935, eventually winning the case that challenged the creation of the Authority.

<sup>152</sup> Jackson to Knopf, 28 Dec. 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>153</sup> Jackson to Freund, 5 Jan. 1940, box 55, folder 1, Robert H. Jackson Papers, LCMss.

April 24, 1940 when he wrote to tell Freund that he had allowed the book to rest, returning to it on a southern vacation, having made some needed improvements to the work. Jackson looked to Freund to review the current state of the book and to offer further comments.<sup>154</sup> Freund responded (in a typewritten letter, perhaps indicative of new status) that he was consumed with work at the university until late May 1940 but that he could review parts of the manuscript then and perhaps meet with Jackson in mid-to late-June to work on the book.<sup>155</sup> When Jackson sent the manuscript in late May 1940 he indicated that there had been a “good deal of alteration” since Freund last saw it, and that he, Jackson, was re-working Chapter V. At the end of the letter Jackson added what he saw as the overarching theme of the book:

Returning to the book, it has occurred to me that in view of the condition of the world today it is pretty apparent that a government to exist must have adequate power to solve its problems. 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 its problems. I am not sure but this theme could be woven into the whole so as to give the book a unity that is otherwise lacking. After you are clear of your work and have had time to meditate on the subject a little, we will get together and go over it.<sup>156</sup>

The joint nature of authorship can be seen in the events surrounding the final submission and of reading and editing the galley proofs prior to publication. Jackson relied heavily on Freund’s input; in fact, he did not submit either the final manuscript version or the galley proofs until Freund had seen them. In late June 1940 Freund met Jackson in Washington and worked on editing the book. This may well have been the

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<sup>154</sup> Jackson to Freund, 24 Apr. 1940, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>155</sup> Freund to Jackson, 29 Apr. 1940, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>156</sup> Jackson to Freund, 21 May 1940, box 55, folder 1, Robert H. Jackson Papers, LCMss.

last work done prior to submission to the publisher, which Jackson did on August 7, 1940.<sup>157</sup> That submission lacked an index, which Jackson noted was being developed by Freund, as well as a table of cases cited, also to be developed by Freund. Knopf sent the first set of galley proofs to Jackson on August 16, 1940. Jackson acknowledged the galley proofs on August 27 as well as a request that he make his presentation of *Swift v. Tyson* and *U.S. v. Morgan* more intelligible to laymen. Jackson also noted that he wanted Freund to examine the proofs and to complete his work on the index, for which he would need the proof page numbers. Jackson went on to tell Knopf about his worry about the fall election and his concerns that no reviews of *The Struggle for Judicial Supremacy* be released before the election.<sup>158</sup> Jackson did not want the book to be seen as an instrument of a political campaign.

Jackson relied on Freund to review all the galley proofs, including those chapters that had been written or edited by Jaffe. On September 30, 1940, Freund wrote a brief note to Jackson; Freund had not seen the preface, and asked that if he was mentioned in it that his name not be identified with Harvard, explaining that he felt freer to do such outside work in a purely personal capacity.<sup>159</sup> Freund also sent a letter the same day with the final galley proofs congratulating Jackson on his rewriting of the *Swift v. Tyson* and *Morgan* cases, finding both great improvements.

Jackson did take responsibility for one aspect of the final appearance of the book, that of the cover art. After the galley proofs were submitted, a series of letters between

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<sup>157</sup> Jackson to Knopf, 7 Aug. 1940, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>158</sup> Jackson to Knopf, 27 Aug. 1940, box 55, folder 1, Robert H. Jackson Papers, LCMss.

Jackson cited an article by Willkie in the *Saturday Evening Post* entitled "The Court is Now His," and expressed his concern that the book not be allowed to become an instrument of the fall election.

<sup>159</sup> Freund to Jackson, 30 Sep. 1940, box 55, folder 1, Robert H. Jackson Papers, LCMss.

Jackson's secretary and Knopf, and Jackson, were exchanged: Jackson did not care for the cover design of the book. On it was an illustration of scales balancing a sword above a pyramid of blocks, the base of which contained the words "Magna Charta" and "SPQR." Knopf wrote to Jackson that this was the work of W. A. Dwiggins "who is really without peer in his field, and I dislike to interfere with his work if I can possibly avoid it." In the end Jackson acquiesced to the design.<sup>160</sup>

Jackson sent a copy of the book to Freund on December 18, 1940, noting it was to be published January 20, 1941. Freund replied, "I have just returned from a ten days' trip to the Middle West and have found the advance copy of your book. I am greatly touched by your inscription and the over-generous remarks in the preface."<sup>161</sup>

The work of Louis L. Jaffe on *The Struggle for Judicial Supremacy*

Jackson thanked Louis L. Jaffe in the preface of the book for "contributions and suggestions," but the extent of Jaffe's contributions to the work has not been previously delineated. Jaffe's work consisted of the historical presentation of the conflicts between the elected branches of government and the judiciary in United States history, prior to the twentieth century. Jaffe had been a member of the Roosevelt administration, serving in two crucial New Deal programs, as attorney for the Agriculture Adjustment Administration and the National Labor Relations Board, but during the time period in which *The Struggle for Judicial Supremacy* was written, he served as Professor and interim Dean of the University of Buffalo School of Law. There is no indication that

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<sup>160</sup> Knopf to Jackson, 2 Oct. 1940, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>161</sup> Freund to Jackson, 31 Dec. 1940, box 23, folder 16, Paul A. Freund Papers, HLS Library. Attempts to obtain the original copy of the book and its inscription have not yet succeeded.

Jaffe and Jackson met in person to work on the book. Unlike Freund's, Jaffe's work was confined to reviewing and editing those sections of the book that Jackson took primary responsibility for writing. While Freund and Jackson had worked closely at the Department of Justice, Jackson and Jaffe's relationship, as judged by the tenor of the correspondence, seemed friendly but more formal. The correspondence was limited: a total of seven letters between the two, including the telegram from Jaffe notifying Jackson he can work on the project, and from Jackson to Jaffe stating his gratitude for this; as well as two letters from 1947 to be detailed. The first item of substance is a letter, which acknowledged receipt of revisions of Chapter III and noted, "the reorganization of the material certainly clarifies it."<sup>162</sup> Jackson resisted Jaffe's suggestion that he delete the reference to the income tax amendment and the interpretation of the amendment by then Governor Charles E. Hughes. Jackson agreed with Jaffe's comment that too much territory was taken in during the discussion of the labor cases as the first victory in a generation. Jaffe commented on paragraphing and Jackson acknowledged this citing Freund's use of subheadings and suggests that he, Jackson, would likely add them to Chapter III for conformity.<sup>163</sup> Jackson ended the letter by telling Jaffe that Jackson thought that Jaffe was "working along the desired lines and that there is no need to make any change of direction or method."

The original draft of the manuscript Jackson prepared appears to have needed significant editing, for Jaffe wrote him, "I have now almost ready a draft of chapter II

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<sup>162</sup> Jackson to Jaffe, 11 Dec. 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>163</sup> In the published work Chapter III does not contain subheadings. The discussion of the labor cases is under a subheading in Chapter II. Jackson also kept the Governor Hughes quote. Jackson, *Struggle*, 43.

which I shall send you very shortly.”<sup>164</sup> Jaffe could not readily find some of the references and quotations Jackson had used and suggested that Jackson may already have them listed elsewhere. Jackson often made statements without precise documentation of the source reference. Rather than question the validity of the statement, Jaffe suggested on each occasion when he could not find the needed reference, that Jackson must have it, and should insert it when he was able.

Jaffe summed up his contributions to Chapter II “Though I have added or expanded here and there, mostly I have lopped off.” Jaffe questioned the central premise of the chapter, which according to Jackson stated that Jefferson, Andrew Jackson and Lincoln challenged “judicial supremacy.”<sup>165</sup> Jaffe questioned the definition of the term; did it equal the power of the Court to declare laws unconstitutional? Jaffe doubted that this was so, particularly with Lincoln. Jaffe called on Jackson to take care in quoting Lincoln and in his interpretation of Lincoln’s words in his debates with Douglas and in his First Inaugural, where Lincoln suggested passing new laws and attempted to “get the Supreme Court to change its mind.” Jaffe cautioned Jackson that he was not certain that Jefferson and Andrew Jackson were so clear. This caution led to Jaffe deleting what he considered to be the less well supported statements made in the earlier drafts.<sup>166</sup>

Jaffe next questioned Jackson’s implication and sometimes overt statement that “the power of the Court over State legislation was early accepted and established whereas that over Federal legislation came somewhat later and harder.” Jaffe put the Federal question at 1803 and the State at 1818, with *Hayburn’s* case having a Federal Circuit

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<sup>164</sup> Jaffe to Jackson, 19 Dec. 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>165</sup> Jaffe to Jackson, 20 Dec. 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>166</sup> Jaffe to Jackson, 20 Dec. 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss.

Court declaring an act of Congress unconstitutional in 1792 or 1793. Jaffe also took exception to Jackson's portrayal of the Court avoiding controversy in the Marshall years. Jaffe saw Marshall as a Federalist, who would not void Federal laws. Instead Marshall engaged actively in the struggle between states and the central government, upholding federal acts and striking down state acts. Jaffe again cautioned Jackson to tone down his argument that the Court was cautious in the early years and reckless recently. Rather, Jaffe saw the Court active in both, with different issues in play. While this may have tempered Jackson's presentation, the final work does portray this cautious/reckless dichotomy of the Court's behavior over time

Jackson also made two partially incongruent arguments in *The Struggle for Judicial Supremacy*. The first was that in a democracy, the elected branches needed wide freedom to govern in response to events and conditions that faced a nation. This included experimenting with different forms of government policy and societal frameworks. Much of the book was a realist's presentation of the facts presented to the government during the Depression, with statistics and descriptions of the state of agriculture and industry and the population as a whole and the efforts of New Deal policies to address these problems. The landslide election returns of 1936 made up much of Jackson's argument for the constitutionality of New Deal legislation.<sup>167</sup> The second was the concept of "going back to the Constitution" in the sense of Jackson's view that the Constitution had previously been interpreted as giving wide ranging powers to the elected branches and that not until the Dred Scott case did the Court limit such powers. This conformed to his view of a previously cautious Court. Jaffe proposed that Jackson

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<sup>167</sup> Jackson, *Struggle for Judicial Supremacy*, 176.



embrace a different view, one of the Constitution as a more plastic document, which would allow for interpretation but within a changing framework than that applied by the Court just prior to 1937.

Still laboring under a January 1 deadline, Jaffe wrote to Jackson, in a December 1939 letter, enclosing handwritten footnotes for Chapter III.<sup>168</sup> Again Jaffe had to leave some footnotes blank as he could not run down Jackson's sources. Jaffe also enclosed a draft of the Introduction, to which he made only minor changes. He did question Jackson's statement of going back to the Constitution before Dred Scott.<sup>169</sup> Jaffe provided a counter that such a rhetorical device may not be apt and that perhaps they should argue the Constitution is flexible and constantly changing. Jaffe ended his letter by stating his work was done and would do no further work until he heard from Jackson. There was no further correspondence between the two until years later when Jackson sent Jaffe a check in payment for his work.

#### Finances of *The Struggle for Judicial Supremacy*

The data on the book's finances provides a glimpse into Jackson's perception of the value of the work that both Freund and Jaffe.

The first notice from Knopf of books sold came after May of 1941.<sup>170</sup> There are gaps of one year or more in the statements on file from Knopf, as well as missing income tax forms for Jackson for 1944 and no entries specifically for royalties in the income tax forms for 1941 and 1943. The data available are presented in Tables I and II. The book

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<sup>168</sup> Jaffe to Jackson, 21 Dec. 1939, box 55, folder 1, Robert H. Jackson Papers, LCMss.

<sup>169</sup> This advice was taken, for such a statement does not appear in the final form.

<sup>170</sup> Financial data are found in boxes 15, 198 and 199 Robert H. Jackson Papers, LCMss.

sold for three dollars, and two hundred fifty copies were printed and sold in the first run. Jackson made about \$473.11 listed in royalties, until his death. Expenses were \$128.71 for alterations and corrections to galley proofs above the \$50 limit, the cost of first time authorship. Jackson also spent at least \$50 on copies of the book, giving the “# 1 copy” to FDR. Jackson paid \$100 to Paul Freund for work done on the book in 1940, before receiving any payments from Knopf, and this was noted on his Federal income tax forms for that year as a deduction.<sup>171</sup> That year Jackson’s salary from the Department of Justice was \$14,763.87 and his total income was \$29, 598.29. Jackson did not pay Jaffe for his work on the book until 1947, when he sent Jaffe a letter acknowledging the oversight and a check for \$100.<sup>172</sup> The financial distribution lends support to the premise that Robert H. Jackson did, in large measure, acknowledge the efforts of Freund and Jaffe for their work on the book, sharing nearly half of his “profits” from the work.

#### Conclusions regarding the writing of *The Struggle for Judicial Supremacy*

The writing of *The Struggle for Judicial Supremacy* was undertaken much like a Supreme Court brief, in which Jackson as author and Solicitor General would have relied upon the assistance and work of Freund and Jaffe. In fact much of the correspondence regarding arguments made in the book could easily have been discussions regarding the arguments in a brief. Jackson’s relationship with Freund, where Jackson served as Solicitor General from early 1938 on, and Freund as Chief Assistant Solicitor General

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<sup>171</sup> Box 198, folder 1, Robert H. Jackson Papers, LCMss. This would be worth \$1,500 in 2007. <http://eh.net/hmit/>, accessed August 18, 2008.

<sup>172</sup> This would be worth \$928 in 2007 dollars. <http://eh.net/hmit/>, accessed August 18, 2008.

until he returned to Cambridge in 1939 have set the pattern for the relationship seen in the work on the book.

While Jaffe served in a traditional editorial role, his role was important in moderating Jackson's presentation of Constitutional interpretation and can be seen in Jaffe's comments that the Constitution be seen as flexible instead of using the "returning to the Constitution" argument that Jackson put forth.

Jackson used both of these arguments in the final version of the book. However, the position Jackson took finally was one in which the Constitution is more open to a wide range of actions by the elected branches of government. This is distinct from Jaffe's constitutional flexibility, for it allows for a variety of governmental constructs within set parameters (to be determined by the court), rather than requiring judicial interpretation of the extent of flexibility. In Jackson's view, it was the elected branches of government that were flexible and the Constitution merely allowed for this needed flexibility. This may be seen as an expansive interpretation (Jackson's view) opposed to the restrictive interpretation that was the "old" Court's view. The expansive interpretation may be rigid but wide, while the restrictive interpretation is rigid and narrow. Jaffe's flexible constitutional view thus had an impact on Jackson's thinking proposing a view that would allow Jackson to later put forth his formulation in which he would be seen as "conservative."

Paul A. Freund played a greater role, writing independently the story of the New Deal cases and doing the final editing of the remainder of the work. Freund, like Jaffe, may have been better informed regarding the historical aspects of Constitutional law, and served not only as an editor, but as a colleague to Jackson in the preparation of the book.

Interactions with both Freund and Jaffe contributed to the formation of Jackson's views. This became evident in Jackson's treatment of the breadth of speech freedoms and the power of the Executive, where Jackson imposed limits on both.<sup>173</sup> In the *Steel Seizure Case* Jackson made his argument that the strength of executive power could be placed into three levels depending on whether Congress had acted in a positive or negative way, or not at all regarding the actions taken by the President. This formulation fits best with an understanding of the Constitution as a flexible document and appears in line with Jaffe's thinking in 1939.

Finally, Jackson standing was aided by the publication of this book and Jackson promoted his career by giving "copy #1" to FDR, who would soon nominate Jackson to the Court. Jackson felt strongly that he was not a New Deal insider, and that while his legal talents were without question, his educational and academic background were no match for those in the brain trust or others like Felix Frankfurter. The acceptance, by literary critics of the book helped to secure Jackson's place in the circle surrounding FDR.

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<sup>173</sup> For example in his opinions in *Dennis v United States*, 341 U.S. 494 (1951) and *Youngstown Sheet & Tube Co. v Sawyer*, 343 U.S. 579 (1952).

Table I

Financial Record of *The Struggle for Judicial Supremacy*  
1941 to 1954

Payable	From	To	# Books		Amount	
1/13/1941					\$ (128.71)	(cost of alterations and corrections in the proofs above the \$50 limit per con
3/1/1942	5/1/1941	10/31/1941	250	17.5%	\$ 94.27	(book price \$3.00)
5/29/1942	11/1/1941	4/30/1942	90	17.5%	\$ 30.09	
12/2/1942	5/1/1942	10/31/1942	38	17.5%	\$ 12.23	minus \$ 22.17 owed on books RHJ purchased; he owes \$9.94 and paid 12/2/42. RHJ sends in check for \$22.17 to cover
1944	11/1/1943	4/30/1944			\$ 13.22	
11/30/1944	5/1/1944	11/30/1944			\$ 10.44	
12/1/1946	5/1/1946	10/31/1946	63	17.5%	\$ 20.78	
6/1/1947	11/1/1946	4/30/1947	100	17.5%	\$ 32.39	(RHJ also buys 20 copies)
12/1/1947	5/1/1947	10/31/1947	105	17.5%	\$ 32.32	(October 31, 1947 RHJ sends Louis Jaffe a check for \$100.)
6/1/1948	11/1/1947	4/30/1948	42	17.5%	\$ 14.38	
11/30/1948	5/1/1948	10/31/1948	76	17.5%	\$ 24.24	
5/31/1949	11/1/1948	4/30/1949	35	17.5%	\$ 12.50	(book now \$3.50, was \$3.00)
5/31/1949	11/1/1948	4/30/1949	27	15.0%	\$ 8.49	(first run of second printing of 973 books)
11/30/1949	5/1/1949	10/31/1949	49	15.0%	\$ 16.14	
5/31/1950	11/1/1949	4/30/1950	62	15.0%	\$ 19.36	
11/1/1950	5/1/1950	10/31/1950	41	15.0%	\$ 13.40	
5/31/1951	11/1/1950	4/30/1951	32	15.0%	\$ 10.23	
10/31/1951	5/1/1951	10/31/1951	50	15.0%	\$ 16.19	
5/1/1952	11/1/1951	4/30/1952	17	15.0%	\$ 6.28	(book now \$4.00)
11/1/1952	4/1/1952	10/31/1952	28	15.0%	\$ 10.13	RHJ buys 50 copies at \$1 per copy net \$50.
5/1/1953	11/1/1952	4/30/1953	22	15.0%	\$ 8.45	
5/1/1953	11/1/1952	4/30/1953	497	10.0%	\$ 49.40	(sold at \$1.00 per copy)
11/1/1953	5/1/1953	10/31/1953	29	15.0%	\$ 10.77	
5/1/1954	11/1/1953	4/30/1954	20	15.0%	\$ 7.41	
			1673		473.11	

Data Represents Invoices and Report of Sales from Alfred A. Knopf

Source: RHJ Papers LOC Box 15

**Table II**

Financial Record of *The Struggle for Judicial Supremacy*  
1941 to 1954

Year	Income	Income Tax Paid	Royalty Income	
1940	\$29,598.29	\$4,688.03	\$ 0	Paid \$100 to PAF work on Book. Salary DOJ \$14,763.87.
1941	\$25,400.57		\$ Not listed	
1942	\$20,149.92		\$ 42.32	
1943	\$20,674.27		\$ Not listed	
1944				
1945	\$25,400.57	\$ 9,769.33	\$22.50	
1946	\$34,221.83	\$13,565.88	\$32.41	
1947	\$37,846.69	\$15,036.07	\$64.71	Deduction of \$100 paid to Jaffe
1948	\$39,996.76	\$11,089.80	\$38.62	
1949	\$36,500.65	\$15,300.11	\$37.13	
1950	\$41,023.00	\$11,793.06	\$32.76	
1951	\$37,218.63	\$11,019.94	\$26.42	
1952	\$36,404.13	\$11,677.86	\$16.41	
1953	\$37,207.42	\$12,004.26	\$68.62	
1954	\$30,385.51	\$	\$ 8.91	
			\$ 390.81	

Data from Federal Income Tax Returns From 1040  
NB: Years 1941 and 1943 No specific entry for  
Royalties. 1944 No data available.

Source RHJ Papers LOC Boxes 198 & 199

### *Conclusion*

In the area of the intersection of electoral politics and the law, Jackson was a transitional figure. He formed a transition from lawyer-politicians like William Howard Taft, Charles Evans Hughes, and Hugo Black, and a later model of non-political legal and judicial service as a background for nomination to the Court. He saw the office of Solicitor General as incompatible with active participation in electoral politics.<sup>174</sup> He later wrote that his enjoyment of the office was due to the insulation from the day to day political decisions in the Department of Justice and the administration as a whole.<sup>175</sup>

However, his views about separation of law and politics did not prevent him from giving a number of political speeches while he was Solicitor General, ten of which dealt with electoral politics.<sup>176</sup> Jackson's willingness to consider a run for governor of New York, and the less than successful outcome of this tepid undertaking, related to his personal traits, which included a dislike of the demands of party politics. This was seen as early as his early twenties when he stepped down from his local Democratic Party State Committee because of his dislike for the politics involved in the distribution of local patronage positions (mostly postmasters) in the Wilson administration.<sup>177</sup> It was this personal trait and not a philosophical view of separation between law and politics that led

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<sup>174</sup> “*Democracy’s Race Against Time*,” Speech before the Young Democratic Club of New York on 24 February 1938, box 35, Robert H. Jackson Papers, LCMss.

<sup>175</sup> Jackson, “Autobiography” Box 189 Robert H. Jackson Papers, LCMss. In his autobiography Jackson states that as Solicitor General he refused to attend Attorney General Murphy’s morning staff meetings because these were not held to discuss purely legal matters, but rather issues about the running of the department.

<sup>176</sup> See Appendix II. These ten speeches make up a minority of his public speeches while Solicitor General were at venues and to audiences where the political nature of the topic is clearly evident.

<sup>177</sup> Kurland, *Lives and Opinions*, 2545.

Jackson to see him as a non-political actor. His failure in the New York governor's race left Roosevelt to advance Jackson within the Department of Justice and then to the Court.

During his tenure as Solicitor General, Robert H. Jackson's primary concern regarded the Supreme Court's power to nullify acts of Congress or the states, limiting the ability of the democratically elected branches of government to deal with the crisis of the Depression. He saw this not just as a matter of efficiency of government but also as a threat to a democratic society, placed at risk for failure when it did not address fundamental social problems brought on by the Depression. Jackson's pragmatic outlook and his embrace of judicial restraint inclined him to argue that the Court should uphold experimental economic legislation.

Jackson's anti-trust views were well within the main stream of those lawyers within the Department of Justice.<sup>178</sup> The N.I.R.A. and the cooperative schemes of Donald Richberg were at odds with long held views of government-industry interactions. Jackson's views in this area were based on policy preferences and not concerns about legal restrictions or precedents.<sup>179</sup> Jackson was one member of the New Deal administration who saw both the problems leading to the Depression and the actions needed to solve the economic problems as requiring control of trusts and monopolies. The FDR administration was divided between allowing cartel-like behaviors and restoring a healthy competitive environment through more aggressive enforcement of anti-trust laws. This was not resolved before the Court mooted the issue by its ruling in the N.R.A. cases.<sup>180</sup>

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<sup>178</sup> Peter Irons, *The New Deal Lawyers* (Princeton, NJ: Princeton University Press, 1982), 1-58.

<sup>179</sup> *Ibid.*, 50-58.

<sup>180</sup> *Ibid.*



Jackson's legal thought during this period was embedded in a general pragmatic philosophy.<sup>181</sup> Pragmatists believed that democracy was the most functional form of government, and that scientific experimentation was the key to understanding, not only in the natural sciences, but also in the social sciences.<sup>182</sup> James Willard Hurst observed: "Clearly there was a drastic change in approach [of the courts] ... The change perhaps reflected the pragmatism which characterized thought in the United States after the turn into the new century."<sup>183</sup> This formed the foundation for Jackson's belief in judicial restraint and in his argument that New Deal programs were wrongly struck down by the Court prior to 1937. William M. Wiecek points to a number of factors that led to the fall of classical legal thought, including modernism, led by the philosophical pragmatists Charles Peirce, William James and John Dewey, as well as the historians and social scientists of the early twentieth century.<sup>184</sup>

Solicitor General Jackson was not a legal theorist but rather a legal craftsman who used the law as a tool to accomplish the goals of his client, the New Deal administration. He did not explore ideas in legal theory as they related to his office. Jackson saw classical legal thought as a theoretical construct that did not work well in the Depression

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<sup>181</sup> It is speculative to consider what effect, if any, living near the Chautauqua Institute may have had on Jackson and his philosophical thinking. A review of the Institute's records show that John Dewey lectured there in 1896 and 1900; therefore it is not likely to have been heard by young Jackson. See <http://www.siu.edu/~deweyctr/CHRONO.pdf>, accessed August 19, 2008. A search of the LOC papers of RHJ reveals no substantive correspondence between the two.

<sup>182</sup> John Dewey "Logical Method and the Law" 1924, in *The Essential Dewey: Pragmatism, Education and Democracy*, eds. Larry A. Hickman and Thomas M. Alexander, (Indianapolis: Indiana University Press, 1998), vol 1 355-62.

<sup>183</sup> James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little Brown, 1950. Law Book Exchange reproduction 2004), 187-88.

<sup>184</sup> William M. Wiecek, *The Lost World of Classical Legal Thought Law and Ideology in America, 1886-1937* (New York: Oxford University Press, 1998), 175-207.

leading him to be critical of those on the bench who were averse to experimentation in government. Jackson saw himself as one of those legal actors for whom practical consequences were the object to their work.

The major themes of Jackson's public speeches during his tenure as Solicitor General included the struggle for American democracy to survive by addressing the problems of the society it ruled. To do so there was a need for a "the new founding." Jackson portrayed the views of those supporting the New Deal as connected to the views of the founders, whom he said supported personal freedom, but not to limit the ability of governments to act to solve the problems of society.<sup>185</sup> His comments on the "new founding" highlighted the need for practical changes in governmental constructs allowing response to changed conditions, with the alternative being dictatorial governments.<sup>186</sup> The third major theme expounded by Jackson during this period was that of judicial restraint, at least in matters of economic regulation.

Jackson, during his service as Solicitor General, thought and acted in concert with the philosophy put forth by Justice Oliver Wendell Holmes Jr. in *The Common Law*, that "the life of the law has not been logic: it has been experience."<sup>187</sup> Jackson expanded this philosophy from the Common Law to Constitutional Law.

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<sup>185</sup> See generally Edward S. Corwin, *The Twilight of the Supreme Court: A History of our Constitutional Theory* (New Haven: Yale University Press, 1934).

<sup>186</sup> See *Leadership with Vision*, box 36, Robert H. Jackson Papers, LCMss.; *Back to the American Way*, box 38 Robert H. Jackson Papers, LCMss.; and *Democracy's Race Against Time*, box 35, Robert H. Jackson Papers, LCMss.

<sup>187</sup> Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little Brown and Company, 1881) p 1.

## Appendix I

Chronology of the life of Robert H. Jackson

Born Spring Creek, Pennsylvania February 13, 1892

Graduates (Frewsburg) Jamestown High School June 21, 1910

College: None

Albany Law School 1911- 1912

Passes New York Bar 1913 (Age 21)

Jamestown Lawyer 1913 – 1934

Counsel, Bureau of Internal Revenue 1934- 1936

Assistant Attorney General, Tax Division 1936

Assistant Attorney General, Antitrust Division 1937

Solicitor General 1938-1940

Attorney General 1940-1941

Supreme Court Justice July 11, 1941- May 2, 1945

Nuremberg Prosecutor 1945-1946

Supreme Court Justice 1946- October 9, 1954 (died)

## Appendix II

*Speeches of Robert H. Jackson given while serving as Solicitor General*<sup>188</sup>*Cooperation between Government and Business*<sup>189</sup>

Town Hall (New York City) of the Air on NBC  
January 6, 1938 (RHJ LOC Box 35)

*Call for a Liberal Bar*

Address before the National Lawyers Guild,  
Washington, D.C.  
Feb. 20, 1938 (RHJ LOC Box 35)

*Democracy's Race Against Time*<sup>190</sup>

Speech before the Young Democratic Club of New York  
February 24, 1938 (RHJ LOC Box 35)

Address before the  
Annual Dinner of the Yale Law Journal  
New Haven, Conn  
March 19, 1938 (RHJ LOC Box 36)

*Social Science & Constitutional Law*

Address before *Phi Gamma Mu* at Catholic University  
Washington, DC  
May 8, 1938 (RHJ LOC Box 36)

Commencement Address at National University  
Washington, DC  
June 9, 1938 (RHJ LOC Box 36)

Commencement Address at Randolph-Macon College<sup>191</sup>

Ashland, VA  
June 13, 1938 (RHJ LOC Box 36)

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<sup>188</sup> Given after his nomination on January 27, 1938. He took the oath of office March 5, 1938.

<sup>189</sup> This was a debate with Wendell Willkie, which caused some uproar given a "stacked audience" and led to letters back and forth to the New York Times.

<sup>190</sup> After being nominated but before confirmation with an interesting introduction on how it will be his last political speech for some time.

<sup>191</sup> This Box also contains an interesting letter from E. Barrett Prettyman Jr. to RHJ asking if Jackson will speak at the ceremony, offering his support for a "1940" run and an interesting sidebar on the "South." Prettyman would later be one of Jackson's clerks (1953-54) on the Court.

*Speeches of Robert H. Jackson given while serving as Solicitor General*

Address upon Accepting an Monument from the Republic of Finland  
Chester, PA  
June 29, 1938 (RHJ LOC Box 36)

*The Rise and Fall of Swift v Tyson*  
Address before the Section of Real Property, Probate and Trust Law of the American Bar  
Association,  
Cleveland, OH  
July 25, 1938 (RHJ LOC Box 36)

Address to the Democratic Party of Chautauqua County  
Introducing Congressman James M. Mead  
Jamestown, NY area  
August 14, 1938 (RHJ LOC Box 36)

Address to the “Greek Club” at Machinist Union Picnic  
Jamestown, NY area  
August 14, 1938 (RHJ LOC Box 36)

*General Welfare and Industrial Prosperity*<sup>192</sup>  
Address at Hotel Faust  
Rockford, IL  
September 14, 1938 (RHJ LOC Box 36)

*Social Justice under our Constitution*<sup>193</sup>  
Address before the National Conference of Catholic Charities  
Richmond, VA  
October 11, 1938 (RHJ LOC Box 36)

*Leadership with Vision*<sup>194</sup>  
Cleveland, OH  
October 31, 1938 (RHJ LOC Box 36)

*To Hell with the Governor*<sup>195</sup>  
Not delivered  
Michigan (RHJ LOC Box 36)

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<sup>192</sup> It seems Thomas Brady Speakers Bureau of NY Manager-Lecture Tours retained RHJ and he was paid \$400.

<sup>193</sup> In this speech Jackson tells his audience that the New Deal follows Catholic Teaching on Social Justice.

<sup>194</sup> Pro FDR political Speech.

<sup>195</sup> Jackson was to make a speaking tour for the reelection of governor Murphy (unsuccessful). This speech was not given; notes indicate that Ben Cohen wrote two speeches for Jackson for this purpose.

*Speeches of Robert H. Jackson given while serving as Solicitor General*

*A Fight for Peace*<sup>196</sup>

Address before Labor Non-Partisan League  
Cleveland, OH  
November 6, 1938 (RHJ LOC Box 36)

*The Law Catches Up with the Times*

Address on the Nation-Wide Network of The National Broadcasting Company  
Washington, DC  
Nov. 21, 1938 (RHJ LOC Box 36)

*The Meaning of Liberalism*<sup>197</sup>

Address before Liberal Voters League  
Rockville, Montgomery County, MD  
November 22, 1938 (RHJ LOC Box 37)

*Cardozo Memorial*

Washington, DC  
November 26, 1938 (RHJ LOC Box 37)

Address before the Bar Association of Washington, DC<sup>198</sup>

Mayflower Hotel  
Washington, DC  
December 3, 1938 (RHJ LOC Box 37)

*Federal – Municipal Cooperation*

Address before the convention of the  
National Institute of Municipal Law Officers  
Washington, DC  
December 6, 1938 (RHJ LOC Box 37)

*Traditions and Prospects of a Liberal Democratic Party*

Address before the Democratic Party of Ohio, Jackson Day Dinner  
Columbus, OH  
January 7, 1939 (RHJ LOC Box 37)

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<sup>196</sup> Very moving political speech about the politics of labor relations and the trouble with the Court cites OWH as example of reason. Supports local democratic senate candidate and FDR. There is a hand written outline and a prelim manuscript and notes and changes of early draft. Looks like RHJ handwriting.

<sup>197</sup> Democratic Party speech, campaigning for local candidates, very ‘political.’

<sup>198</sup> “The Solicitor Generalship is a rather ambiguous position at best. The politicians think of you as part of the judiciary, and the judges think of you as a politician. Of course, a double life does have its compensations - as many of you well know.” Handwritten copy in RHJ handwriting of speech draft.

*Speeches of Robert H. Jackson given while serving as Solicitor General*

*The Challenge to the Christian Conscience*<sup>199</sup>

Address before the Conference on Palestine  
Mayflower Hotel  
January 15, 1939 (RHJ LOC Box 37)

*Federal Cooperation and Local Independence*

Address at a banquet in honor of the North Carolina Assembly  
Given by North Carolina League of Municipalities  
Raleigh, NC  
January 25, 1939 (RHJ LOC Box 37)

*Striking at the Root of Crime*

Address before The Washington Council of Social Agencies  
Washington, DC  
February 1, 1939 (RHJ LOC Box 37)

*A United Party or a Minority Party*

Address to Annual State Banquet of the Democrats of Kansas  
Topeka, KS  
February 22, 1939 (RHJ LOC Box 37)

*Trade Barriers - A Threat to National Unity*

Address before the National Conference on Interstate Trade Barriers,  
Chicago, IL  
April 6, 1939 (RHJ LOC Box 37)

*Which Way America?*<sup>200</sup>

Address before a closed door session of the Convention of American Society of  
Newspaper Editors  
Washington, DC  
April 21, 1939 (RHJ LOC Box 37)

Address before New York County Lawyers

New York, NY  
April 27, 1939 (RHJ LOC Box 37)

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<sup>199</sup> In this speech Jackson quotes two Bible verses. This is a national radio address supporting the creation of a Jewish homeland where all could be free and all religions equal.

<sup>200</sup> Jackson was invited as a possible candidate for president. The speech carries an anti-war theme, Jackson states he was against the US entry into WWI and is now against entry into the European conflict, in part because of his doubts about the leaders of England and France.

*Speeches of Robert H. Jackson given while serving as Solicitor General*

Address before Yale News Annual Banquet<sup>201</sup>  
New Haven, Conn  
May 3, 1939 (RHJ LOC Box 38)

*Progress in Federal Judicial Administration*  
Address before the American Judicature Society,  
Washington, DC  
May 10, 1939 (RHJ LOC Box 38)

Address at Northwestern University Dinner for Dean Leon Green  
Palmer House  
Chicago, IL  
June 6, 1939 (RHJ LOC Box 38)

Address to National Politiconomic Forum  
June 10, 1939 (RHJ LOC Box 38)

Address to Young Democrats of Virginia  
Fredericksburg, VA  
June 17, 1939 (RHJ LOC Box 38)

Address to the Buffalo Rotary Club  
Buffalo, NY  
June 22, 1939 (RHJ LOC Box 38)

*Maryland at the Supreme Court Bar*  
Address before the Maryland State Bar Association,  
Atlantic City, NJ  
June 23, 1939 (RHJ LOC Box 38)

*The Problem of the Administrative Process*  
Address before Wisconsin State Bar  
Milwaukee, WI  
June 27, 1939 (RHJ LOC Box 38)

*Briefless Barristers and Lawyerless Clients*  
Address before the Junior Bar Conference of the ABA  
San Francisco, CA  
July 9, 1939 (RHJ LOC Box 38)

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<sup>201</sup> Given at the invitation of his son, William.



*Speeches of Robert H. Jackson given while serving as Solicitor General*

*Back to the Constitution*

Address before the Section of Public Utility Law of the American Bar Association,  
San Francisco, CA  
July 10, 1939 (RHJ LOC Box 38)

*Product of the Present Day Law School*

Address before the Legal Education Section of the American Bar Association,  
San Francisco, CA  
July 11, 1939 (RHJ LOC Box 38)

Address to the Columbia Alumni Luncheon  
Palace Hotel  
San Francisco, CA  
July 12, 1939. (RHJ LOC Box 38)

*Back to the American Way*<sup>202</sup>

Address to the Commonwealth Club of CA  
California  
July 14, 1939 (RHJ LOC Box 38)

Address at the Governor's Day Ceremonies  
Springfield, IL  
August 17, 1939 (RHJ LOC Box 39)

Address at the Opening of the FBI National Police Academy  
Associates Retraining Course and Annual Reunion  
Washington, DC  
September 25, 1939 (RHJ LOC Box 39)

*Is Our Constitutional Government in Danger? (Endangered?)*

Address on the Town Meeting of the Air  
New York, NY  
Nov. 6, 1939 (RHJ LOC Box 39)

*The Party and the Nation, 1940*<sup>203</sup>

Jackson Day Dinner Hotel Statler  
Broadcast over NBC Blue Network  
Cleveland, Ohio  
January 8, 1940 (RHJ LOC Box 39)

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<sup>202</sup> Contains a letter of congratulations on the speech from Edward Lamb of Toledo, Ohio.

<sup>203</sup> A purely partisan speech, rehearses the table of votes in Presidential election of 1920-1936 as given in *Struggle*.

## Appendix III

*The Struggle for Judicial Supremacy*<sup>204</sup>**CONTENTS**

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<sup>204</sup> Robert H. Jackson. *The Struggle for Judicial Supremacy A Study of a Crisis in American Power Politics*. New York, Alfred A. Knopf, 1941.